International Trade and Environmental Protection:
Domestic PPM Regulations and WTO Jurisprudence

Marie Catherine Paula Wynter

A thesis submitted for the degree of Doctor of Philosophy of
The Australian National University

October, 2001
Except where indicated otherwise, this thesis is entirely my own work.

[Signature]

Marie Catherine Paula Wynter

October, 2001
ACKNOWLEDGEMENTS

I wish to thank the many people who have helped me during my studies and contributed to the development of my ideas. In particular, I wish to thank my supervisors Professor John Braithwaite and Associate Professor Janet McDonald for their inspiration, encouragement and for patient reading of many drafts; and my original supervisors Professors Henry Nix and Peter Drahos for their guidance in the early days of my studies. Michael Lennard and Brett Williams have been a constant source of support, always willing to share their knowledge of international and international trade law with me. I have also benefited greatly from interviews, discussions and assistance from Hussein Abaza, Rudolf Adlung, Ichiro Araki; John Atwood, Duncan Brack, Joshua Brien, James Cameron, Bill Campbell, Milton Churche, Judy Clark, Mirrelle Cossey, John Edwards, Simon Farbenbloom, Aimée Gonzales, Joan Hird, Veena Jha, Bruce Jones, James Lee, Henry Leveson-Gower, Thilo Marauhn, Gabrielle Marceau, Franca Musolino, Simon Niemeyer, Joost Pauwelyn, Rhonda Pigott, Greg Rose, Phillipa Rowlands, Gretchen Stanton, Ian Sutton, Brennan Van Dyke, Scott Vaughan, Paul Volich, René Vossenaar, Halina Ward, Jacob Werksman, Durwood Zaelke, Mark Zanker and my former colleagues at the Office of International Law, Attorney-General’s Department, Canberra, and in the Department of Foreign Affairs and Trade, Canberra. In 1997 I attended the Hague Academy’s Special Studies Course on the Law of the World Trade Organization conducted by the Centre for Studies in Research in International Law and International Relations. I gained immeasurably from this experience and wish to thank Professor Mengozzi who led this course, the participants of the course, and Ms Croese for arranging for me to attend.

My studies were funded by a scholarship from the Australian National University and by a grant from the Centre for Resource and Environmental Studies (CRES), Australian National University. I am grateful for this support, and for the support of my two research schools: The Research School of Social Sciences, Law Programme, and CRES.
Finally, my thanks go to my family and friends. My parents, sister and Judy have given me all the love and encouragement a child could hope for; my son, sweet distractions. Words cannot thank my wonderful husband, Tom, who is always there for me, and provides me with daily inspiration.
ABSTRACT

One of the most significant critical themes directed towards the World Trade Organization (WTO), and the remaining institutions making up the Bretton Woods System (the World Bank and the International Monetary Fund), is their failure to take into account or ameliorate the negative social and environmental consequences of the doctrine of comparative advantage and free trade. More recently, these criticisms have been compounded with fears and concerns about the effects of globalisation, particularly when concerns as to competitiveness are raised.

Radical critics call for the abolition of the WTO in the face of its 'failure' to solve the trade and environment debate and deliver sustainable development. Moderate voices suggest the creation of a new international environmental organisation to resolve trade and environment disputes. This thesis rejects the radical localist critique which would dismantle the WTO, and notes that while there is some strength in the idea of a new international environmental organisation, significant institutional, political and economic hurdles must be overcome for it to eventuate.

The WTO is one of the key international institutions to participate in the trade and environment 'debate', but it does not have the institutional capacity to resolve it on its own, nor to alone set the world on the path to sustainable development. Instead, states and specialist environmental organisations must play the primary role in these tasks. Within this context, the role of the WTO is not to play an active role in reviewing national environmental priorities, setting environmental standards or developing global priorities or policies on the environment. Rather, it is to ensure that it provides a forum for the balanced treatment of trade and environmental concerns so that states which wish to create the conditions for the improvement of global environmental standards are not overly inhibited.
To this end, the jurisprudence of the WTO generated by key trade and environment cases is examined to assess the extent to which WTO rules allow states to raise their environmental standards. Its particular focus is the limit they place on states introducing domestic regulatory measures to encourage sustainable consumption and constrain the trade in products whose production has a significant environmental impact. The trade in such products raises the ‘process and production methods’ (PPMs) issue. That is, whether a state can use a ‘non-product-related PPM-based trade measure’ to restrict the importation of a product because it has been processed or produced in an environmentally damaging way, even though the consumption or use of the product poses no direct threat to that state’s domestic environment.

Recent interpretations of WTO rules have allowed a strengthening of national abilities to use non-product-related PPM-based trade measures and raise environmental standards. Members do face considerable substantive and procedural hurdles to raising environmental standards, yet their regulatory autonomy to protect the environment from harmful methods of processing and producing goods and foster sustainable consumption habits among their consumers is broader than is popularly understood. States now have a greater scope to use trade measures to encourage producers to adopt higher environmental standards for the production of internationally traded goods. Seeing the benefits to market access and competitive advantage to be gained from moving to higher environmental standards, other states may be encouraged to raise theirs. Thus, notwithstanding the general trend towards the deregulation of global markets, a ‘California effect’, where states gradually move to embracing higher environmental standards for internationally traded products, may occur.

Now that the WTO rules do allow the use of non-product-related PPM-based trade measures, the call for the negotiation of a PPMs Agreement may resurface. The trade community has long been opposed to the use of PPM-based measures and will search for ways to have their use constrained. This thesis concludes by outlining some vital elements of a PPMs Agreement derived from the analysis, which balances trade and environmental interests. These are:
- Products should only be distinguished on the basis of inherently objective criteria. Preferably, these criteria should be agreed in an instrument establishing acceptable approaches to environmental valuation methodologies.
- Measures should be science-based and evidence-based;
- The environmental harm must be sufficiently serious to warrant action;
- In order to ensure that PPM measures are of global concern, the need for a measure should be adjudged not just according to domestic criteria, but by an independent panel of scientific experts, an organisation such as UNEP, or an environmental advocate;
- The design of measures should be appropriate to the environmental harm. Measures should be adapted to suit the urgency and magnitude of the environmental harm, and be based on the principle of cost internalisation. The words of the chapeau of Article XX offer sufficient flexibility to achieve these results, and should be included.
- Distinction should be drawn between impact-based PPM measures, producer-based PPM measures and country-based PPM measures. Measures should be origin-neutral and impact-based to the greatest possible extent. Impact-based PPM measures can be more closely adapted to suit the environmental harm by being targeted to only those products which exhibit relevant negative environmental attributes. This limits the scope for the occurrence of negative redistributive side effects. If based on the environmental impact of the product during its life-cycle, they are more amenable to being assessed according to ‘inherently objective criteria’. The burden of proof on Members to demonstrate the propriety of implementing a PPM-based trade measure should increase according to whether an impact-based, producer-based or country-based is used.
- The measure should be adjudged more according to Article XX(g) criteria than Article XX(b) criteria;
- Measures designed to implement a Multilateral Environmental Agreement (MEA), or achieve a goal of an MEA (such as halting the decline of sea-turtles), should be prima facie allowed;
- Measures should be based on international standards, guidelines or recommendations, where they exist. Measures which comply with an international
standard, guideline or recommendation of an accredited organisation, or offer equivalent protection to the environment, should be *prima facie* allowed.

- Members should show that they have a sufficient commitment to ameliorating the harm. They may have a jurisdictional basis, but this would not be a necessary condition. Rather, they should show an enduring interest in ameliorating the particular environmental harm, for example by being a party to relevant MEAs or having in place other environmental policies which address similar harms.

- Developing countries should be at least partially compensated for the introduction of such measures, whether it be by technology transfer, aid, foreign investment, etc;

- Measures should be able to be precautionary in nature; and

- Measures should not be more trade restrictive than necessary. Measures should not fail this test unless the proposed alternative would be ‘significantly less restrictive’ to international trade, as effective as the disputed measure, and, as a practical matter, could be implemented in sufficient time that further significant deterioration of the environment would not occur.

- Measures should only be maintained while they are appropriate to the circumstances.

Some provision should be made for challenging environmental standards which are too low, and NGO groups should be able to participate in the process of devising and adjudging PPM measures and environmental standards. How this should be done is a challenge for future work.
PUBLICATIONS ARISING FROM THIS THESIS

Wynter, M., ‘Countervailing environmental subsidies in our World Trade Order’ (Paper presented at Ecopolitics X Conference, 26-29 September, Australian National University, Canberra, 26-29 September 1996)


Wynter, M., ‘Beefing up our trade: environmental and consumer concerns and rural exports’ in Robertson A.I. and R Watts (eds), Preserving Rural Australia: Issues and Solutions (1999) 69-81

# CONTENTS

**ACKNOWLEDGEMENTS** ............................................................................................................. v

**ABSTRACT** ............................................................................................................................... vii

**PUBLICATIONS ARISING FROM THIS THESIS** ................................................................. xi

**TABLE OF TREATIES** ............................................................................................................. xvii

**TABLE OF DOMESTIC LEGISLATION** .................................................................................... xxi

**TABLE OF CASES and DISPUTES** ......................................................................................... xxiii

**ABBREVIATIONS** .................................................................................................................... xxix

**Part I: Introduction and Theoretical Framework** ................................................................. 1

**Chapter 1: Introduction** ......................................................................................................... 3

  The approach of this thesis ........................................................................................................... 6

**Chapter 2: A Theoretical Framework: theories of international trade, environmental protection and the place of the WTO in the debate** .......................................................... 15

  The theory of liberalised international trade ............................................................................ 15

  **Theories on environmental protection** ............................................................................... 20

    Anthropocentrism and Ecocentrism ....................................................................................... 22

    Discourses on trade and environment ................................................................................. 24

      i) The environmental effects of economic growth ............................................................ 26

      ii) Internalising environmental costs and setting environmental standards ................. 29

      iii) Trade Leverage and Competitiveness issues .............................................................. 36

    The synergies of trade and the environment ...................................................................... 38

    Mechanisms for institutional reform and environmental improvement .......................... 44

      Environmental problem solving ....................................................................................... 44

      Sustainable Development ................................................................................................. 47

      Ecological Modernisation ................................................................................................. 54

    ‘Trading Up’ – Pursuing Environmental Comparative and Competitive Advantage .......... 57

**The Relevance of the World Trade Organization to the Trade and Environment Debate** .... 64

  A comparison of the GATT and WTO dispute settlement mechanism ................................. 72

**Conclusion** ............................................................................................................................... 76
| The Consistency of the Ban with Article XX | 228 |
| Subparagraph (g) of Article XX | 230 |
| The chapeau of Article XX | 235 |
| The role of Sustainable Development in the multilateral trading system | 243 |
| Fairness considerations in the balancing of strong markets with a strong environment | 246 |
| The interpretation of XX(b) – European Communities – Asbestos and others | 249 |

**Conclusion** ................................................................. 251

**Chapter 6: The SPS Agreement: balancing trade, health and environmental concerns** ................................................................. 257

**Introduction** ........................................................................... 257

**The Rationale for the SPS Agreement** ........................................ 261

**The Requirements of the SPS Agreement** .................................... 264
  - Matters involved in Bringing an Action and Defending a Measure | 267
  - The Burden of Proof under the SPS Agreement | 267
  - The Standard of Review | 271
  - The Use of Experts | 273
  - Article 2 of the SPS Agreement And the requirement not to maintain measures without sufficient scientific evidence | 279
  - Article 3 of the SPS Agreement and the role of International Standards, Guidelines and Recommendations | 280
  - The reification of international standards, guidelines and recommendations | 282
  - Article 5: Assessing Risk to set the Appropriate Level of Sanitary and Phytosanitary Protection | 286
    - The relevance of PPM factors in risk assessments and establishing an appropriate level of protection | 291
  - Article 5.5: Consistency of Levels of Protection and Resulting Discrimination or Restriction on International Trade | 294
  - Article 5.6: Choosing the less trade-restrictive measure | 300
  - The precautionary principle in the SPS Agreement | 301

**Conclusion** ........................................................................... 311

**Chapter 7: Strengthening the Environment through Trade: problems with the TBT Agreement in using technical regulations and standards to improve safety and empower consumer decision-making** ................................................................. 317

**The development of the Standards Code and the TBT Agreement** ................................................................. 320

**The coverage of PPM-based trade measures under the TBT Agreement** ................................................................. 324
  - Technical regulations .................................................. 326
  - Summary ..................................................................... 330
  - Standards .................................................................... 331
  - Summary ..................................................................... 333

**The substantive obligations of the TBT Agreement and their effect on non-product-related PPM requirements** ................................................................. 333
  - Disciplines on Technical regulations | 334
    - Most-Favoured-Nation and National Treatment: implications for PPM-based trade measures | 334

---

xv
TABLE OF TREATIES

GATT Treaties


WTO Treaties


Agreement on Agriculture, in Annex 1A to the WTO Agreement.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in Annex 1A to the WTO Agreement.

Agreement on Sanitary and Phytosanitary Measures, in Annex 1A to the WTO Agreement.

Agreement on Subsidies and Countervailing Measures, in Annex 1A to the WTO Agreement.

Agreement on Technical Barriers to Trade, in Annex 1A to the WTO Agreement.

Agreement on Textiles and Clothing, in Annex 1A of the WTO Agreement.

Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the WTO Agreement.

Agreement on Trade-Related Investment Measures, in Annex 1A to the WTO Agreement.

General Agreement on Tariffs and Trade 1994, in Annex 1A to the WTO Agreement.

General Agreement on Trade and Services, Annex 1B to the WTO Agreement.

Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement.
Other Treaties, Agreements and Arrangements


FAO Code of Conduct of Responsible Fisheries, adopted 31 October 1985 by the 28th Session of the FAO Conference. An updated version of the Code is available at


International Convention Prohibiting the Use of White (Yellow) Phosphorus in the Manufacture of Matches, Berne, 26 September 1906, [1919] ATS 9, UKTS 1909 No. 4 (Cd. 4530), 203 CTS 13. Entered into force generally, 1 January 1912, for Australia 30 December 1919.


International Maritime Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, Mexico City, Moscow, Washington, 29 December 1972, 1484 UNTS 441, [1985] ATS 16, 11 ILM 1294, 26 UST 2403, TIAS no. 8165. The 1996 Protocol to the Convention (36 ILM 7) will replace this agreement when ratified by the requisite number of countries.


Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals 19 ILM 11, at 15.


Trans-Tasman Mutual Recognition Arrangement between Australia and New Zealand, entered into on 9 July 1996 between the Commonwealth of Australia, New Zealand, the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, the Australian Capital Territory and the Northern Territory.


# TABLE OF DOMESTIC LEGISLATION

## Australia

Environment Protection and Biodiversity Conservation Act, 1999 (Cth)
Environment, Sports and Territories Legislation Amendment Act, 1995 (Cth)
Great Barrier Reef Marine Park Act, 1985 (Cth)
Protection of the Environment Administration Act, 1991 (NSW)
Fisheries Management Act, 1994 (NSW)
Environment Protection Act, 1993 (SA)

## European Communities


Decree No. 96-1133 concerning asbestos and products containing asbestos, *Official Journal*, 26 December 1996

## Thailand

Tobacco Act, 1966.

## United States

Clean Air Act, 1990.
Cuban Freedom and Democratic Solidarity (Libertad) Act, 1996
Marine Mammal Protection Act, 1972
Superfund Amendments and Reauthorization Act, 1986.
Tariff Act, 1930.
### TABLE OF CASES and DISPUTES

**GATT**

*Australian Subsidy on Ammonium Sulphate*, adopted 3 April 1950, GATT/CP.4/39, BISD II/188.

*Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181.

*Belgian Family Allowances (Allocations Familiales) Report*, (G/32) adopted 7 November 1952, BISD 1S/59.

*Canada – Administration of the Foreign Investment Review Act*, (L/5504) adopted 7 February 1984, BISD 30S/140.


*Italian Discrimination against Imported Agricultural Machinery*, (L/833) adopted 23 October 1958, BISD 7S/60-68.


*Spain – Tariff Treatment of Unroasted Coffee: Claim of Brazil concerning a Spanish Royal Decree which divided unroasted coffee into five tariff classifications with different tariff treatment* (L/5135) adopted 11 June 1981, BISD 28S/102.

Treatment by Germany of Imports of Sardines, (G/26) adopted 31 October 1952, BISD 1S/53.


Uruguayan Recourse to Article XXIII (L/1923) BISD 11S/95 (15 November 1962).

WTO


European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to arbitration by the European Communities under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator, WT/DS26/15, WT/DS48/13, 29 May 1998.

European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to arbitration by the European Communities under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS26/ARB (original complaint by the US), WT/DS48/ARB (original complaint by Canada), 12 July 1999.


European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 of the DSU, Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999.


Malaysia – Prohibition of Imports of Polyethylene and Polypropylene, complaint by Singapore (WT/DS1), settled on 19 July 1995.


Other International Cases and Disputes

Aegean Sea Continental Shelf Case (1978) ICJ Reports 3.

Lillie S. King (USA) v United Mexican States, 4 RIAA, at p.585, Mexican-USA General Claim Commission.

Behring Sea Fur Seals Fisheries Arbitration (Great Britain v United States), Moore’s International Arbitrations (1893) 755.

Case Concerning the Gabicikovo Nagymaros Dam (1997) ICJ Reports 7.

Corfu Channel Case (Merits) (United Kingdom v Albania) (1949) ICJ Reports 4.

International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996) 35 ILM 809.

Lac Lanoux Arbitration (Spain v France) 12 RIAA 281, (1959) 53 American Journal of International Law 156.


Trail Smelter Case (United States v Canada) 3 RIAA 1905.
Domestic Cases

Australia

Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436.

Leatch v National Parks and Wildlife Service (1993) 81 LGERA.


Greenpeace Australia Ltd v Redbank Power Co Pty Ltd (unreported, NSW Land and Environment Court, 10 November 1994).

United States


Earth Island Institute v. Albright, 147 F.3d 1352 (Fed.Cir. 1998).


European Community


### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ATS</td>
<td>Australian Treaty Series (published by the Australian Government)</td>
</tr>
<tr>
<td>BEM</td>
<td>Baseline establishment method (of the Gasoline Rule)</td>
</tr>
<tr>
<td>BISD</td>
<td>Basic Instruments and Selected Documents (published by the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade)</td>
</tr>
<tr>
<td>CIT</td>
<td>United States Court of International Trade</td>
</tr>
<tr>
<td>CSD</td>
<td>Commission on Sustainable Development</td>
</tr>
<tr>
<td>CTE</td>
<td>WTO Committee on Trade and Environment</td>
</tr>
<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
</tr>
<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes)</td>
</tr>
<tr>
<td>EC</td>
<td>European Communities</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GMO</td>
<td>Genetically Modified Organism</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTSD</td>
<td>International Centre for Trade and Sustainable Development</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>IPPC</td>
<td>International Plant Protection Convention</td>
</tr>
<tr>
<td>ISO</td>
<td>International Organization for Standardization</td>
</tr>
<tr>
<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
</tr>
<tr>
<td>ITO</td>
<td>International Trade Organization</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>IUCN</td>
<td>The World Conservation Union</td>
</tr>
<tr>
<td>MEA</td>
<td>Multilateral Environmental Agreement</td>
</tr>
<tr>
<td>MMPA</td>
<td>Marine Mammal Protection Act 1972 (US)</td>
</tr>
<tr>
<td>MRA</td>
<td>Mutual Recognition Agreement</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OIE</td>
<td>Office International des Épizooties</td>
</tr>
<tr>
<td>PPMs</td>
<td>Process and Production Methods</td>
</tr>
<tr>
<td>SPS Agreement</td>
<td>Agreement on Sanitary and Phytosanitary Measures</td>
</tr>
<tr>
<td>TBT Agreement</td>
<td>Agreement on Technical Barriers to Trade</td>
</tr>
<tr>
<td>TPRM</td>
<td>Trade Policy Review Mechanism</td>
</tr>
<tr>
<td>TRIMs</td>
<td>Trade-Related Investment Measures</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific, and Cultural Organization</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>USITC</td>
<td>United States International Trade Commission</td>
</tr>
<tr>
<td>World Bank</td>
<td>International Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Agreement establishing the World Trade Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WWF</td>
<td>World Wide Fund for Nature</td>
</tr>
</tbody>
</table>
Part I: Introduction and Theoretical Framework
Introduction

In recent times, the World Trade Organization (WTO) has come under considerable criticism as to how its rules allow trade and environment concerns to be balanced. A key aspect of this criticism is the view that the rules allow states little room to introduce domestic regulatory measures to foster sustainable consumption habits among their consumers or to improve global environmental conditions.¹

This thesis analyses three key agreements of the WTO to determine the validity of these criticisms. Its particular focus is the law relating to the trade in products whose production has a significant environmental impact. The rules affecting such trade has generated much of the heat in the trade and environment debate. Some commentators have urged changes in the rules of the GATT/WTO to allow states to use domestic regulatory measures to target methods of processing and producing products, despite the consumption or use of the product posing no direct threat to that state’s domestic environment (non-product-related PPM-based trade measures). Other commentators have argued that the very same rules are adequate for that purpose without change. This contradiction has been addressed for example by the work of Esty, Charnovitz, Thaggert, Howse and Regan, and Schlagenhof. Esty has dealt with a number of the agreements with a good treatment of the trade and environment debate and argues for change.² Charnovitz has made a detailed analysis of whether Article XX of the

¹ I follow Hudec in the use of the term ‘domestic regulatory measures’ to mean “measures that a government characterizes as an exercise of its authority to regulate its domestic affairs.” Hudec, R.E., ‘GATT/WTO constraints on national regulation: requiem for an “aim and effect” test’ (1998) 32(3) The International Lawyer 619, at 619. The regulation of the consumption habits of a nation’s consumers falls within this category.
² Esty, D., Greening the GATT: Trade, Environment and the Future (1994). The disadvantage of this approach is that a change in the rules of the WTO requires collective action. An amendment to the text of the WTO Agreement and the covered agreements must be accepted by the appropriate number of Members and it is only binding on those Members who do accept. An amendment to Article I of the General Agreement requires all Members to accept the amendment. An amendment to alter the rights and obligations of the Members set out in Articles III and XX of the General Agreement, the SPS Agreement and the TBT Agreement, requires acceptance by two-thirds of the Members and only takes effect for those Members and those others who accept thereafter. Article X:3 of the WTO Agreement, see also
General Agreement on Tariffs and Trade (General Agreement) allows environmental measures to be taken, and argues against change. In contrast, Thaggert and Howse and Regan argue that that recourse to Article XX is unnecessary as the ‘like product’ concept in the General Agreement is broad enough to distinguish between products on the basis of how they are produced. Schlagenhof also considers that the ‘like product’ concept in the General Agreement does not necessarily exclude non-product-related PPM criteria being used to distinguish between products, but argues that a new environmental organisation is needed to resolve transboundary environmental problems caused by the production of products.

The distinctive contribution of this thesis is the attempt to extend their work and that of others by conducting a thorough analysis of the treatment of non-product-related PPM-

---

Article X:4 of the WTO Agreement and Article XXX of the General Agreement. Note Article X:3 of the WTO Agreement also states that if an amendment made effective under Article X:3 “is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or remain a Member with the consent of the Ministerial Conference.” Davey considers that this seems to provide a mechanism to force Members to either accept an amendment which has gained significant support, or withdraw from the WTO. He notes that the 1947 General Agreement did not have such a procedure, and that in the 1950’s, one country essentially caused a series of amendments to be abandoned by refusing to accept them. The result was that it was thereafter thought to be impossible to amend the General Agreement, so that side agreements, such as those concluded in the Tokyo Round, became a substitute of sorts for the amendment process. Davey, W.J., ‘The WTO/GATT world trading system: an overview’ in P Pescatore, W J Davey and A F Lowenfeld (eds), Handbook of WTO/GATT Dispute Settlement (1991) 3-86, at 14.


4 Thaggert, H.L., ‘A closer look at the Tuna-Dolphin case: “like products” and “extrajurisdictionality” in the trade and environment context’ in J D Cameron, P.; Geradin, D. (ed), Trade & the Environment: the Search for Balance (1994) 69-95 at 72; see also Schagenhof, M., ‘Trade measures based on environmental processes and production methods’ (1995) 29(6) Journal of World Trade 123, at 129. In Thaggert’s view, the manner in which a product has been made can have a bearing on consumers’ tastes and habits towards a product, which will differ from country to country, as well as the product’s overall ‘nature’. These factors can influence how a product is treated by an importing state, and are an important consideration when determining if that treatment is discriminatory.


6 Schagenhof, 1995, above at n 4, at 129, 154. Nations would also have to act collectively to create a new international environmental organisation. See further below at text accompanying nn 25-26.
based trade measures in the relevant GATT/WTO case law across three of the main agreements affecting the trade in goods. The thesis seeks to accomplish this by making a detailed and current overview, set within its historical context, of the law relating to the trade in products which have a significant environmental impact during their production phase. It analyses the extent to which the rules allow domestic regulatory measures to improve environmental standards to flourish, so that strong Member states may foster sustainable consumption habits amongst their consumers and exert an upward pull on environmental standards over time.

It is the contention of this thesis that, rather than weakening national attempts to improve environmental standards, recent interpretations of WTO rules have allowed a considerable strengthening of national abilities to improve environmental standards. Vogel describes the process of strong states using trade measures to bargain with weaker states to introduce higher environmental standards as the ‘California effect’.7 The operation of the ‘California effect’ has been hampered at the global level partly because the WTO rules have been understood to prevent states from introducing standards to prevent the importation, or discourage the purchase of, products which have been made in an environmentally unsustainable way.8 This thesis shows that this interpretation of the rules has now been overturned. Accordingly, the rules now allow scope for a ‘California effect’ in relation to production standards to occur at the global level.9

---

7 Vogel, D., Trading Up: Consumer and Environmental Regulation in a Global Economy (1995), at 6ff. The ‘California effect’ is so named as, within the US, it is often California which leads a “race to the top” of environmental standards, just as Germany often leads a similar move within the EC. See Chapter 2, text accompanying nn 156-166, below.

8 Vogel, 1995, above at n 7. Vogel states: “The frustration of environmentalists with the GATT stem in large measure from the extent to which GATT rules limit the ability of nations in which green pressure groups are especially influential to use trade policies to change the environmental policies of their trading partners. Accordingly, ‘greening the GATT’ essentially means expanding the legal basis on which the United States, but also the EU and a number of other countries, can use their economic power to influence the regulatory policies of countries with a weaker commitment to environmental protection. This, however, has not yet occurred, in part due to a lack of consensus regarding the appropriateness of such a shift by the international community in general and the EU, the United States, and Japan in particular. Accordingly, the scope of the California effect remains weakest at the global level.” (at 265).

9 Note that the political commitment of strong nations still remains a vital ingredient in this equation. A ‘California effect’ to improve global environmental standards will not occur unless a strong nation such as the EU, the United States, Japan or even China decides to use its regulatory powers to achieve this goal.
The approach of this thesis

The agreements which receive specific attention are the *General Agreement on Tariffs and Trade*¹⁰ (General Agreement), in particular Articles I, III and XX; the *Agreement on Sanitary and Phytosanitary Measures*¹¹ (the SPS Agreement) and the *Agreement on Technical Barriers to Trade*¹² (the TBT Agreement). These agreements, among others, are annexed to the *Agreement Establishing the World Trade Organization*¹³ (WTO Agreement) and are known as the Multilateral Trade Agreements or covered agreements.¹⁴ They have significant potential to give rise to trade disputes grounded in a clash of trade and environmental principles, and have attracted notable attention in

---


¹¹ In Annex IA to the WTO Agreement.

¹² Ibid.


¹⁴ The *WTO Agreement* and the covered agreements do not represent merely a larger and more detailed version of the GATT regime. The 1947 *General Agreement* has been replaced by the 1994 *General Agreement*, the SPS Agreement, the *Agreement on Trade-Related Investment Measures* (TRIMS, in Annex IA to the WTO Agreement), the *General Agreement on Trade in Services* (GATS, in Annex 1B to the WTO Agreement), and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS, in Annex 1C to the WTO Agreement) are all new, important changes to the *Agreement on Agriculture* (Agriculture Agreement, in Annex 1A to the WTO Agreement and the TBT Agreement have been made and the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement, in Annex 1A to the WTO Agreement) has been fine tuned. The *Understanding on Dispute Settlement* is also new, and the interpretative style of the Appellate Body is quite different to the approach taken by GATT.
discussions within the WTO Committee on Trade and Environment (CTE) and in the GATT and WTO dispute settlement arena. Focusing on these agreements thus provides a useful reference for discussing the scope for Members to implement domestic regulatory measures to protect the environment, particularly from harmful methods of processing and producing traded goods. Analysing these agreements allows us to trace how this scope has evolved with the change from the institutional structure of the GATT to that of the WTO, and provides a basis for identifying areas to be modified or augmented to improve ‘convergence’ in the trade and environment debate.\textsuperscript{15} The disputes considered by WTO panels and the Appellate Body are treated as case studies to enable a critical analysis of the WTO rules. Where relevant, the work of the CTE is considered. It provides an important perspective on issues which have not yet gone to dispute resolution but are of serious concern for the Members of the WTO.

The rules of the WTO and its jurisprudence are assessed by reference to the manner in which the normative principles of trade, the environment, democracy and the rule of law are balanced. These principles are fundamental to achieving sustainable development and are key principles in Agenda 21, the Programme of Action for Sustainable Development, adopted by the United Nations Conference on Environment and Development (UNCED).\textsuperscript{16} The promotion of international trade lies at the very

\textsuperscript{15} I acknowledge that agreement on whether or not there has been some ‘convergence’ in the trade and environment debate does really depend upon one’s perspective. Members supportive of the use of domestic regulatory measures to protect the environment would see an increased tolerance of the use of such measures at the international level as a ‘convergence’ in the debate, since their views on protecting the environment while engaging in international trade would be aligned. Countries and Members opposed to the use of such measures, for example developing countries, would be more likely to read the change as allowing wealthy developed Members an increased ability to protect their domestic markets than a ‘convergence’ in the debate. Equally, some NGOs, focusing on the practical consequences of recent WTO rulings, would still see domestic regulatory measures taken to protect the environment and consumer health being struck down. Thus, they would see only some convergence. My own interest in the trade and environment debate, shared with many others, is ensuring that world trade rules allow domestic regulatory measures (particularly those aimed at discouraging the trade in unsustainably produced products) to be maintained by a Member so as to protect the global environment, if such measures are carefully designed so as to reduce to a minimum discrimination and other restrictions on trade. Since some of the rule modifications made during the Uruguay Round, and recent WTO jurisprudence, seem to support this proposition, I see a convergence in the trade and environment debate. I use the term ‘convergence’ throughout this thesis in this latter sense.

heart of the WTO agenda, and some recognition is also given to the need to observe sustainable development while pursuing that agenda. The influence that the WTO rules have on domestic regulatory processes often leads critics to question the impact the WTO has on sovereignty, democracy, and the legitimacy of the organisation. The importance of the rule of law to maintaining the "security and predictability to the multilateral trading system"\(^{17}\) has been recognised by WTO Members with the negotiation of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and is evident in the central role which the DSU and the principle play in the settlement of disputes by the WTO.

The focus is limited to the WTO for two reasons. Firstly, the WTO can be considered to be the 'repository' of the international trade rules which govern many of the actions of nation states playing a role in the international community. In contrast, the administration of international environmental law is considerably more fragmented, it consequently being more difficult to discover an institutional focus for the co-ordination of international trade and environmental law if approaching it from that direction.\(^{18}\) Secondly, the WTO and its predecessor the GATT have been the primary arbiter of the trade and environment disputes which have gone to dispute resolution. Accordingly, it is a key focal point of the trade and environment 'debate'.

During the past decade, the international trade system has evolved from one primarily the domain of trade diplomats, to one increasingly inhabited by lawyers. The increasing legalisation of the international trade system give legitimacy to an approach which gives law some centrality. This legalisation can be seen in moves such as the creation of the WTO and the establishment of a unified dispute settlement system so that disputes under all parts of the *WTO Agreement* are covered by the same procedure;

---

\(^{17}\) Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the *WTO Agreement*.

the removal of the ability of Members to block the formation of a panel to consider a dispute; the establishment of an Appellate Body to review the decisions made at first instance by panellists; the interpretative approach emphasised by the Appellate Body; and the use of a ‘negative consensus’ procedure to overcome blocking by automatically adopting Appellate Body reports and panel reports as modified or sustained by the Appellate Body.¹⁹ A substantial body of literature addressing the inadequacies of the international trading system already exists. Although this is fast changing, much of it is focused on the law predating the creation of the WTO. The approach taken here is therefore to analyse a number of the agreements which provide the skeleton for the WTO as a new institution with an identity peculiar to itself, discussing the interpretation of those agreements in light of the new jurisprudence of the WTO.

This investigation is topical. The trade and environment debate has been prominent for the past ten years.²⁰ While some have said that the debate has stalled and needs to be re-energised,²¹ recent media coverage portrays it as coming to a head. The third WTO Ministerial meeting held in Seattle (the Seattle Ministerial) was delayed by violent protests, a common complaint being that the WTO “unduly constrains the regulatory autonomy of Member states, defeating or frustrating democratic choices in important areas of social, economic, environmental and cultural policy”.²² Similar protests, albeit

---


19 Decisions must be adopted to be binding on the parties to the dispute. Under GATT procedure, decisions could only be adopted if all of the Contracting Parties agreed, including the party which lost the case. The ‘negative consensus’ rule is a reverse of the GATT procedure. Decisions are automatically adopted by the WTO Dispute Resolution Body unless a consensus decisions is taken by the Members, including the victor (being the Member which the report finds for), not to adopt. A negative consensus to not adopt a report has not yet occurred.

20 It origins are, however, considerably older. For example, as noted by Bergsten in 1973 “Environmental issues affect the world economy through the movement of polluted products in international trade, the differences in national rules governing (or ignoring) the pollution content of production processes, and activities of industrial countries which affect other countries through altering the environment itself. All three aspects could prove important to international economic relations.” Bergsten, F.C., The Future of the International Economic Order: An Agenda for Research (1973) in Charnovitz, S., ‘Free trade, fair trade, green trade: defogging the debate’ (1994) 27 Cornell International Law Journal 460, at 461.

21 Thus in March 1999, a High Level Symposium was convened to refocus attention on common ground which might move the debate forward, contiguous with a high level meeting on trade and development. The record of the environment symposium is at http://www.wto.org/english/tratop_e/envir_e/dgenw.htm; and of the development symposium at http://www.wto.org/english/tratop_e/devel_e/hlmdv_e.htm.

22 Howse, R., ‘The Canadian generic medicines panel: a dangerous precedent in dangerous times’ (2000) 4(3) Bridges between Trade and Sustainable Development 3, at 4. Note that only a small segment of the protestors were violent; however these groups captured most of the media attention.
on a smaller scale, have been held at other international economic meetings in 2000 and 2001, such as the World Economic Forum in Davos, Melbourne and Prague, the World Bank and International Monetary Fund (IMF), as well as at the negotiations of the Cartagena Protocol on Biosafety.  

The common theme of such protests is the concern that globalisation and increasing global business power threatens individual liberties and sovereignty. A more generalised hostility towards institutions and regimes supporting the liberalisation of trade and the liberal economic paradigm is also evident. Environmentalists among the protesters tend to be concerned that the international trading system does not adequately take into account legitimate concerns as to the pace of world wide environmental degradation caused by environmentally inappropriate development, and take the view that world trade rules override national attempts to do so. For example, prior to the Seattle Ministerial, Kelly Quirk, head of the Rainforest Action Network, said “The WTO has the right to completely rescind any law passed by the citizenry to protect the environment, health and labour rights.”  

This view is extreme and incorrect. The rhetoric is, however, symptomatic of the fundamental concern as to the impact of the WTO on the discretion and ability of Members to implement policies designed to take into account environmental concerns. Such concerns are by no means limited to those present at such protest rallies, but are becoming increasingly widespread among the world wide community.

While the more radical elements of the Seattle and other protests have called for the abolition of the WTO, that approach is not supported in this thesis. Other voices have argued in favour of creating a new international environmental organisation to resolve trade and environment disputes, although financial and political hurdles make the

24 The Rainforest Action Network was one of the co-sponsors of a direct-action training camp organised by the Ruckus Society to stop the WTO’s Seattle Ministerial. Rowell, A., ‘Unlikely bedfellows unite to fight WTO’, The Canberra Times, 8 October 1999.
25 For example, in his opening remarks to the WTO High Level Symposium on Trade and Environment, 15 March, 1999, the former Director-General of the WTO, Renato Ruggiero, called for the establishment of a World Environment Organisation to assist in the resolution of trade and environment issues, at http://www.wto.org/english/tratop_e/envir_e/envir.htm The call for such an organisation was reiterated by green politicians at the Global Greens 2001 conference, at
creation of such an organisation unlikely in the near future.\textsuperscript{26} Many commentators remain gloomy about the ability of the WTO to accommodate the trade and environment debate and the prospects of the WTO allowing domestic regulatory measures to protect the global environment to prevail.\textsuperscript{27} Yet this thesis concludes that the situation is not so dire, and there have in fact been significant signs of convergence of the trade and environment debate since the WTO has come into being. In particular, a significant deadlock in the rules affecting the trade in products having significant environmental impact during their production phase has been broken by the Appellate Body of the WTO.\textsuperscript{28} This thesis does recommend some alteration to the existing rules to better integrate trade and environment concerns. While demonstrating problem areas in the rules may assist in progressing calls for a new international environmental organisation, in the absence of the appropriate conditions for a new institution to be created, a case for the modification of WTO rules may be advanced. The advocates of free trade may feel less threatened and possibly more willing to listen to proposed changes if the WTO is retained as a core supranational institution, and, although significant institutional and political impediments to amendments exist, their adoption may broaden the core constituency which accepts the legitimacy of the WTO.\textsuperscript{29}


\textsuperscript{26} As Esty notes, “Despite the many advantages of a global environmental regime, the prospects for the creation of a new international environmental entity with a comprehensive and coherent mandate in the near future are dim. Lacking a major trauma to the international system to highlight the need for a new institutional structure (as World War II provided the impetus for the GATT regime) and having missed the opportunity for change offered by the 1992 Earth Summit [UNCED], there appears to be little momentum for a Global Environmental Organization.” Esty, 1994, above at n 2, at 98, footnotes omitted. The creation of such an organisation raises a number of institutional issues to be resolved. For example, the institution’s function, powers, location, staff, mechanisms for financial support, as well as its authority vis-à-vis other existing institutions. Would the new institution have, for example, a dispute mechanism, and would it be binding? If a dispute arose involving both trade and environment issues, what would be the process of determining the forum for adjudication?


\textsuperscript{28} For discussion, see Chapter 5, below.

\textsuperscript{29} As noted by a number of commentators, legitimacy is vital to ensuring the durability of the organisation. See, for example, Howse, R. and M.J. Trebilcock, ‘The fair trade-free trade debate: trade,
Part I introduces the philosophical, economic and environmental foundations of the trade and environment debate. Part II outlines and analyses the current legal framework of the WTO used to balance domestic regulatory measures in the trade and environment context and examines the framework’s deficiencies and synergies. The particular focus is on ‘non-product-related PPM-based trade measures’. That is, domestic regulatory measures taken to control the trade in products which pose no direct threat to the importing state’s domestic environment, but whose methods of production, harvesting and processing (PPMs) are environmentally harmful. PPM-based trade measures may be implemented in a number of different ways, including:

- direct regulations by governments [such as import and export bans for products not meeting specified PPM standards];
- market-based intervention ... [through the use of economic instruments such as environmental taxes, border tax adjustments or countervailing duties];
- indirect measures through consumer choice [such as environmental labelling schemes]; [and]
- voluntary agreement by the industries concerned.

This thesis focuses primarily upon measures implemented by government regulation. It notes that regulation can influence the use of market-based economic instruments and the opportunities for consumer choice which countries are willing to extend their citizens.

Chapters 1 and 2, being Part I of the thesis, outline the relevance of the WTO to the trade and environment debate and introduce a set of principles to guide the thesis. These are a theoretical and practical commitment to a strong environment and strong markets, a commitment to development and sustainability through trade, and a commitment to the rule of law. Chapter 2 notes that one means of achieving sustainability through trade is via Vogel’s theory of ‘trading up’, where unilateral measures are used to harness the trade liberalisation agenda to that of business acceptance and implementation of higher environmental standards. It points out that

while WTO rules cannot be used to spur nations to adopt higher environmental standards, the constraint such rules place on the domestic regulatory capacity of states will determine whether they may ‘trade up’.

Chapters 3 – 5 examine the case law of the *General Agreement*. Chapter 3 covers the non-discrimination requirements expressed in Articles I and III of that agreement. It shows that measures attempting to distinguish between products on the basis of their production history or other characteristics not visible in the product as it crosses the border (the ‘final product’) have generally been found to be inconsistent with those Articles under both GATT and WTO jurisprudence. Chapter 3 distinguishes between PPM-based trade measures which may be used to further environmental goals, and introduces the concepts of ‘producer-based’ and ‘impact-based’ PPM measures. PPM-based trade measures are those measures which target the process and production methods of the product. Producer-based measures target the characteristics of the producer of the product, while impact-based measures target the environmental impact caused by the production of the product. Impact-based measures are more narrowly focused. Whereas impact-based measures will only target those products which contravene the environmental goals established by the measure, producer-based measures may also target products which do not contravene those goals if the producer also makes products which do contravene those goals. Chapter 3 shows that while ‘producer-based’ PPM measures have been tested against the disciplines of Articles I and III, ‘impact-based’ PPM measures have not. It argues that there are some grounds to find impact-based measures consistent with the disciplines of those Articles, but observes that given those Articles are read narrowly to ensure the integrity of the trading system, such an interpretation is unlikely.

Chapter 4 examines the ‘environmental exceptions’ found in Article XX of the *General Agreement*. It discusses how its narrow interpretation during the GATT years, born in a culture of diplomacy, severely limited the choice of domestic regulatory measures

---

available to states to improve environmental standards and led them to consider that non-product-related PPM-based trade measures were not available.

Chapter 5 examines these exceptions in light of the new interpretative approach of the Appellate Body of the WTO. The Appellate Body has introduced a greater observance of the principles of international law which has relaxed prior constraints on the choice of domestic regulatory measures and has opened the way for non-product-related PPM-based trade measures to be available.

Chapter 6 discusses the Agreement on Sanitary and Phytosanitary Measures in light of present case law. It observes that there is no distinction between the choice of PPM-based trade measures available, but notes that the disciplines of Article XX(b) are considerably strengthened. It nevertheless concludes that the agreement provides states with sufficient latitude to achieve both development and sustainability through trade.

Chapter 7 discusses the Agreement on Technical Barriers to Trade. Its application to non-product-related PPM-based trade measures is unresolved, but measures at least partially relying on such criteria (eco-labelling schemes based on a life-cycle approach) are prominent in the market place. This Chapter assesses the potential application of the agreement to such schemes, and the disciplines of the agreement in general. It concludes that the disciplines severely compromise a Member’s ability to introduce domestic regulatory measures to promote a strong environment and recommends modifications to the disciplines accordingly.

Chapter 8 concludes that Members must contend with considerable substantive and procedural hurdles to be able to maintain high environmental standards, yet, nevertheless, the interpretive approach of the Appellate Body of the WTO has had a significant influence in relaxing constraints placed on the domestic regulatory authority of states to do so. It suggests that, given that the WTO rules do appear to allow states to use non-product-related PPM-based trade measures, and that the trade community wishes to see their use constrained, calls for the negotiation of a PPMs Agreement may resurface. Chapter 8 concludes by outlining some vital elements of such an agreement derived from the analysis.
A Theoretical Framework: theories of international trade, environmental protection and the place of the WTO in the debate

In order to better understand the international trade and environment debate, it is important to understand some of the principles which frame it. There are many and varied contributors. The major factors which influence their contribution are clearly their approach to liberalised international trade, and their approach to the protection of the environment. For example, those who would describe themselves as ‘environmentalists’ are not necessarily anti-free trade, yet they see a greater role for regulatory intervention to ensure protection of the environment. This chapter discusses the philosophical, economic and environmental foundations which frame the international trade and environment debate. It is intended to provide the context for a discussion of the cases discussed in subsequent chapters. Firstly, the theory of international trade is considered, then theories on environmental protection are examined, and finally the relevance of the WTO to the trade and environment debate is outlined.

The theory of liberalised international trade

The dominant economic paradigm of the liberalised trading agenda is the theory of ‘comparative advantage’. Comparative advantage is the classical economic theory used to explain why certain industries succeed in international trade. The notion of comparative advantage grew out of Adam Smith’s proposition of ‘absolute advantage’ set out in the Wealth of Nations.1 According to the theory of absolute advantage, a nation should specialise and export those goods which it can produce most cheaply, and

---

purchase from other nations those goods which it can produce less cheaply.\(^2\) Absent government intervention, the market should move like an ‘invisible hand’ so that the most efficient producer of the good will flourish and global welfare will increase. According to Smith, a nation which unilaterally liberalised its trading policy would benefit, irrespective of whether other nations also pursued this course. The benefit would, however, be greater if all nations liberalised.

David Ricardo refined the theory of absolute advantage to show that even if a nation is able to produce certain goods at the lowest world price, it would still make sense to import those goods, rather than make them, if it made a relatively greater profit from producing other goods which it could export for a higher price. Ricardo’s theory of ‘comparative advantage’, which saw labour productivity differences as central to the ability of nations to produce goods at differing rates, was subsequently extended by Heckscher and Ohlin to include factors such as land, labour, natural resources, and capital. Their theory, known as the ‘factor proportions hypothesis’, is that the comparative advantage of nations will be derived from the production of goods which utilise their most abundant factors of production, and that those goods which are made from a nation’s more scarce factors will tend to be imported.\(^3\)

Adam Smith, David Ricardo, and perhaps most famously, Thomas Malthus, were pessimistic as to whether economic growth and global welfare could be sustained indefinitely through the operation of the market. Indeed, they projected that production and economic growth would be reduced as good agricultural land became more scarce, eventually leading to a stationary state with only a subsistence level of existence.\(^4\) Their pessimism was later replaced by optimists such as John Stuart Mill, who, by


\(^3\) Porter, M., The Competitive Advantage of Nations (1990); Howse, R. and M.J. Trebilcock, ‘The fair trade-free trade debate: trade, labour, and the environment’ (1996) 16 International Review of Law and Economics 61. The Heckscher and Ohlin theory assumes that all nations possess equivalent technology with which to make their goods, that all factors of production are immobile and that nations do not alter the list of goods produced. Note that the ‘factor proportions hypothesis’ has not necessarily been validated when applied to real-world situations, leading to some loss of confidence in its approach. Whitwell, R., The Application of Anti-Dumping and Countervailing Measures by Australia (1997), at 45.

incorporating the influence of technological change into their models, proposed that the stationary state could be postponed through technological advancement.\(^5\)

Adam Smith and David Ricardo intended government to play a minimal role in the market so as to let the self-interested and rational behaviour of market actors (producers and consumers) determine the most efficient types of production. Governments and interest groups are aware, however, that through intervention in the form of tariffs, subsidies, export financing, interest rate reductions, wage freezes, devaluation of currencies, and other industry policies, governments are able to manipulate the comparative advantage of their industries. The theory of free trade attempts to limit governments’ use of tariffs, border restrictions and subsidies to boost their industries’ comparative advantage.\(^6\)

Other trade theories see government intervention as beneficial in certain circumstances. In the case of ‘strategic trade theory’, the short term provision of support can help boost a fledgling or struggling industry to help it achieve capacity.\(^7\) In contrast, the theory of ‘competitive advantage’, developed by Michael Porter, sees domestic regulatory conditions as useful for building strong industries. For example, strict environmental laws can spur innovation and the improvements of products which will assist in the creation of comparative advantage.\(^8\) The theory of ‘competitive advantage’ augments, rather than detracts from, the theory of free trade.

---

\(^5\) Ibid. The idea that humanity can postpone a stationary state through technological advancement and the use of substitutable products retains currency in some economic thinking. For example, Julian Simon’s position in his famous bet with Paul Ehrlich as to the movement in the price of five metals over 10 years depended on this view. See Dryzek, J.S., *The Politics of the Earth: Environmental Discourses* (1997). The notion of ‘sustainable development’ also depends on the development and application of environmentally beneficial technology and the use of substitutable products to help fuel economic growth.

\(^6\) As noted by Charnovitz, the idea that “free trade connotes deregulation (or no regulation) of individual actions ... is based on an extremely doctrinaire view of free trade.” Charnovitz, S., ‘Free trade, fair trade, green trade: defogging the debate’ (1994) 27 *Cornell International Law Journal* 460, at 471. He explains ‘Originally, free trade meant that trade would not be taxed by tariffs; hence it is free. In typical usage, free trade also means the absence of special border restrictions. Free trade does not mean the absence of all regulation of commerce.’ at 471.


\(^8\) Porter, 1990, above at n 3.
For the past 50 years, trade policy has largely been dominated by a commitment to the theory of free trade. This was not always so. World War I threw the economies of many countries into ruins, damaging production facilities, severing channels of international trade, and causing countries to incur heavy debt. The Great Depression saw the disappearance of the gold standard, currency crises and a sharp decline in international trade. International conferences were held in the interwar years encouraging a return to international trade, yet governments implemented increasingly restrictive policies. In 1930, the US enacted the Smoot-Hawley Tariff Act, in which duties were raised to the highest levels in US history. Canada, Cuba, France, Mexico, Italy, Spain, Australia and New Zealand followed suit, raising tariffs shortly thereafter. In 1932, the United Kingdom also abandoned free trade, introducing a general tariff and implementing an imperial preference policy for the British Commonwealth. The resulting complicated tariff structures maintained countries' economies as distinct entities, making international trade quite prohibitive and causing many countries' economies to languish. The outbreak of war was seen as symptomatic partly of trade tensions, as well as the tensions generated by the numerous other political, economic and social agendas of the time.

Determined to avoid a repetition of past mistakes, negotiations began towards the end of the second world war to reduce tariff barriers over time. Discussions also began for an institutional structure intended to encourage economic integration and independence to such an extent that future hostilities on the scale of the world wars could never take place again. The three international organisations designed to implement this plan were the IMF, the International Bank for Reconstruction and Development (the World Bank) and the International Trade Organization (ITO). The ITO never came into existence, although the final text of its agreement was negotiated. Instead, because it had been agreed that negotiations for tariff reductions would take place prior to the entry into


11 Hudec, 1990, above at n 10; Wilcox, 1949, above at n 10.
force of the ITO, part of the text was given provisional application in order to safeguard the effect of those negotiations. That agreement was the 1947 General Agreement, and a commitment to provide the agreed tariff concessions and to avoid discrimination in trade relations between nations were embedded as cornerstone principles.\textsuperscript{12}

The General Agreement thus has its roots as much in peace as in promoting economic advancement. It is for this reason that calls for an unwinding of the global economy's commitment to free trade are viewed with caution, as it is feared that the price of disturbing or even fracturing the economic integration which has now already occurred may be far more than the financial benefits of liberalised trade; it may also include stability and peace.\textsuperscript{13}

\textsuperscript{12} Hudec, 1990, above at n 10.
Theories on environmental protection

The health of the environment, and particularly that of the international environment, was given little consideration at the time of the negotiation of the 1947 *General Agreement*, but there is now no doubt that it is of common concern.\(^\text{14}\) The 1972 United Nations Conference on the Human Environment in Stockholm\(^\text{15}\) marked the beginning of the international community’s recognition that the ‘environmental crisis’ has local, national, regional and international implications.\(^\text{16}\) Since that time, increasing reference has been made to international law to slow or bring about a more controlled depletion of environmental resources, and to allow time for some regeneration to occur.\(^\text{17}\)

The primary issues which now confront the global community include the stabilisation of the ozone layer and climate change; biodiversity conservation, including of the habitat and species which form the ecosystems of migratory species; the conservation of marine resources; the management of pollution including toxic and hazardous waste; the prevention of erosion and the desertification of land; the slowing of deforestation and species loss; and the conservation of non-renewable resources. The groundswell of environmental concern over these issues and the concurrent development in international environmental law has been influenced largely by scientific evidence demonstrating the interdependent nature of environmental systems, and the significant damage to those systems which has already occurred.

The incentives to negotiate global solutions have been consolidated by a general acceptance of the view that ongoing environmental degradation has the potential to

\(^{14}\) Widespread public concern in the developed nations has been evident since the 1960s, with the publication of works such as Carson, R., *Silent Spring* (1963). While in the 1970s it was increasingly recognised that the global environment was at risk, initially it was perceived that the solution to the problem rested at the state level. Goodin, R.E., *Green Political Theory* (1992), at 3; Anderson, K. and R. Blackhurst, *The Greening of World Trade Issues* (1992), at 3.

\(^{15}\) 5-16 June 1972, Stockholm, Sweden.


threaten both personal health and fortunes, as well as global peace and security. Accordingly, the global community has seen an enormous proliferation of environmental agreements, treaties and laws at the international level and is arguably moving towards the view that if efforts are not co-ordinated, then any efforts will be ultimately futile.

Yet unlike the coordinated approach to the development, implementation, administration and operation of international trade law, formerly overseen by the GATT Secretariat and now by the WTO, "the management of international environmental affairs has little structure and is marked by policy gaps, confusion, duplication, and incoherence". There are many national, international and transnational bodies which are concerned with the co-ordination of international environmental policy, including many UN agencies such as the United Nations Environment Programme (UNEP) and the Commission on Sustainable Development (CSD), the secretariats of many environmental treaties and conventions, the World Bank, regional political groups, nation states, and national and international NGOs.

Reference to theories on environmental protection can help us answer questions as to how humanity's conduct has brought about the environmental crisis, as well as provide some guidance as to how to set about mending present and preventing future environmental harm. Two major theoretical strands are that of anthropocentrism and ecocentrism, briefly outlined below.

---


Anthropocentrism and Ecocentrism

An anthropocentric view sees the environment in instrumental terms. That is, the environment is valuable because it is useful for us, rather than being valuable in itself. This approach to the environment has been common throughout the ages, the scientific revolution of the seventeenth century, aided by the writings of Sir Francis Bacon, helping embed this approach in modern thought.20

The ecocentric view is that value exists in the environment in its own right, the value of the environment does not depend on its utility for humans. On this view, humans are an important ethical concern within the context of the environmental community, but not necessarily the moral centre of that concern.21 This view influences the animal liberationist, land ethic and deep ecology perspectives.22

One’s philosophical approach towards the environment is important, for as Caldwell explains:

Obviously how one understands the world may affect one’s opinions regarding the propriety or justification of human behaviour in relation to the environment.23

---

22 The ‘animal liberationist’ viewpoint is one of the weakest forms of ecocentric thought. According to this position, equal moral consideration (as distinct from treatment) should given to all beings which are sentient. See Singer, P., *Animal Liberation* (1977); Eckersley, 1992, above at n 16, at 42-45; Gillespie, 1997, above at n 20, at Chapter 8; Goodin, 1992, above at n 14, at 89-90. Alternative and stronger or ‘deeper’ ecocentric theories include Aldo Leopold’s ‘land’ (or environmental) ethic and the ‘deep ecology’ ethic of Arne Naess. According to Leopold, the land ethic “simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land community to plain member and citizen of it. It implies respect for his fellow members, and also respect for the community as such.” Sylvan and Bennett, 1994, above at n 21, at 81, quoting Leopold, A., *A Sand County Almanac* (1966), at 219-220; see also Eckersley, 1992, above at n 16, at 60-61. Arne Naess advocates that the person actually identify with the environmental entity or entities, and that “no moral exhortation to show care” is necessary if one’s sense of self actually extends to that entity. Eckersley, 1992, above at n 16, at 62 quoting Naess, A., ‘Self-realization: an ecological approach to being in the world’ (1987) 4 *The Trumpeter*, at 39. Deep versions of the ecocentric position reject the view that humans and human concerns are always more valuable than those of the environment. See Sylvan and Bennett, 1994, above.
According to Zimmerman, the danger for the environment in adopting an anthropocentric approach is that:

If humankind is understood as the goal of history, the source of all value, the pinnacle of evolution, and so forth then it is not difficult for humans to justify the plundering of the natural world, which is not human and therefore 'valueless'.

At the same time, while radical green philosophers may consider that ‘anthropocentrism’ "underpins the whole range of radical green objections to current forms of human behaviour in the world", the viewpoint can also offer arguments in favour of environmental protection. This is not lost on green political activists, including those participating in the trade and environment debate, who commonly use anthropocentric arguments to persuade people to their cause. Indeed, this thesis is primarily influenced by the anthropocentric view.

Anthropocentric arguments for environmental protection flow from the idea that the well-being, or in some cases, survival, of humanity depends on the well-being or survival of the environment, and therefore humans must act in their own interest and those of future generations to preserve the environment. Well-being is not limited to considerations purely on the basis of health; economic, aesthetic, cultural and recreational considerations may also be invoked as justification for environmental protection. Similarly, religious reasons may ground anthropocentric motivations for environmental protection. According to a short term anthropocentric view of environmental protection, few restraints are placed on human interactions with the environment unless they interfere with other humans. A longer term anthropocentric view of environmental protection places significantly more constraint on human interactions with the environment since it is difficult to predict now what environmental attributes will be beneficial, or necessary, for human use and survival into the future. For example, the 'ecological modernisation' viewpoint, outlined below, argues that being green is good for business; the 'human welfare ecology' viewpoint argues that

26 Ibid, at 67.
27 Gillespie, 1997, above at n 20; Sylvan and Bennett, 1994, above at n 21.
28 Sylvan and Bennett, 1994, above at n 21.
maintenance of the overall health and resilience of the physical and social environment (for example through ‘sustainable development’) is necessary to ensure the survival of humanity; the ‘preservationist’ viewpoint sees the environment as a source of wonderment on aesthetic and spiritual grounds, and argues strongly in favour of protecting it (particularly wilderness) from development; and the ‘resource conservation’ viewpoint argues against the waste or depletion of natural resources in order that ‘nature’s bounty’ may remain available for future human use.29

Discourses on trade and environment

The trade and environment debate has both anthropocentric and ecocentric elements. Environmentalists are critical of the pursuit of economic growth where such growth is blind to the wider environmental and social consequences, and are sceptical of science and technology alone being able to provide a satisfactory outcome to global ecological problems. The ‘preservationist’ and ‘animal liberationist’ discourses make a significant contribution to the debate, supporters of such positions tend to be particularly in favour of a number of PPM-based trade bans which have been implemented. It will be recalled that non-product-related PPM-based trade bans target products whose methods of production, harvesting and processing are environmentally harmful, even though the product itself poses no direct threat to the importing state’s domestic environment. Examples include the US’s ban on the importation of yellowfin tuna caught in a manner which harmful to dolphins; its ban on the importation of shrimp caught in a manner threatening the survival of a number of species of turtles;30 and Chile’s ban on the importation of swordfish caught in a manner which threatens the sustainability of the species.31 These bans appeal to both preservationists as well as animal liberationists.

29 See further Eckersley, 1992, above at n 16; Garner, R., Environmental Politics (1996); Gillespie, 1997, above at n 20; Dryzek, 1997, above at n 5; Sylvan and Bennett, 1994, above at n 21; O’Riodan, T., Environmentalism (1976).
30 See Chapters 3-5 below.
Likewise, the EC’s ban on leg-hold traps\textsuperscript{32} appeals primarily to animal liberationists; and the EC’s ban on the importation of beef treated with growth promotion hormones\textsuperscript{33} appeals both to consumers as well as to animal liberationists. The one-time proposed Austrian ban on the importation of tropical timber\textsuperscript{34} appealed to preservationists, resource conservationists, as well as human welfare ecologists.

Much of the writings within the trade and environment debate falls within the ‘human welfare ecology’ viewpoint. This perspective argues, without recourse to ecocentrism, that some social and economic changes to the WTO need to take place. This would be to ensure the health of the environment is maintained so that human needs are met and ecosystems preserved. Esty notes four central propositions which are reflective of this viewpoint and which found the environmentalists’ case:

- Without environmental safeguards, trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production.
- Trade rules and trade liberalization often entail market access agreements that can be used to override environmental regulations unless appropriate environmental protections are built into the structure of the trade system.
- Trade restrictions should be available as leverage to promote worldwide environmental protection, particularly to address global or transboundary environmental problems and to reinforce international environmental agreements.
- Even if the pollution they cause does not spill over into other nations, countries with lax environmental standards have a competitive advantage in the global marketplace and put pressure on countries with high environmental standards to reduce the rigor of their environmental requirements.\textsuperscript{35}

These propositions, which define a set of tensions between the theory of comparative advantage and environmental discourses, are discussed below. The key tensions amount to a debate on the effects of economic growth, whether adequate and sufficient


\textsuperscript{33} See Chapter 6 below.


\textsuperscript{35} Esty, 1994, above at n 13, at 42.
environmental safeguards exist to temper the effects of growth, and the impact of growth and safeguards on competitiveness.

i) The environmental effects of economic growth

Esty sees the first proposition, which is concerned with the effects of economic growth in the absence of appropriate environmental safeguards, as the 'essence' of the trade and environment debate. Of all the propositions, this first proposition has, in particular, been fuelled by the Malthusian type discourse generated by work such as the Club of Rome's commissioned report *Limits to Growth*, the *Global 2000 Report to the President*, Hardin's 'Tragedy of the Commons' scenario, and Ehrlich's *Population Bomb*, which point to an eventual exhaustion of the Earth's stock of natural resources and carrying capacity. Proponents of this position see international trade contributing to the problems caused by economic growth.

Trade liberalisation creates the conditions where goods may cross national borders free of tariff and non-tariff barriers. The environmental impact precipitated by international trade may be seen in the actual transportation of goods, which imposes a direct cost of environmental protection such as energy to transport the good, infrastructure to service the transport (roads, harbours, airports) and packaging to protect the good. Pollution is generated as the goods are transported, and hazardous spills may occur during the transportation. Moreover, if the goods are hazardous, contaminated or diseased in some way, relocation imposes a direct environmental cost upon the environment at the point of destination.

---

38 Hardin, G., 'The tragedy of the commons' (1968) 162 Science 1243.
40 Dryzek, 1997, above at n 5; see also Porter, G. and J. Welsh Brown, *Global Environmental Politics* (2nd ed, 1996). Note too that Adam Smith and David Ricardo also had reservations in this regard; above at n 5 and accompanying text.
More fundamentally, economic growth affects the scale of production and consumption of goods, so that as more goods are produced and consumed, more resources are used and pollution and waste is generated. Moreover, because the sites of production and consumption are separated, the full pollution effects of economic growth are not felt by the consumer or producer or both. As put by Daly, while specialisation advocated under the theory of comparative advantage can increase resource efficiency:

trade does postpone the day when countries must face up to the discipline of living within natural regenerative and absorptive capacities, and by doing that probably serves on balance to increase throughput growth and environmental degradation. Free trade also introduces greater spatial separation between the production benefits and the environmental costs of throughput growth, making it more difficult for the latter to temper the growth of the former. Furthermore, as a result of the increased integration caused by trade, countries will face tightening environmental constraints more simultaneously and less sequentially than they would with less trade and integration. Therefore, there will be less opportunity to learn from other countries’ prior experience with controlling throughput. In sum, by making supplies of resources and absorption capacities everywhere available to demands anywhere, free trade will tend to increase throughput growth and with it the rate of environmental degradation.42

Structural changes in the production priorities of a country, may also occur.43 The method of production may change, with countries adopting a cheaper but more polluting method of production. Alternatively, the choice of goods being produced may change, with countries moving away from traditional and sustainable practices, leaving them more vulnerable to the vagaries of international trade.44

41 Chamovitz, 1994, above at n 6, at 462.
43 Esty, 1994, above at n 13; Chamovitz, 1994, above at n 6.
44 For example, in order to increase foreign exchange earnings, a country may move away from its focus on growing traditional subsistence crops to growing cash crops. The cash crops are often farmed in manner a which is considerably less sustainable than the traditional crops, and the food security of the nation may be affected by the transition. United Kingdom House of Commons Environment Committee, World Trade and the Environment (1996), (hereinafter UK HOC Report). Furthermore, the environmental consequences of changing trading patterns may be obscured by the increased monetisation of traded goods. A move from traditional agriculture to cash crops will involve monetisation as the crop becomes internationally traded. As noted by Johnstone, “Depending on the suitability of the crop, the very process which overstates actual economic growth through increased monetization of the local economy may simultaneously understate environmental degradation since the ecological function played by the displaced crop was never valued explicitly in the market.” Johnstone, N., ‘Trade liberalization, economic specialization and the environment’ (1995) 14 Ecological Economics 163, at 167. See also Coote, B., The Trade Trap (1992).
These problems have led some radical environmentalists to conclude that international trade imposes unnecessary environmental costs which could be avoided by countries becoming either self sufficient or regionally sufficient. Thus they argue the future adoption of ‘isolationist’ environmental policies.\textsuperscript{45}

Free traders and champions of economic growth argue that it is generally not free trade which is the culprit, but poor environmental cost internalisation at the source of the environmental harm.\textsuperscript{46} For example, Anderson and Blackhurst state:

trade per se is not a direct cause of environmental problems. Some distortion must be present – most obviously, the absence of or inappropriate environmental policy – in order for there to be a possibility that international trade will create or worsen environmental problems.\textsuperscript{47}

Thus they argue that the answer is not to halt free trade, but to put in place appropriate policies to properly internalise the environmental effect into the price of the product. This encourages producers and consumers to amend their behaviour, mitigating or preventing environmental damage from occurring.\textsuperscript{48}


\textsuperscript{46} Even moderate environmentalists agree with this point. For example, Esty is supportive of free trade, yet notes its potential for negative short term consequences. He explains “In fact, in an overarching sense, trade helps society to be more efficient in its modes of production and the use of resources – allowing more output to be produced with fewer inputs, including fewer natural resources. Nevertheless, in the more immediate and tangible context, trade liberalization creates new market opportunities for exporters and therefore leads to new economic activity, which, in the absence of properly priced environmental amenities and harms, can result in more pollution.” Esty, 1994, above at n 13, at 43.

\textsuperscript{47} Anderson and Blackhurst, 1992, above at n 14, at 20.

\textsuperscript{48} Anderson and Blackhurst theoretically demonstrate that “free trade is nationally and globally superior to no trade so long as the optimal pollution tax is in place”. Ibid, at 44. Their view is also reflected in the 1992 report by the GATT Secretariat on Trade and the Environment, which argues that trade might be the magnifier of environmental harm, but it is not the central cause. These pro-free trade views have been criticised. GATT Secretariat, ‘Trade and the Environment’ (1992) 1 International Trade 90-91 19 (hereinafter GATT 1992 Report). Common has noted for example that “Appropriate environmental policies are not generally in place” and “Concerns about impacts on competitiveness are very often raised when it [is] proposed that environmental policies be put in place.” Common, M., ‘Background paper’ (1996) Environmental Economics Seminar Series 8, at 8. See also Ekins, P., Proposals for Reconciling Trade and Environmental Sustainability (1996); Esty, 1994, above at n 13. Kingsbury has noted that the GATT Secretariat report received substantial criticism because the report promoted free trade values “without concomitant measures to promote full internalization of environmental costs”. Further, the report avoided dealing with the issue of what response should be made when a government is uninterested in improving their environmental policies, or when no means of improving the environmental problems exist. Kingsbury, B., ‘The Tuna-Dolphin controversy, the World Trade Organization, and the liberal project to reconceptualise international law’ (1994) 5 Yearbook of International Environmental Law 1, at 6 and note 18.
Yet as acknowledged by a recent report into trade and the environment published by the WTO:

In the best of all worlds, governments would use proper environmental policies to "internalize" the full environmental costs of production and consumption – the "Polluter Pays Principle." Specifically, market failures would be corrected directly at the source by appropriate taxes and regulations, and policy failures would promptly be removed, including subsidization of polluting and resource degrading activities. In this idealized world, trade liberalization would unambiguously raise welfare. However, as this is not always the case, trade liberalization could potentially exacerbate the consequences of poor environmental policies.49

Moderate environmentalists would agree with pro-free traders that international trade should not be prevented.50 As history shows, the adoption of an isolationist approach would be economically disastrous. Such an approach would also lead to the loss in synergies between trade and the environment, outlined further below. Yet whereas pro-free traders are reluctant to allow trade measures to be used to implement appropriate environmental policies, moderate environmentalists see such measures as important tools. They insist that trade be sustainable. Thus, if appropriate environmental policies have not been adopted at the point of production of a good, the international trading regime should allow importing states to adopt domestic regulatory measures to reflect the goods' environmental costs into its price so as to encourage or promote sustainable production and consumption patterns among their consumers.

ii) Internalising environmental costs and setting environmental standards

The second of Esty's propositions speaks of finding a balance between allowing market access and ensuring legitimate environmental protection. That is, setting up the rules so

that the trading regime “reinforces legitimate environmental regulations but prevents hidden trade barriers masquerading as environmental rules and regulations that disproportionately and unfairly burden imports.”

This may be done by, for example, by implementing mechanisms to ensure that the environmental cost of producing traded products is incorporated into their price, such that the ‘polluter pays principle’ is observed. As Caldwell and Wirth point out, the principle of cost internalisation is “entirely consistent with the goals of liberalized trade [and] ... affirmative mechanisms to ‘avoid distortions in international trade and investment’.”

Coase and Pigou have each proposed influential theories regarding the internalisation of environmental costs. The Pigovian approach is to impose a tax upon the producers of externalities which damage ‘public goods’ such as the environment, clean air and water, species habitat, and so on. Environmental damage constitutes a social cost. The aim of the tax is to internalise these costs and pass them on to the producers of environmental damage. This will encourage producers to search for less environmentally damaging production processes to reduce their costs.

Coase has suggested that a property law paradigm be used to achieve a price system method of regulating externalities. He has argued that the costs involved in the interaction with the environment are not unidirectional, as suggested in the Pigovian approach, but can be regarded as reciprocal. For example, while pollution from a factory will be harmful to surrounding residents, pollution abatement will impose costs

---

51 Esty, 1994, above at n 13, at 43.
53 Caldwell and Wirth, 1996, above at n 52, at 589; referring also to Wirth, 1992, above at n 19, at 1398-401.
54 See, for example, Pigou, A.C., The Economics of Welfare (1924).
on the factory. He has suggested that the specification of property rights clarifies who should bear these costs. In the absence of transaction costs, market forces will prevail upon the parties to reach a negotiated solution by which both benefit. The residents might choose to pay the factory not to use its specified right to pollute, or the factory owner could pay the affected community to agree to waive its right to clean air.\(^\text{56}\)

The state in which the producer is situated may implement these mechanism to internalise the environmental costs of production. Alternatively, the importing state may apply its environmental standards at the border to ensure that the environmental cost of internationally traded products is internalised prior to sale on the importers market. This may be done through the use of negotiated tariffs, providing environmental subsidies,\(^\text{58}\) applying environmentally based countervailing duties,\(^\text{59}\)


\(^{56}\) Note that there are difficulties with Coase's theorem. For it to operate in the international arena, rights over environmental attributes would have to be comprehensively defined. This is an exceedingly complex task, well nigh impossible. Coase theorem assumes that transaction costs are absent between the parties, whereas this not an accurate reflection of the real world situation. The theorem also does not operate effectively when there are more than two participants negotiating their rights. If people sell their rights to environmental quality, the externalities will still be borne by the environment. Moreover, an individual may receive a disproportionately high price for their rights by 'holding out' when others have agreed to sell. Calabresi, G. and A.D. Melamed, 'Property rules, liability rules and inalienability: one view of the Cathedral' in B Ackerman (ed), *Economic Foundations of Property Law* (1975).

\(^{57}\) For example, it may be negotiated that for two physically identical goods which are produced in two different ways, the good whose production complies with certain criteria may be charged a lower import duty than the other good.

\(^{58}\) For example, funds are paid to meet the costs of new environmental requirements, such as upgrading existing facilities in response to new environmental regulation. Article 8.2(a) of the *Subsidies Agreement* allows such payments in limited circumstances. See Wynter, M., 'Countervailing environmental subsidies in our World Trade Order' (Paper presented at *Ecopolitics X Conference*, 26-29 September, Australian National University, Canberra, 26-29 September 1996); Youngman, R., 'Greenlighted environmental subsidies in GATT 1994' (1996) 8(4) *International Environmental Affairs* 337.


---


\[^{56}\text{57}\] Note that there are difficulties with Coase's theorem. For it to operate in the international arena, rights over environmental attributes would have to be comprehensively defined. This is an exceedingly complex task, well nigh impossible. Coase theorem assumes that transaction costs are absent between the parties, whereas this not an accurate reflection of the real world situation. The theorem also does not operate effectively when there are more than two participants negotiating their rights. If people sell their rights to environmental quality, the externalities will still be borne by the environment. Moreover, an individual may receive a disproportionately high price for their rights by 'holding out' when others have agreed to sell. Calabresi, G. and A.D. Melamed, 'Property rules, liability rules and inalienability: one view of the Cathedral' in B Ackerman (ed), *Economic Foundations of Property Law* (1975).

\[^{57}\text{58}\] For example, it may be negotiated that for two physically identical goods which are produced in two different ways, the good whose production complies with certain criteria may be charged a lower import duty than the other good.

\[^{58}\text{59}\] For example, funds are paid to meet the costs of new environmental requirements, such as upgrading existing facilities in response to new environmental regulation. Article 8.2(a) of the *Subsidies Agreement* allows such payments in limited circumstances. See Wynter, M., 'Countervailing environmental subsidies in our World Trade Order' (Paper presented at *Ecopolitics X Conference*, 26-29 September, Australian National University, Canberra, 26-29 September 1996); Youngman, R., 'Greenlighted environmental subsidies in GATT 1994' (1996) 8(4) *International Environmental Affairs* 337.


---

31
making border adjustments for environmental taxes, applying certification and labelling schemes, or implementing trade bans. As noted by Pearce and Turner, however, "it is virtually only by accident that [standard-setting] will produce an economically efficient solution, ie, it is unlikely to secure the optimum level of externality." Instead, the standard chosen will represent the outcome of a 'cost-benefit' analysis reflecting certain political choices including, but, as public choice theorists would argue, not limited to, environmental factors.

A number of policy questions are relevant to the development of standards to balance market access and environmental protection. These affect the form which the measure implementing the standard takes. Firstly, how high or low should environmental standards be set? The higher the standard, the greater impediment it will place on trade;

equitable international competition' in J Bhagwati and R E Hudec (eds), Free Trade and Harmonization: legal analysis (1996) ; Rauscher, M., International Trade, Factor Movements, and the Environment (1997). It is unlikely that such duties are WTO consistent. The WTO Agreement on Subsidies and Countervailing Measures applies only to subsidies of a financial nature, being 'financial contributions' and forms of 'income or price support' made in the sense of Article XVI of the General Agreement. (Article 1 of the Subsidies Agreement). Wynter, 1996, above at n 58; Esty, D. and D. Geradin, 'Environmental protection and international competitiveness: a conceptual framework' (1998) 32 Journal of World Trade 4; McDonald, 1999, above at n 50. Moreover, there are several difficulties associated with countervailing such subsidies. Environmental subsidies can be difficult to quantify, so assessing the degree of financial benefit would be difficult. Low environmental standards, or low enforcement of environmental standards, reflect not only a country's attitude to environmental protection. They also reflect its wealth and the priority it gives to other equally legitimate social issues which can be balanced against the environment. Should this be taken into account when assessing the extent of the subsidy? Ordinarily, countervailing duties are retained by the state collecting the duty. Some commentators have suggested a return of the duties collected to the state from which they were collected for use towards upgrading facilities or for other environmentally sustainable projects. This would mitigate some of the concern that countervailing duties would be used purely to serve protectionist ends. Housman, R.F. and D.J. Zaelke, 'Trade, environment, and sustainable development: a primer' (1992) 15 Hastings International and Comparative Law Review 535; Housman, R.F. and D.J. Zaelke, 'Making trade and environmental policies mutually reinforcing: forging competitive sustainability' (1993) 23 Environmental Law 534; van Pelt, 1994, above; Wilson, 1994, above; Wynter, 1996, above.

This involves applying to imported goods at the border a tax which corresponds to that applied to domestically produced products, and exempting or rebating a tax to goods to be exported. See Charnovitz, 1994, above at n 6; Demaret, P. and R. Stewardson, ‘Border tax adjustments under GATT and EC law and general implications for environmental taxes’ (1994) 28(4) Journal of World Trade 5; Brack, D., 'Energy tax, border tax adjustments and the multilateral trading system' (Paper presented at Institute for Environmental Studies (IVM) International Workshop on Market-Based Instruments and International Trade, Amsterdam, 19 March 1998); Fauchald, O.K., Environmental Taxes and Trade Discrimination (1998), at 164ff.

This is where the product is denied entry to a market.

Pearce, 1990, above at n 4, at 102.
the lower the standard, the greater the chance that environmental costs will not be reflected in the price of the product. Secondly, should standards be uniform across all jurisdictions, or should they vary depending on the circumstances of the particular jurisdiction?64

Thirdly, at what stage of the product’s lifecycle should standards be directed? Will standards only examine the product in its final form as it crosses the border, or can they deal also with the production, processing and harvesting methods of the product (its PPMs) as it is being created? This issue has fuelled much of the trade and environment debate, as has the issue of whether the rules permit importing states to regulate the PPMs of a product; and whether such conduct is a legitimate exercise of the importer’s sovereignty, or an incursion of the exporting state’s sovereignty. The dispute settlement arm of the WTO has, in recent cases, allowed states greater flexibility to regulate the PPMs of important products but has avoided addressing the sovereignty aspect in their rulings.

---

64 Uniform standards assist economies of scale in commercial production but tend to reduce welfare as they are not sensitive to the diversity of local environmental and social conditions. In contrast, variable standards are sensitive to local conditions yet may detract from economies of scale being developed. Esty, D., ‘Environmental regulation and competitiveness: theory and practice’ in S S C Tay and D Esty (eds), Green Trade and Asian Dragons: Environment, Economics and International Law (1996) . Esty identifies a number of policy options for variable standards. The standards may set minimum thresholds of environmental conduct or set maximum thresholds on the stringency of the regulation; alternatively, the standards may combine these two approaches by setting both maximum and minimum thresholds thereby establishing a band in which certain standards and conduct are acceptable. Variable standards may be set by a central agency but differ according to the environmental, socio-economic or other criteria of differing groups of countries, and may be limited to covering only certain essential environmental issues. The process of putting in place a standard might be harmonised. For example, the Environmental Management and Auditing System (EMAS) and the International Standards Organization (ISO) both offer models for the development of management requirements to lead to the improvement of environmental performance without identifying substantive standards for that performance. Alternatively, the processes by which a standard is developed and a product is tested may be made uniform, so that different regulatory systems use “common testing protocols, scientific methodologies and risk assessment procedures”. Esty, 1996, at 45. Different jurisdictions may then adopt different substantive standards to ensure local needs and preferences are met, and may also adopt standardised information requirements to inform consumers about products (for example by establishing standardised criteria for eco-labels). Of course, rather than a standard being used, a state may chose to recognise others’ standards as sufficient evidence of environmental protection. Esty, 1996, above. See, for example, the Trans-Tasman Mutual Recognition Arrangement between Australia and New Zealand, which allows most goods legally sold in Australia to be sold in New Zealand, and visa versa, regardless of differences in standards and other regulatory barriers.
Fourthly, who should set environmental standards, who should enforce them, and should the standards be mandatory or voluntary? Environmental product and management standards have been developed by the International Organization for Standardization (ISO) but are also being developed by countries (for example eco-labelling criteria and the regulation of eco-management and audit schemes developed by the European Community) as well as NGOs. Additionally, it is becoming more common for standards to be established and enforced privately by companies which require their suppliers to meet certain standards.

Fifthly, who will benefit from the standards? Do they discriminate between producers for genuine environmental reasons or for protectionist reasons; are they disproportionately burdensome on importers?

An issue which has come to the fore in the context of dispute settlement, is the standard of review WTO panels and the Appellate Body may apply when determining whether a measure implementing an environmental standard is maintained in violation of one of the covered agreements. This can differ according to the agreement under consideration. For example, whereas the standard of review for anti-dumping actions is that of reasonable deference to the findings of the authorities of the importing Member, the standard of review under the SPS Agreement, itself silent on the matter, is that of “an objective assessment of the matter ... including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...”.

A concern environmentalists have with the covered agreements is that while they are proficient at eliminating environmental standards that are set too high or are

---


66 For example, the labels by the Forest Stewardship Council (http://fscoax.org); Consumer’s Choice Council (http://www.consumerscouncil.org); and Green Seal (http://www.greenseal.org).

67 For example supermarket chains such as Sainsburys in the United Kingdom require that, for their own brand food, their supplies do not use GM products, and try to implement sustainable practices. This includes a reduction in the use of pesticides. See http://www.sainsburys.co.uk

68 See further Esty, 1994, above at n 13, at 40-46.

69 Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

70 Article 11 of the DSU in Report of the Appellate Body in *European Communities – Hormones* at paras 118-119.
discriminatory in a manner which violates the rules,\(^71\) insufficient deference is given to standards chosen by states, and the agreements and existing institutional structure do not encourage the WTO to suggest alternative environmental measures which are not in violation.\(^72\) As Chapter 5 argues however, the Appellate Body of the WTO has now provided many broad hints as to how measures might be more successfully structured.

Another concern is that the WTO has no mechanism to allow environmental standards to be challenged if they are too low.\(^73\) The suggestion has been made that the law of the WTO could be modified so that adversely affected states could introduce countervailing duties to recover ‘externalised’ costs, challenge low environmental standards directly, or NGOs could themselves initiate a challenge of the low standards.\(^74\) Although the (usually) speedy dispute resolution mechanism of the WTO along with its effective enforcement mechanism makes use of the WTO for such matters attractive, the expertise to decide whether environmental standards are too low is properly that of an international environmental organisation or environmental treaty secretariat.\(^75\) The expertise, culture and institutional mandate of the WTO would have to significantly change before it could attempt this task itself.

\(^71\) See Wirth, 1992, above at n 19, at 1397; and Wirth, D.A., ‘International trade agreements: vehicles for regulatory reform?’ (1997) University of Chicago Legal Forum 331, at 334, who describes trade obligations as ‘negative’ obligations in that they define what states cannot do in relation to matters including the environment, as opposed to encouraging states, as environmental treaties do, to take certain actions to protect the environment.

\(^72\) For example, environmentalists criticised the Panel in the Tuna-Dolphin disputes for striking out the US’s measure without describing measures which would be considered consistent with the rules.

\(^73\) Wirth, 1992, above at n 19, at 1397; Esty, 1994, above at n 13, at 232; Wirth, 1997, above at n 71, at 579.

\(^74\) Cameron, J. and K. Campbell, ‘Challenging the boundaries of the DSU through trade and environment disputes’ in J Cameron and K Campbell (eds), Dispute Resolution in the World Trade Organisation (1998).

\(^75\) While it might be theoretically possible for a WTO dispute settlement panel to quantify the value of an environmental subsidy which is derived either from the maintenance of low environmental standards or from disregarding environmental costs, it is very unlikely that the Subsidies Agreement covers such subsidies. See n 59, above. Moreover, there exists the potential to abuse the use of countervailing duties as a response to such subsidies. For example, countervailing duties could be threatened or imposed to achieve strategic trade goals such as protectionism and leverage for consensus on unrelated trade matters. Wynter, 1996, above at n 58; Barceló, 1994, above at n 59.
iii) Trade Leverage and Competitiveness issues

The third and fourth propositions are linked. Producers, politicians and environmentalists fear that with liberalisation and heightened competition, producers that internalise the environmental costs of production into their products or comply with high environmental standards will be at a competitive disadvantage. They fear producers will then apply domestic pressure on states to retain their standards at current levels or adopt lower environmental standards to maintain competitiveness, or producers may move to the countries with lower environmental standards creating 'pollution havens.' Environmentalists therefore propose that trade measures be used selectively so as to promote the raising of environmental standards. Free traders of course worry that this will impede market access and allow protectionism to run rampant.

International empirical evidence supporting the theory that competitive pressures will promote a downward pressure on environmental standards is scarce. That which exists provides little support for the view that companies move to countries with lower environmental standards to increase their competitiveness, although some exceptions have been found. Evidence suggests that pollution abatement costs account for between 1 and 5 percent of production costs in the OECD, and that labour costs, corporate tax and market size have a greater influence on investment decisions. It is noted however that as environmental regulations become more stringent, the environmental costs of production may rise. This will undoubtedly impact upon the continuing competitiveness of businesses, particularly for the most polluting

---


77 See, for example, Nordström and Vaughan, 1999, above at n 49, citing Xing, Y. and C. Kolstad, Do Lax Environmental Regulations Attract Foreign Investment? (1998); and Bouman, M., Do Pollution Abatement Costs Induce Direct Foreign Investments? Evidence from Germany (1996), who identify some instances where industries have moved to locations where environmental standards are lower.

78 Nordström and Vaughan, 1999, above at n 49, at 40.
Corporations which are successfully able to market themselves as ‘clean and green’ will be able to mitigate the increased costs by catering for the ‘environmentally aware’ markets and by passing higher costs onto consumers.

Meanwhile, policymakers are not indifferent to the concern expressed by major companies either threatening or indicating that they must relocate to nations with less stringent regulations, and attempt to meet these concerns when drafting and reviewing domestic legislation. Environmentalists fear in this instance a ‘watering down’ of environmental standards, or the occurrence of a ‘regulatory drag’ or a ‘policy chill’ in upgrading environmental standards. As noted by Runnalls and Cosby:

There has been little research on the pervasiveness of regulatory chill. This may, however, be a more important effect than the actual migration of firms which most studies look for. It may be that for every firm that migrates to escape regulation, a score of others have weakened or prevented regulation by simply threatening to do so.

Lester Thurow argues that with the liberalisation of trade and the free movement of goods, the competitive edge of nations, and transnational corporations, will increasingly

---

80 For example, Dr. Manfried Schnieder, the Chief Executive of Bayer, when discussing the reasons why “European chemical companies are shifting bulk capacity to Asia” stated that “The main disadvantages we have to face are higher labour costs and expensive social security systems, coupled with widespread regulation of environmental affairs by the state”, and Dr. Hans-Helge Sechl, BASF Board member, stated “High costs in the established countries are forcing producers to take evasive action, moving to countries where labour and capital expenditure costs offer a more favourable economic framework.” Ekins, 1996, above at n 48, at 10, referring to Abrahams, P., ‘The dye is cast by growth and costs’, Financial Times, May 31. (London)1994.
81 But see Article 1114(2) of the North American Free Trade Agreement, Canada-Mexico-United States, 17 December 1992, entered into force 1 January 1994, 32 ILM 289 (hereinafter NAFTA) which notes that the lowering of environmental standards to encourage investment is undesirable and allows consultations to occur if one Party believes another Party has lowered its standards to encourage investment. The WTO has no such provision. See Ferretti, J., ‘PPMs and the NAFTA’ in OECD (ed), OECD, Trade and Environment: Processes and Production Methods (1994) 121 - 125.
82 For example, Australian attempts to simplify the approvals procedure for business engaging in projects of environmental significance were met with the concern that it would result in a ‘watering down’ of environmental standards. The Minister for the Environment rejected these concerns, explaining the intention was merely to clarify the law so that “those involved in the development know what the rules are, whether they have to deal with the Commonwealth or the State”. Taylor, L., ‘Cabinet overhauls green laws’, The Australian Financial Review (Australia)1996, at 1.
83 Runnalls, D. and A. Cosby, Trade and Sustainable Development: a Survey of the Issues and a New Research Agenda (1993), at 65; Ekins, 1996, above at n 48, at 11. Esty cites as examples the Clinton Administration’s attempts in 1993 to introduce an energy tax which “collapsed under the weight” of industry protest concerned about the effects on their international competitiveness, and the failure of the EU to introduce a carbon/energy tax without similar moves by the US and Japan to do likewise. Esty, 1996, above at n 64, at 35. See also Esty, 1997, above at n 76.
be governed by the efficiency of the production and process component of the good.\textsuperscript{84} If this is so, the temptation to exclude the environmental costs of production and stifle movement towards higher environmental standards will become increasingly strong. This will pose significant economic and political problems for promoting the value of sustainable development unless trade and environmental concerns can be balanced in a mutually supportive way.

The synergies of trade and the environment

Tensions between trade liberalisation and the environment exist, yet synergies are also available. Agenda 21, the blueprint for sustainable development, sees a very clear and positive link between the two.\textsuperscript{85} Trade and environmental policies can be mutually supportive, either spontaneously or through design. This section identifies the synergies produced by mutually supportive trade and environmental policies, and notes that where the pursuit of comparative advantage is tempered to incorporate environmental effects – so that the goal is ‘environmental comparative advantage’ – this can have a beneficial economic effect.

Proponents of free trade argue that the liberalisation of international trade can contribute to the preservation of environmental quality as it can encourage a more efficient allocation and use of resources.\textsuperscript{86} They argue that allowing competition and market forces to operate will force their resource use to become more streamlined and environmentally responsible. It is the inefficient use of resources which results in undesirable environmental ‘externalities’ such as pollution and resource degradation.

\textsuperscript{84} Thurow, L., \textit{Head to Head: The Coming Economic Battle among Japan, Europe, and America} (1992).

\textsuperscript{85} See, for example, at para 2.19 which states “Environment and trade policies should be mutually supportive. An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment. It thus provides additional resources needed for economic growth and development and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.”

They further argue that with trade liberalisation, and according to the theory of comparative advantage, a use will be found for all resources and all resources will be put to good use, rather than being discarded as pollution, bycatch, or waste and so on. Although in theory the internalisation of environmental externalities may occur purely as a result of market forces, regulatory or other instruments are necessary to ensure internalisation occurs in a timely manner. The goal is therefore to design regulatory or other instruments to achieve cost internalisation in a manner which still allows international trade to flourish.

Trade liberalisation can be seen as beneficial as it can encourage the eradication of trade distortions, including subsidy programs, which have significant environmentally-damaging consequences. The elimination of such subsidies can be considered to be a 'win-win' solution in the trade and environment debate. Although theory suggests externalities as a result of forces, other measures are necessary to ensure internalisation in a timely manner. The goal is therefore to design regulatory or other instruments to achieve cost internalisation in a manner which still allows international trade to flourish.

---

87 Mooted reforms include the elimination of export subsidies, allowed under the Agreement on Agriculture (Agriculture Agreement), which lead to overproduction and land degradation in developed countries. The elimination of such subsidies would be environmentally beneficial for developed countries and would promote trade liberalisation by allowing developing countries better market access. Similarly, the elimination of subsidies which encourage over-fishing would be beneficial to the global health of fish stocks and assist in their sustainable utilisation. Subsidisation can cause a downwards pressure on fish prices, so removing such subsidies can assist developing countries to access adequate returns. See, for example, WT/GC/W/303 General Council – Preparations for the 1999 Ministerial Conference – Fisheries Subsidies – Communication from Australia, Iceland, New Zealand, Norway, Peru, Philippines and US. The problem of fishery subsidisation could be addressed through modifications to the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), the Agriculture Agreement or through a stand alone agreement. Note an alternative mechanism is to repeal the exclusion of fish products from the product coverage under the Agriculture Agreement (Article 4:2 and Annex 1). This would result in the tariffication (and subsequent reduction) of import restrictions on fish products, which otherwise appears to have escaped the tariffication process. Williams, B.G., Choice of Policy Instrument and the Effectiveness of GATT in Application to Agriculture (Unpublished PhD thesis, Adelaide University, 1999), at 683. Negotiations in the context of the General Agreement on Trade and Services (GATS) could also see environmental and trade benefits through the improved market access for environmental services or environmentally sensitive services. See WT/CTE/W/172 Environmental Goods and Services: An Assessment of the Environmental, Economic and Development Benefits of Further Global Trade Liberalization – Information Note by the OECD Secretariat. Some of these benefits include the fostering of technology transfer, lower the cost of achieving environmental objectives, and providing access to the latest pollution prevention approaches, WT/GC/W/304 General Council – Preparations for the 1999 Ministerial Conference – Trade and Sustainable Development – Communication from the United States. Discussion on 'Win-Win' scenarios for trade liberalisation and environmental conservation also took place during the Trade, Investment and Environment Conference, Royal Institute for International Affairs, London, 29-30 October, 1998.

88 According to strategic trade theory, subsidies and other forms of government intervention are thought to be strategically advantageous when used temporarily to nurture or maintain the competitive position of
the detrimental impact the industry has on the environment may be magnified by the high production levels and low operating efficiency which subsidies tend to encourage. Myers and Kent estimate that approximately $860 billion world-wide is spent on subsidies each year, causing significant and long-term adverse environmental and economic effects. As noted above, the elimination of these distortions can be mutually beneficial for both developed and developing nations.

Further, trade liberalisation can be seen as beneficial in that it can encourage norm building and learning within the international community through the exchange of persons, capital and ideas. This can work to the benefit of the environment, a tangible example being the dissemination of environmentally efficient ('green') technology. The dissemination of green technology is thought to be advanced by imports, foreign direct investment (FDI), particularly where multinational corporations operate their plants at the highest international standard in all countries and encourage local producers to adopt the technology and compete on the same levels, by the harmonisation of environmental standards and though internationally harmonised intellectual property regimes. There are some reservations associated with strengthening intellectual property regimes in that they ‘price up’ environmental technology and exclude ‘free riders’ which can slow the technology’s movement

certain domestic industries relative to external industries. Stegeman, 1989, above at n 7. Strategic trade theory is a highly controversial theory of trade, particularly as the success of intervention depends on the action taken by the governments of competing firms who may experience or fear a loss of competitive advantage. Trebilcock and Howse, 1995, above at n 2; van Bergeijk and Kabel, 1993, above at n 7.

89 Environment Sport and Territories Report, above at n 59. The current agricultural policies pursued by the US and the EU are often cited as both economically and environmentally inefficient policies, See, for example, Andersson, Folke and Nyström 1995, above at n 34; Hathaway, D.E. and M.D. Ingco, ‘Agricultural liberalization and the Uruguay Round’ (Paper presented at World Bank Conference on “The Uruguay Round and the Developing Economies”, January 26-27 1995); UK HOC Report, above at n 44.

90 They estimate that a further $1,090 billion per annum is lost as a result of governments failing to properly internalise environmental costs. Myers, M. and J. Kent, Perverse Subsidies: How Misused Tax Dollars Harm the Environment and the Economy (2001).

91 Reed, D., Structural Adjustment, the Environment and Sustainable Development (1996).
around the globe. However, without strong intellectual property regimes in place, the incentive to invest in or distribute advanced technology to states is low.\(^92\)

Finally, trade liberalisation is expected to promote sufficient economic growth to allow for a greater proportion of resources to be spent on development and environmental protection. Since the signing of the GATT and the first negotiated tariff reductions in 1947, world trade has increased from $50 billion to $6.82 trillion in 1999-2000. This has created wealth, jobs and world-wide economic integration, with the growth of international trade currently (in 1999-2000) estimated to be about 5 percent per annum.\(^93\)

**Connecting trade liberalisation with economic growth**

To connect economic growth with environmental welfare however, it must first be argued that the liberalisation of trade promotes growth.\(^94\) While it can be argued that the liberalisation of trade promotes economic growth for some parts of society, not all of those – in both the developed and developing world – touched by the hand of international trade can claim they have been treated benevolently. There are both winners and losers.\(^95\) Next it must be argued that economic growth promotes environmental welfare.\(^96\) The 1992 GATT Secretariat Report suggested that an ‘income effect’ of development and economic growth is that the citizens of wealthier nations demand that money be spent on raising environmental standards – thus

\(^92\) This is, for example, the argument used by the US when faced with requests to introduce compulsory licensing schemes into agreements such as the *Montreal Protocol on Substances the Deplete the Ozone Layer*, Montreal, 16 September 1987, 1522 UNTS 3; [1989] ATS 18; 26 ILM 1550. Entered into force generally: 1 January 1989, for Australia: 17 August 1989 (hereinafter the *Montreal Protocol*). This issue was canvassed at some length at the UNCTAD open-ended meeting on Positive Measures to Promote Sustainable Development. UNCTAD Secretariat, *Positive Measures to Promote Sustainable Development, Particularly in Meeting the Objectives of Multilateral Environmental Agreements* TD/B.COM.1/EM.3/2 (1997).


\(^94\) Johnstone, 1995, above at n 44.


\(^96\) Johnstone, 1995, above at n 44.
economic growth provides its own incentives to protect the environment.\textsuperscript{97} This is a two step process. Firstly, that citizens express a preference to move towards greater environmental quality which is responded to by their government, and secondly, that economic growth allows industries to move away from ecologically exploitative and intensive activities.\textsuperscript{98}

While early research has shown that, beyond a certain point, an increase in affluence is strongly correlated with higher environmental quality – described as an inverted U curve (Figure 1) – more recent research has shown that predictions on the basis of this relationship must be made with caution.\textsuperscript{99} While the relationship appears to hold true for certain pollutants which have local, short term costs, such as urban air and water pollution, it does not apply for resource depletion, and does not seem to apply to situations where there is an accumulation of waste or to global pollutants with long-term and more dispersed costs, for example carbon dioxide.\textsuperscript{100}

\begin{center}
\begin{tikzpicture}
\begin{axis}[
    axis x line=bottom,
    axis y line=left,
    xlabel=Affluence,
    ylabel=Environmental harm
]\end{axis}\end{tikzpicture}
\end{center}

\textit{Figure 1: The ‘inverted U’ correlation between affluence and environmental harm.}

As noted by Nordström and Vaughan:

nothing in the ... [inverted U curve] literature suggests that environmental degradation will turn around with increasing income by compelling necessity. If economic incentives facing producers and consumers do not change with higher incomes,
pollution will continue to grow unabated with the growing scale of economic activity. In other words, income growth, while perhaps a necessary condition for allowing countries to shift gear from more immediate economic and social concerns to more long term sustainability issues, is not sufficient to reverse environmental degradation. Environmental policies must be brought to bear.\textsuperscript{101}

Where rising incomes and declining emissions are correlated, domestic institutional reforms, such as the implementation of environmental legislation, have played a great part.\textsuperscript{102} This, as pointed out by Johnstone, depends on the strength of local institutions to provide for its citizens' demands, not the actual demands which the citizens may have. The demand for clean environmental facilities in developing countries can be greater than in developed countries simply because they do not have an alternative source of supply to service their needs.\textsuperscript{103} Nor is it true to say that the citizens of developing nations do not worry about the state of their environment and the environment which their children will inherit, despite the environmentally unsound practices they may have to engage in to eke out a living.\textsuperscript{104} If, however, the environmental costs are to be borne by the poor, by future generations, or by other countries, the incentive for institutions to correct the problem becomes much weaker,\textsuperscript{105} particularly since the greater spatial separation of production and consumption allows the consequences of consumption to be masked.\textsuperscript{106} The solution need not mean an end to economic growth, but creating the conditions for institutional reform and environmental improvement.

Mechanisms for institutional reform and environmental improvement are the subject of the discourses of environmental problem solving, sustainable development, and

\textsuperscript{101} Ibid, at 6-7, 47ff.
\textsuperscript{102} Eckersley, 1998, above at 99, at 103. The notion that the positive link between economic growth and environmental health must be treated with caution is also borne out by the World Resources Institute, the United Nations Environment Program and the United Nations Development Program and the World Bank, \textit{World Resources 1996-1997} (1997). It points out that much of the world's population has economic incomes below the estimated turning points on the 'inverted-U curve', so "economic growth in these countries could be expected to increase pollution. Globally, the projected increases would more than cancel out any reduction of pollution in more developed countries". (at 165).
\textsuperscript{103} Johnstone gives as an example the demand for clean river water which is probably greater among the poor in developing countries as, unlike their wealthier counterparts, they do not have the same access to piped or bottled water. Johnstone, 1995, above at n 44, at 167.
\textsuperscript{104} Buckley, 1993, above at n 18; Coote, 1992, above at n 44.
\textsuperscript{105} Eckersley, 1998, above at 99, at 310.
\textsuperscript{106} Johnstone, 1995, above at n 44, at 166.
ecological modernisation, which we turn to next. Arguably, the environmental problem solving and ecological modernisation discourses are merely alternative versions of the sustainability discourse.\textsuperscript{107} That may well be. Certainly the strands present in the environmental problem solving discourse have been brought together in the sustainability discourse, which has in turn been re-oriented in the ecological modernisation discourse to be more persuasive to business interests. This section separates the discourses to make the different voices and their influence on the trade and environment debate more apparent. It culminates by showing how businesses’ acceptance of the sustainability/ecological modernisation discourse is the first step in operationalising the ‘California effect’, where the pursuit of trade liberalisation and the gradual elevation of global environmental standards can be fruitfully combined.

**Mechanisms for institutional reform and environmental improvement**

**Environmental problem solving**

The discourse in which changes are proposed to the operation of the market, to administrative procedures, and to the democratic process of environmental decision-making in order to respond to environmental problems, is characterised by Dryzek as ‘environmental problem solving’.\textsuperscript{108} The discourse does not challenge the prevailing political/economic makeup of society, rather, public policy amendments are advanced as a primary tool.

The elements of the discourse make up three separate strands. The ‘market’ strand of the discourse recognises that environmental harm has occurred partly as a result of the market’s failure to take into account the environmental costs of certain activities, and advocates adjustments to better allow the market to incorporate and respond to environmental inputs which otherwise might be ignored. For example, property rights could be assigned to environmental attributes (pollution, carbon) to allow their trade, or other market mechanisms such as environmental taxes, tradable permits, deposit-refund systems and subsidies might be used to encourage or discourage certain types of

\textsuperscript{107} Dryzek characterises the calls for sustainable development the ‘sustainability’ discourse. Dryzek, 1997, above at n 5. I use the terms interchangeably.

\textsuperscript{108} Dryzek, 1997, above at n 5.
This aspect of the environmental problem solving discourse rejects a "command and control approach" and advocates only a minimal interference with the market. Government intervention is only needed to allocate property rights, set environmental standards and taxation conditions, and provide a credible enforcement regime. From then on, market operators (producers and consumers) can decide to what use they put the environment.\textsuperscript{109}

The 'administrative' strand of the discourse advocates institutionalising environmental expertise in the administrative decision-making process of government. For example, natural resource management and pollution control agencies could be established, regulatory instruments to set environmental standards and environmental impact procedures could be introduced, expert advisory commissions could be constituted, and policy analysis techniques such as cost benefit analysis and risk analysis could be used to ground decision-making.\textsuperscript{111}

The 'democracy' strand of the discourse advocates the increase of public participation in governmental decision-making processes to promote and incorporate environmental awareness into decision-making. This could be achieved, for example, through public consultation procedures, holding public inquiries and policy dialogue forums, enacting community right-to-know legislation, and using alternative dispute resolution methods so as to avoid contentious legal proceedings to resolve environmental disputes.\textsuperscript{112}

Views as to which form of adjustments should be implemented can be hotly debated, with the motivations of advocates of one strand of the discourse questioned by another. For example, public choice theorists question the propriety of extensive government involvement in environmental standard setting since institutional capture or the desire to retain government biases decision-making. On the other hand, the wisdom of

\textsuperscript{110} Dryzek, 1997, above at n 5, at chapter 6. For a discussion of environmental justice issues associated with the use of market mechanisms, see Bosselmann, K. and B.J. Richardson, Environmental Justice and Market Mechanisms (1999).
\textsuperscript{111} Dryzek, 1997, above at n 5, at chapter 4.
\textsuperscript{112} Ibid, at chapter 5.
leaving environmental decision-making wholly to the market is also questioned given the difficulty of valuing non-economic goods and the systemic injustices this creates.\textsuperscript{113}

Elements of each of these discourses can be seen in proposals made to modify the WTO, as well as modifications already made. For example, the dispute settlement system now allows somewhat greater opportunities for public participation by allowing non-diplomatic officers of Member governments to attend hearings and make representations,\textsuperscript{114} and providing NGOs with leave to make written submissions to certain panel and Appellate Body proceedings.\textsuperscript{115} It is also somewhat more open, publishing panel and Appellate Body decisions and other de-restricted documents relatively quickly and freely on the internet. Environmentalists would, however, like to see even greater possibilities for public participation, openness and transparency in the WTO system. For example, they would like panel and Appellate Body hearings to be open to the public, and would like NGOs to be able to participate more fully, for example to be able to make \textit{amicus curiae} submissions as of right, make oral submissions in hearings or have an ‘environmental advocate’ to make submissions on their behalf, and be granted standing to bring actions.\textsuperscript{116} Adjustments to the

\textsuperscript{113} See generally Bosselmann and Richardson, 1999, above at n 110.

\textsuperscript{114} This has considerably improved the relative power particularly of developing countries participating in dispute settlement, as such countries may hire experienced WTO lawyers to present their case.

\textsuperscript{115} See in the Report of the Appellate Body in \textit{United States – Import Prohibition of Certain Shrimp and Shrimp Products}, WT/DS58/AB/R, adopted 6 November 1998 (hereinafter \textit{United States – Shrimp}); \textit{United States – Imposition of Countervailing Duties on certain Hot-Rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom}, WT/DS138/AB/R, adopted 7 June 2000 (hereinafter \textit{United States – Hot-Rolled Lead}) and \textit{European Communities – Measures Affecting Asbestos and Asbestos – Containing Products}, Report of the Panel WT/DS135/R; as modified by the Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001 (hereinafter \textit{European Communities – Asbestos}). Note, however, that these rulings have been substantially criticised by many Members of the DSB. The primary criticisms are that the Appellate Body’s action is tantamount to rulemaking, contra Article 3.2 of the DSB, and that NGOs are being accorded ‘rights’ to participate greater than that afforded to Members who are non-parties to a dispute. See the General Council’s Annual Report 2000 (WT/GC/44), International Centre for Trade and Sustainable Development, ‘Amicus brief storm highlights WTO’s unease with external transparency’ (2000) Year 4, No. 9 \textit{Bridges between Trade and Sustainable Development}, 1, (ICTSD) at 4, and the BRIDGES Weekly Trade News Digest, for example Vol 4 Nos 23, 43, 44, 45, 47 (all in 2000); Vol 5 No 7, and Feb 21, 2001. It remains to be seen whether, in light of these criticisms, further opportunities for NGO participation will be accorded. Moreover, as noted by ICTSD, 2000, above, at 4, the only NGO amicus curiae brief which has been taken into account by a panel is that in \textit{Australia – Measures Affecting Importation of Salmon}, Report of the Panel as modified by the Appellate Body, WT/DS18/R, adopted 6 November 1998 (hereinafter \textit{Australia – Salmon}). Therefore it can be argued that NGO participation has been tolerated largely only in form, and not in substance.

\textsuperscript{116} See generally Enders, A., \textit{Openness and the WTO} (1997); Cameron, J., ‘Compliance, citizens and NGOs’ in J Cameron, J Wersman and P Roderick (eds), \textit{Improving Compliance with International...
administrative process of decision-making have been made in the WTO with increased reliance on expert opinion in the dispute settlement process.\textsuperscript{117} Proposals to allow an increased use of market mechanisms to rectify market failures resulting from international trade include broadening the ‘environmental exception’ available in Article XX of the General Agreement by either an amendment or through interpretation, and amending the Agreement on Subsidies and Countervailing Measures\textsuperscript{118} to allow countervailing duties to be taken against environmental subsidies. Modification of Subsidies Agreement is politically unlikely, but as we shall see, a less restrictive interpretation of Article XX has evolved in recent WTO jurisprudence. A greater use of market mechanisms to rectify market failures for internationally traded goods is consequentially now available.

\textit{Sustainable Development}

The sustainability discourse\textsuperscript{119} integrates the elements of the problem solving discourse into one. Its key features are “economic growth, environmental protection, distributive justice, and long-term sustainability”, all which are “mutually reinforcing”.\textsuperscript{120} It encourages the harnessing of market forces and the institutionalisation of environmental expertise in administrative decision-making, and supports the greater democratisation of the environmental decision-making process. It recognises that humanity has the capacity to extend present limits to economic growth through technological advancement, although this capacity is not unlimited.

The discourse is primarily anthropocentric, and tends to be a fairly non-hierarchical in approach. As such, it recognises that the solutions to create sustainable development


\textsuperscript{117} For example, experts were consulted in \textit{EC Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States}, WT/DS26/R/USA; Complaint by Canada, WT/DS48/R/CAN (hereinafter \textit{European Communities – Hormones}); \textit{Australia – Salmon}, Report of the Panel, WT/DS18/R; and \textit{United States – Shrimp}; Report of the Panel, WT/DS58/R, 15 May 1998.

\textsuperscript{118} Annex 1A to the \textit{WTO Agreement}, hereinafter the \textit{Subsidies Agreement}.

\textsuperscript{119} Much of this section is based on Dryzek, 1997, above at n 5. As noted at n 107, above, Dryzek characterises the calls for sustainable development the ‘sustainability’ discourse. I use the terms interchangeably.
must be found and implemented at the local, national and regional level as well as the
global level. Additionally, it seeks the enhancement of democratic participation, and
calls for a much more coordinated effort between international action and grass-roots
participation and all the stages between. It is not just a discourse for governments, but
includes intergovernmental organisations, NGOs, business groups and civilians.
Participation is a two way process. Just as civil society is expected to play a much
greater role in the implementation of sustainable development, it requires the
mechanisms for allowing and encouraging such participation to be improved at all
levels of decision-making.\footnote{Dryzek, 1997, above at n 5, at 126.}

The principles of sustainable development may be found in documents such as \textit{Our
Common Future};\footnote{For example, Chapter 8.3 of Agenda 21 states “The overall
objective is to improve or restructure the decision-making process so that consideration
of socio-economic and environmental issues is fully integrated and a broader range of
public participation assured. Recognising that countries will develop their own priorities
in accordance with their prevailing conditions, needs, national plans, policies and
programmes, the following objectives are proposed: ...
• To strengthen institutional structures to allow the full integration of environmental
and developmental issues, at all levels of decision-making;
• To develop or improve mechanisms to facilitate the involvement of concerned
individuals, groups and organizations in decision-making at all levels;…”}
the primary documents of UNCED, in particular, the Rio Declaration on Environment and Development\footnote{World Commission on Environment and Development, \textit{Our Common Future} (1987) (hereinafter \textit{Our
Common Future}), approved by General Resolution of the United Nations General Assembly in 1987: GA
Res 187, 42 UN GAOR (96th plen mtg), UN Doc A/42/821/Add.5 (1987). Also known as the Brundtland
A/CONF.151/26/Rev. 1. For Reports of the Preparatory Committee see UN Doc. A/CONF.151/PC/L.31,
L5, L6, L8/Rev.1, L.20-8 (1991-2).} and the workings of the CSD, the focal point for the collection and discussion of
Future} established the sustainability discourse as one playing a central role in the
redesign of international environmental policies and institutions:

In essence, sustainable development is a process of change in which the exploitation of
resources, the direction of investments, the orientation of technological development,
and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.126

According to that report, sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.127 Central concepts of sustainable development include the precautionary principle, the polluter pays principle and the principle of intergenerational equity, the principle of intragenerational equity, common-but-differentiated responsibility, public participation, access to information, access to justice, and environmental impact assessment.128

126 Our Common Future, above at n 122 at 46.
127 Ibid, at 43. In particular, the International Court of Justice case Case Concerning the Gabčíkovo v Nagymaros Dam (1997) ICJ Reports 7 emphasised that the needs of the world’s poor, including their need for development, must be addressed in mapping out the course in which sustainable development can be practically implemented. Note that this case referred to ‘sustainable development’ as a ‘concept’ and not a principle’, at 201, see A-Khavari, A. and D.R. Rothwell, ‘The ICJ and the Danube Dam Case: a missed opportunity for international environmental law?’ (1998) 22(3) Melbourne University Law Review 507, at 519ff. Compare the decision of Judge Weeramantry in that case, who considered sustainable development a principle of customary international law, at 205. Note that definition of what constitutes ‘sustainable development’ is hard define with precision. Dryzek notes that in 1992, 40 definitions had been collected, and the count was “still rising”. “By 1996 … UNESCO was sponsoring a project to clarify the meaning of the concept in a number of disciplines with a view to making the concept a scientifically useable one – implying that at the moment it is not a scientific concept.” Dryzek, 1997, above at n 5, at 124, referring also to Torgerson, D., ‘Strategy and ideology in environmentalism: a decentered approach to sustainability’ (1994) 9 Industrial and Environmental Crisis Quarterly 295, at 303. Yet ‘sustainable development’ goes beyond being merely a concept in which precise definition is sought to that of a discourse which many actors in society can implement to convey their message. The term is therefore inherently malleable, but not hollow. As Dryzek points out “it is not unusual for important concepts to be contested politically” and points to the term ‘democracy’ which “has at least as many meanings and definitions as does sustainable development” (at 125). The fact that so many actors have seen the advantage in the sustainable development cause indicates the resilience of the discourse.

128 See, for example, Boyle and Freestone, 1999, above at n 17; Boer, B., ‘International aspects of ESD’ in C Hamilton and D Throsby (eds), The ESD Process: Evaluating a Policy Experiment (1998) 83-99, at 87, 90-91; Beyerlin and Marauhn, above at n 19; Birnie and Boyle, 1992, above at n 17. These concepts may in whole or part also be seen as reflected in the 1996 Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, which Boer identifies as “one of the more significant” developments of recent meetings, conferences and papers concerned with identifying the principles and concepts central to sustainable development. The report identifies 19 such principles and concepts, many of which are also reflected in the Rio Declaration: “The principle of interrelationship and integration; the right to development; the right to a healthy environment; the eradication of poverty; equity; sovereignty over natural resources and responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction; the sustainable use of natural resources; the prevention of environmental harm; the precautionary principle; the duty to cooperate in the spirit of global partnership; the common heritage of mankind; cooperation in a transboundary context; public participation; access to information; environmental impact assessment and informed decision-making; peaceful settlement of disputes in the field of environment and development; equal, expanded and effective access to judicial and administrative proceedings; national implementation of international commitments; monitoring of compliance with international commitments.” United Nations, Report of the
These principles are all relevant to the conduct of international trade. If such trade is to occur in a manner compatible with environmental protection, the principles need to be taken seriously by Members when designing domestic regulatory measures which impact upon traded products. It is also desirable that they be incorporated throughout the WTO Agreement and the covered agreements in a systematic manner, and used when interpreting that agreement. Principle 2 of the Rio Declaration states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This reinforces that states should internalise the environmental costs of their activities and not cause transboundary environmental harm.\(^{129}\) We have already seen that the principle of cost internalisation is "entirely consistent with the goals of liberalized trade" and environmental protection.\(^{130}\) The ability to reflect the environmental costs in the good should be possible both with regard to domestically produced goods, as well as goods produced internationally and imported. At the same time, the principles of

---

\(^{129}\) As argued by Rothwell and Boer, states have an international law obligation to “prevent environmental harm. ... monitor the environment and to assess the risk of potential transboundary environmental damage from proposed or existing activities. ... [and cooperate] to deal with environmental problems both within and beyond areas of national jurisdiction.” Rothwell, D.R. and B. Boer, ‘From the Franklin to Berlin: the internationalisation of Australian environmental law and policy’ (1995) 17 Sydney Law Review 242, at 251. See also Kiss, A. and D. Shelton, International Environmental Law (1991), at 145-54; Birnie and Boyle, 1992, above at n 17, at 9-26; Taylor, 1998, above at n 23, at 65. The duty of states to prevent their territory from being used in such a way that transboundary pollution results was articulated in the Trail Smelter Case (United States v Canada) 3 RIAA 1905 “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another... when the case is of serious consequence and the injury is established by clear and convincing evidence.” (at 1965). The Corfu Channel Case (Merits) (United Kingdom v Albania) [1949] ICJ Reports 4, similarly held that it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (at 22). See also the Lac Lanoue Arbitration (Spain v France) 12 RIAA 281, (1959) 53 American Journal of International Law 156; and the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996) 35 ILM 809 15, at para 29. The majority in the latter case stated “The existence of the general obligation of States to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”
Intergenerational equity, intragenerational equity and common-but-differentiated responsibilities are relevant to issues of poverty and equity associated with international trade. In particular, Principle 7 of the Rio Declaration underlines that while developed and developing nations may have a unified purpose to fulfil with respect to preserving the environment, they have different roles to play. Moreover, Principle 11 of the Rio Declaration cautions that:

Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Specifically, developed countries must shoulder much of the burden of modifying their environmentally harmful patterns of production and consumption, and should provide assistance for developing countries to do the same. Trade distortions should be ameliorated to provide not just win-win solutions for trade and the environment, but win-win-win solutions for trade, environment and social equity. Moreover, if trade measures are used to internalise costs, they should be carefully designed so as to ensure that they do not encourage producers to simply shift from one form of unsustainable activity to another, and should try to minimise the economic and social impact on the producers of developing nations.

These principles of sustainable development are also relevant to the further negotiation of market access. The WTO Agreement and the covered agreements exempt least developing countries from some commitments, or allow them a longer time to comply with commitments. Developing countries have, however, opposed a new round of

---

130 Caldwell and Wirth, 1996, above at n 52, at 589, above at n 53.
131 Principle 7 states “In view of the different contributions to global environmental degradation, States have common-but-differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”
132 For example, Article XI:2 of the WTO Agreement states that “The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities”. Special concessions to their needs, as well as the needs of developing country Members are also set out in the covered agreements, including in Article 15 of the Agreement on Agriculture, Articles 10 and 14 of the SPS Agreement, Article 6 of the Agreement on Textiles and Clothing (in Annex 1A to the WTO Agreement), Article 12 of the TBT Agreement, Article 5
trade negotiations, a primary reason being their belief that the developing world is yet to experience an equal share in the benefits flowing from the last round. This needs to be addressed. The ‘precautionary principle’ allows states to take preventative action to ensure internationally traded products do not contribute to environmental degradation. There are many formulations of the principle, the one found in Principle 15 of the Rio Declaration being widely cited. It states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

This formulation recognises that it may be appropriate to take action to prevent harm to the environment in situations where scientific uncertainty still remains, rather than waiting to take action only in the face of full scientific certainty. The precautionary principle has been found to be present in the SPS Agreement. Arguably Article XX of the General Agreement, and Article 2.2 of the TBT Agreement also sustain its use. To clarify this situation however, the principle arguably needs to be integrated more thoroughly throughout the covered agreements so Members can invoke its application on a more systematic basis. At the same time, more precision needs to be given to the principle so that it can be used to enhance the linkage between trade and the environment and not be used as a protectionist tool. Environmental impact

of TRIMS, and Article 15 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (in Annex IA to the WTO Agreement).

Thus, it remains to be seen whether the Fourth Ministerial Conference in Doha, Qatar, (9-13 November 2001) will see the launch of a new round of trade negotiations.


The concern that the precautionary principle will be used to serve protectionist ends has been a primary reason why countries such as the US, Canada, Australia, and New Zealand have been resistant to its inclusion in substantive text in recent environmental negotiations. See, for example, the negotiation of the Stockholm Convention on Persistent Organic Pollutants, Stockholm, 23 May 2001, (UNEP/POPS/CONF/4) 5 June 2001, not yet in force, (hereinafter the POPs Convention), reported in International Institute for Sustainable Development, ‘Summary of the Third Session of the INC for an international legally binding instrument for implementing International Action on Certain Persistent organic pollutants: 6-11 September 1999’ (1999) 15(27) Earth Negotiations Bulletin ; International Institute for Sustainable Development, ‘Summary of the Fourth Session of the INC for an international legally binding instrument for implementing International Action on Certain Persistent organic pollutants: 20-25 March 2000’ (2000) 15(34) Earth Negotiations Bulletin. See also the negotiation of
assessments could be used in the future negotiation of text, as well as by Members implementing domestic regulatory measures which affect internationally traded products. Environmental impact assessments could also become a feature of the Trade Policy Review Mechanism (TPRM) of the WTO.

The concept of sustainable development is often noted to be flexible or vague and subject to many different interpretations. This can be seen as an advantage, as many groups can see their ambitions as falling within the concept’s ambit and can therefore readily commit to its implementation. Yet it can also be viewed as problematic. For example, Dryzek worries that if concrete outcomes of sustainable development are not observable, then the case for deeper commitment to the dominant economic paradigm – strengthening trade liberalisation, increasing capital mobility, government deregulation, (unsustainable) economic growth – will become more compelling. The ‘ecological


This accords with Principle 17 of the Rio Declaration, which states that “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.” See the Report of the Meeting held on 18-19 February 1999, Note by the Secretariat, WT/CTE/M/20, 19 March 1999, in which a number of countries voiced their support of conducting environmental reviews of future trade rounds. The US, Canada and the EC have already such processes in place. See, for example, Canadian Approach to Trade and Environment in the New WTO Round WT/GC/W/358, October 12, 1999; and http://www.art.man.ac.uk/eia/nl18wto.htm for the report commissioned by the EC examining the potential impact on sustainable development of a proposed agenda for a new round of trade negotiations. See also Environmental Review of Trade Agreements at the National Level, Communication from the US, WT/CTE/W/37, 23 July 1996. Note also that the Bush administration has reaffirmed its commitment to conduct environmental review of WTO’s built in agenda, Executive Order 13141.

The TPRM was created in 1989, during the Uruguay Round negotiations (see L/6490, BISD 36S/403). As explained by Dillon, its purpose is “to improve adherence of WTO Members to obligations under the Multilateral Trade Agreements and, where applicable, under the Plurilateral Trade Agreements. It is also intended to achieve greater transparency in the trade policies and practices of WTO Members. The ... Mechanism provides for a Trade Policy Review Body ... which review country policy on the basis of Member submitted ‘Country Reports’ and WTO Secretariat reports.” Dillon, 1995, above at n 13, at 370. Dryzek, 1997, above at n 5; Boer, 1998, above at n 128. Boer further notes the difficulty in implementing sustainable development. Speaking on the “Rio + Five” session he reported “The session demonstrated the difficulties of attempting to achieve sustainability on a global basis over a short period of time. It also highlighted the inherent political and economic difficulties faced by individual countries in trying to achieve sustainability in various economic sectors. It is apparent that there is as yet no common agreement on an international or regional level about the approaches and concepts on the achievement of sustainable development. While an enormous amount of intellectual effort has been focused on the concept, a great deal more work needs to be done, particularly at the individual economic sector level, to develop practical approaches for its achievement.” Boer, 1998, above at n 128, at 86-87. See also Freestone, D., ‘The challenge of implementation: some concluding notes’ in A Boyle and D Freestone (eds), International Law and Sustainable Development: Past Achievements and Future Challenges (1999) 359-364.
modernisation’ discourse can in this sense be viewed as a more practically oriented implementation of sustainable development.

Ecological Modernisation

The ecological modernisation discourse is that aspect of the sustainability discourse which speaks to business and other interests, persuading them that sustainability can be profitable and that economic growth can be maintained. In portraying environmental protection as a ‘positive sum game’, it introduces the notion of environmental competitive advantage – that business can be won by being green.

Like the problem solving and sustainability discourse, the ecological modernisation discourse informs much of the moderate critique of the WTO, including its redesign. In Hajer’s view, ecological modernisation does not require that a radical overhaul of society take place, because existing political, economic and social institutions have the capability to cope with the structural problems which environmental degradation presents. Nevertheless, as Dryzek argues, some “restructuring of the capitalist political economy along more environmentally sound lines” is necessary as the market cannot be assumed to deliver good environmental outcomes.

A number of elements have been identified as underpinning the conceptual shift towards ecological modernisation:

- A movement to a more integrative environmental management strategy built more on an ‘anticipate-and-prevent’ approach and less on a ‘react-and-cure’ approach.
- Greater autonomy accorded to firms to devise their own methods of harm minimisation and to integrate these into their assessment of their costs and risks.

139 The concept of ‘ecological modernisation’ was first identified by German political scientist Huber (1982) and Jänicke (1985) in Hajer, M.A., The Politics of Environmental Discourse: Ecological Modernization and the Policy Process (1995), at 25; Dryzek, 1997, above at n 5, at 141; and was a focal point of discussions at the 1984 OECD Conference on Environment and Economics.


141 Ibid., at 25. Note that Hajer actually sees Our Common Future (above at n 122) as “one of the key paradigm statements of ecological modernisation” (at 26) not, as does Dryzek, as a related yet separate discourse.
Ideas such as the polluter pays principle and the precautionary principle, approaches such as cost-benefit analysis and risk analysis, and the increased movement away from ‘command and control’ to market-based Instruments, provide both the justification and incentive for governments and firms to commit to the concept of ecological modernisation.

- A modification of the role played by scientists in the policy-making process, from a role of policy input where scientists provide proof of environmental harm to the more central role of determining the ‘critical load’ which the environment is capable of withstanding.
- A shift in the notion that environmental protection is purely a drain on resources to the notion that ‘pollution prevention pays’ because pollution, which signifies waste, is diminished.
- A shift in the notion that the environment is a ‘free good’ or ‘sink’ to the notion the environment is a shared and public good or resource, and that environmental externalities should be internalised.
- A modification of the burden of proof to place a greater initial burden on the suspected polluter rather than the injured party.
- A recognition of the role played by non-state actors including environmental organisations and local residents in the environmental discourse, as well as discursive forms of environmental decision-making, so that there is a shift: from regular consultancy to active funding of environmental NGOs, from a reconsideration of the procedural rules of Environmental Impact Assessments to the regular employment of round table discussions and environmental mediation.143

Many, if not all of these elements can be found in the important documents advancing sustainable development, such as Our Common Future; the Rio Declaration on Environment and Development and Agenda 21. Elements can also be seen in the views of business and other non-governmental organisations’ approaches to sustainable development, such as the work of World Business Council for Sustainable

---

142 Dryzek, 1997, above at n 5, at 141.
143 Hajer, 1995, above at n 139, at 29.
Development,\textsuperscript{144} and the Winnipeg Principles promoted by the International Institute for Sustainable Development.\textsuperscript{145}

The ecological modernisation discourse can also be seen in arguments which show that a commitment to environmental preservation need not hinder trade and the economic benefits which trade brings, and that a strong regulatory environment can stimulate innovation which is beneficial for the environment and the creation of wealth.\textsuperscript{146}

Countries which are particularly notable for embracing the ecological modernisation philosophy to positive effect are Germany, Japan, and the US. In Germany’s case, its requirement that the best available green technology be adopted by companies producing goods in Germany has been of benefit not just to the environment, but profitable for Germany’s economy and for many of the companies so required to operate.\textsuperscript{147}

Ecological modernisation is not, however, a discourse which benefits only developed nations. As pointed out by Schmidheiny and Gentry, developing countries are now becoming convinced that “it is almost always in their best interests to implement stronger environmental policies.”\textsuperscript{148} Higher environmental standards ensure that health, quality of life and productivity are not impaired, so the benefits of economic growth are not diminished for their citizens. Moreover, higher environmental standards do not tend to drive away investors. The environmental costs of investment play a significantly smaller part in the investment decision compared to labour costs and market access. Finally, a strong regulatory environment provides certainty and

\textsuperscript{144} See, for example, Holliday, C. and J. Pepper, \textit{Sustainability Through the Market: 7 Keys to Success} (2001), available at http://www.wbcsd.ch/aboutus.htm
\textsuperscript{146} Porter, 1990, above at n 3.
\textsuperscript{147} Braithwaite, J. and P Drahos, \textit{Global Business Regulation} (2000). Germany, the US and Japan lead the market in the trade in technology designed to prevent, control and clean-up pollution. In 1996, that trade was estimated to be worth about $200 billion, and was estimated to increase to between $300 and $600 billion in the following next four years. The success of Germany, the US and Japan in this field is attributed to a commitment to high standards and their strict enforcement. Anderson, A., ‘How green turns to gold’, \textit{New Scientist}1996.
predictability for investors and strong environmental laws ensure that consumer concerns about products can be met, both making investment more attractive.149

‘Trading Up’ – Pursuing Environmental Comparative and Competitive Advantage

This section on theories on environmental protection began by setting out the two dominant ethical approaches towards the environment: anthropocentrism and ecocentrism. It noted that both ethical positions shape the views expressed in the trade and environment debate, although arguments based on conservationist, preservationist, animal liberationist and human welfare ecology viewpoints are heard most often. The fundamental arguments of the trade and environment debate were then set out, as were the main mechanisms for institutional reform and environmental improvement (environmental problem solving, sustainable development and ecological modernisation).

The core concern is, as expressed by Dowdeswell and Charnovitz, finding “policies that pursue simultaneously the benefits of sound environmental management and real economic development.”150 It was noted that the liberalisation of international trade can stimulate economic development in a manner supportive of sound environmental management, but that unless appropriate environmental policies are in place, the liberalisation of trade could also exacerbate environmental problems by encouraging damaging activity which might otherwise not occur. To avoid this result, countries need to focus on the production of products for which they not only have a comparative advantage, but also have an environmental comparative advantage. That is, the production of products which will leave neither their own environment, nor the global

149 Ibid, at 124.
environment, worse of. Better still, they should focus on developing their companies’ ‘environmental competitive advantage’ by rewarding business which is green.

This is not a radical idea. The sustainability discourse essentially calls for countries to focus on their environmental comparative advantage when considering their priorities for encouraging economic growth, and developing their policies to implement such growth. The fields of environmental and natural resource economics, as well as ecological economics, provide significant insight into how regulatory and market signals may be developed so that environmentally sensitive economic growth may occur. The ecological modernisation discourse provides the answer to the ‘what’s in it for us?’ question which industry and investors will ask prior to committing funds to pursue projects to deliver an environmental competitive advantage.  

The most appropriate place for policy instruments to address environmental problems is at the source of the problem. Nordström and Vaughan demonstrate that this is true for activities which involve “polluting production processes or undefined property rights over natural resources”.  

Policy instruments which address environmental problems indirectly, for example as trade measures directed at imports or exports, can lead to unwanted and unpredictable side effects which impact negatively on the environment or society or both. At the same time, trade measures can perform a useful role in encouraging behavioural change. In the multilateral context they are regarded as providing an important role in encouraging parties to join multilateral environmental agreements, and to comply with those agreements.  

Although their use on a unilateral basis is widely discouraged, particularly within trade policy circles, unilateral action is seen to play a useful role in

---

151 See, for example, Schmidheiny, 1997, above at n 148.
152 Anderson and Blackhurst, 1992, above at n 14; Nordström and Vaughan, 1999, above at n 49.
153 Nordström and Vaughan, 1999, above at n 49, at 3.
prompting action when no action is the alternative, and in acting as a spur for multilateral action.\(^{155}\)

For Vogel, such flexibility to use unilateral measures is important as it helps harness the trade liberalisation agenda to businesses’ acceptance and implementation of ecological modernisation. He describes the effect of trade liberalisation coupled with a movement to higher environmental standards as the ‘California effect’,\(^{156}\) and argues that it is dependent on three factors:

1. businesses must see a competitive advantage in moving to higher standards (that is, they must see the advantage of, and commit to ecological modernisation);
2. strong states must be able to prevent the importation of goods which do not meet the standards; and
3. strong states can then negotiate market access conditions for weaker states in exchange for them adopting higher product and production standards.\(^{157}\)

Alternatively, strong states can allow products complying with the higher standards to enter on a case by case basis.\(^{158}\)

Vogel emphasises that the relationship between trade liberalisation and higher regulatory standards is not as simple as having a trade liberalisation agreement in place; there must be both room for ‘push’ and ‘pull’. That is, because trade liberalisation agreements have a powerful deregulatory force,\(^{159}\) there must be scope for trade measures to be used for environmental purposes from time to time, and the appropriate political forces must be in place to motivate their use. He argues:

---

\(^{155}\) For detailed treatment of this issue, see Charnovitz, 1994, above at n 6, who canvasses a number of incidences where unilateral action led to later, multilateral, action.


\(^{157}\) Ibid, at 259-263.

\(^{158}\) Indeed, this is the more likely scenario, the single measure being authorised by, for example, Article XX of the General Agreement or similar provision under the SPS Agreement or TBT Agreement. If the Member was to enter into an agreement discriminating between countries on the basis of their environmental standards, this would violate Article I of the General Agreement. To be able to stand, the agreement would have to be sanctioned under Article XXIV of the General Agreement, pertaining to customs territories and free trade areas. For such an area to be established, “the duties and other restrictive regulations of commerce ... on substantially all the trade between the constituent territories” would have to be eliminated. Article XXIV:8(b), see also Article XXIV:8(a)(i). (emphasis added).

\(^{159}\) Caldwell and Wirth, 1996, above at n 52; Wirth, 1997, above at n 71.
The reason for this relationship is not that international agreements to promote trade liberalization automatically strengthen regulatory standards; in principle, they can just as easily weaken them. It is politics that makes the difference. Specifically, trade agreements and treaties are likely to maintain or raise regulatory standards when a powerful and wealthy nation insists that they do. In turn, the powerful nation’s willingness to demand that trade liberalization be accompanied by the maintenance or strengthening of health, safety, and environmental standards is in large measure due to the influence of its domestic NGOs and, in many cases, its domestic producers as well. But the ability of a powerful nation to impose its preferences on its trading partners is also dependent on the degree of integration: the more integration, the greater its influence.\textsuperscript{160}

Caldwell and Wirth criticise Vogel’s analysis, pointing out that the ‘California effect’ does not occur as a result of the liberalisation or the constraints imposed as a result of the deregulation of international trade, rather it is the “affirmative authority” of strong institutions with “active rule-making powers” “that has the capacity to offset the deregulatory effects of trade liberalization”.\textsuperscript{161} Whereas the US and the EU do have the authority to engage in rule-making, the WTO, like the GATT before it, has none. Rather, it has been designed to help nations avoid the ‘trading nation’s dilemma’.

According to the doctrine of comparative advantage, a state’s wealth can be enhanced by it specialising in the production of goods which it can produce at the relatively best price, and by providing an unrestricted market for specialisation to occur. The ‘trading nation’s dilemma’ is that in order to help maintain production, states will be tempted by special interest groups and electoral politics to provide support to firms in the form of subsidies, tariffs or countervailing duties. This is so, despite it being to the economic and political disadvantage of states to do so. If one state bows to temptation to provide such support, the disadvantaged nation, wishing to maximise its own self interest, will be tempted to respond in kind. If the disadvantaged nation has the economic and political ability to respond with protectionist measures, both states achieve a ‘third best’ solution which negatively impacts on their domestic economies and leads to the

\textsuperscript{160} Vogel, 1995, above at n 156, at 264.
\textsuperscript{161} Caldwell and Wirth, 1996, above at n 52, at 580. See also Wirth, 1997, above at n 71, at 372, stating that trade agreements, as currently structured “are poor candidates to serve as vehicles for facilitating regulatory reform of domestic public-health and environmental regulation”.
possibility of a cycle of counter-retaliatory action. This may be a "trade war" that would leave few industries unscathed."\(^\text{162}\)

The dilemma is able to be solved by states entering into trade agreements and thereby constraining their actions.\(^\text{163}\) The GATT 1947 has been widely seen as a mechanism which states use to prevent themselves from being captured by internal protectionist forces, and the \textit{WTO Agreement} is no different. For example, Petersmann sees this as the ‘primary’ function of the GATT:

> economic analysis suggests that the primary regulatory function of the GATT rules for transparent and economically efficient policy-making ... does not consist in the resolution of \textit{international} conflicts of interests among states, but in the transparent ... and the welfare-increasing resolution of \textit{domestic} conflicts of interests within GATT member countries among individual producers, importers, exporters and consumers.\(^\text{164}\)

It is true that the WTO does not have the affirmative authority or active rule-making powers of the US and the EU to make strong environmental rules (contrary to the hopes of many environmentalists). Nevertheless, its institutional structure does allow it to enter into a dynamic partnership with Member states willing to implement their own environmental rules. The rules of the WTO will not provide the impetus to raise environmental standards, but they can provide the flexibility for states to do so. True, there are not many strong states willing to be environmental leaders. The rules of the WTO are therefore important in determining \textit{whether} a ‘move to the top’ led by jurisdictions with strong environmental rules can happen, not in shaping what the ‘top’ will look like.

The \textit{General Agreement} and the covered agreements of the WTO allow powerful nations to insist that importers abide by strict health, safety, and environmental


standards in terms of those characteristics detectable in the product as it crosses the border (the ‘final product’ which is imported). With some qualifications, discussed in detail in Part II, WTO rules therefore do not prevent a ‘move to the top’ for product standards. Conventional wisdom has had it, however, that states may not use trade measures to insist that importers abide by strict health, safety, and environmental production standards. Accordingly, WTO rules have been viewed as standing in the way of a ‘move to the top’ to clean up the production of imported goods.

This opposition has now been largely eradicated by two landmark rulings of the Appellate Body of the WTO.\textsuperscript{165} These rulings have clarified that the General Agreement does allow states the possibility to use both product standards and production standards to prevent the importation of goods. Accordingly, in relation to both types of standards, the conditions of the second leg for Vogel’s thesis may be met.

This does not mean that global environmental conditions will automatically improve. As Vogel himself notes, the ‘California effect’ at the global level is weak, and what effect there is depends on the environmental inclinations and policy objectives of the leader states. These are largely determined at the domestic level. As Vogel notes:

\begin{quote}
were China to replace the US as the world’s largest economy and its regulatory policies to remain unchanged, the dynamics of global regulatory policy-making would be altered significantly.\textsuperscript{166}
\end{quote}

Instead, what it does mean is that WTO rules do not appear to present an insurmountable hurdle to states acting on their own affirmative authority to initiate a ‘move to the top’. The details of this are explored in Part II, which focuses on the rules constraining the use of unilateral measures introduced to slow or exclude the importation of products produced in a manner harmful to the environment. Thus Part II discusses the extent to which such rules assist or hinder in the ‘push’ and ‘pull’ dynamic of increased environmental standards coupled with international trade.

It is to be noted that unilateral action is regarded in this thesis only as an option of last resort. The value in the investigation is understanding, from a legal perspective, when and how an option of last resort may be used. The use of unilateral trade action is associated with significant negative redistributive side effects of an economic, environmental and political nature, and accordingly is not an optimal means of achieving the goals of sustainable development. Generally, trade restrictions negatively impact upon producers' livelihoods, but do not necessarily offer an alternative production activity to which those people may turn. Producers may use certain production techniques not out of reckless disregard for the environment, but from the inability to access alternative, more environmentally friendly, techniques as a result of lack of funds, know-how, ownership of the appropriate intellectual property, or a combination of these elements. Developing country producers are highly likely to be hampered by such factors, and when faced with trade restrictions, may have little option but to turn to alternative activities which may be even more socially or environmentally harmful simply to sustain themselves. Therefore, rather than creating a win-win situation helping to deliver a strong environment, trade measures may undermine environmental protection initiatives.

Poverty is recognised as one of the fundamental contributors to environmental degradation. Trade measures which appear to solve the environmental issue at hand, but which incidentally force people further into poverty, do not achieve sustainable development. Instead, they shift the focus of the environmental harm to another area which the consumer is less able to perceive. Positive measures such as technology transfer, capacity building and funding to modify unsustainable production practices provide a less confrontational and often more equitable solution for solving environmental problems occurring within the developing context. This is because the

166 Vogel, 1995, above at n 156, at 269.
167 Of course the financial benefit flowing from the non-internalisation of environmental costs will have its attractions, and will probably be a factor influencing the production method adopted if choice is available.
168 See, for example, Principle 5 of the Rio Declaration. As stated in Our Common Future (above at n 122) "Poverty pollutes" is a short way of saying that poverty 'reduces people's capacity to use resources in a sustainable manner ....” (at 49).
beneficial environmental effects of changing existing methods of production are not then achieved at the expense of the human population.169

Before turning to the detailed examination of the WTO Agreement and the covered agreements, it is appropriate to consider more fully the relevance of the WTO to the trade and environment debate, and consider how the role of law operates to influence state behaviour in the WTO system. While some early commentators argued that environmental issues were of little relevance to trade decisions taken pursuant to the General Agreement, there is now no doubt that the WTO is one of the key international organisations which must take sustainable development considerations into account when carrying out its functions.

**The Relevance of the World Trade Organization to the Trade and Environment Debate**

The WTO “provides the common institutional framework for the conduct of trade relations among its Members” in matters related to the Agreements and associated legal instruments signed as part of the Uruguay Round of Multilateral Trade Negotiations (1986 – 1994).170 The WTO is established by the WTO Agreement, and a number of Multilateral and Plurilateral Agreements signed during the Uruguay Round are annexed to the WTO Agreement. The WTO’s tasks are to “facilitate the implementation, administration and operation, and further the objectives,” of the WTO Agreement and the Multilateral Trade Agreements, and to “provide the framework for the implementation, administration and operation” of the Plurilateral Agreements.171

---

169 At the UNCTAD meeting on Positive Measures to Promote Sustainable Development, it was emphasised that “failure to comply with the provisions of MEAs is rarely the result of deliberate policies of parties, but rather the consequence of deficiencies in administrative, economic or technical infrastructure. In this context, positive measures have been considered necessary because compliance control and enforcement regimes are often insufficient for the effective implementation of MEA provisions.” UNCTAD Secretariat, 1997, above at n 92, at para 3, also referring to Beyerlin and Marauhn, above at n 19.

170 Article II:1 of the WTO Agreement.

171 Article III:1 of the WTO Agreement.
The 1994 *General Agreement* is one of the key Multilateral Trade Agreements adopted during the Uruguay Round. Also considered central are the *General Agreement on Trade in Services* (GATS) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). In the environment domain, the General Agreement, the SPS Agreement and TBT Agreement are central. The 1994 *General Agreement* is legally distinct from the 1947 *General Agreement*, and differs in a number of respects. Its adoption has allowed the WTO to take over the institutional responsibilities of administering the 1947 *General Agreement* which the GATT Secretariat conducted since its entry into force.

The 1947 *General Agreement* was the document which catapulted the trade and environment dispute to fame in 1991. Tensions existed prior to that time, however in late 1990, Mexico held consultations with the US regarding their ban on the importation of tuna caught using purse seine nets in the Eastern Tropical Pacific Ocean. Failing satisfactory resolution of those consultations, Mexico referred the matter in early 1991 to a GATT panel for dispute resolution. The stated reason for the US’s ban was that the particular method of harvesting the tuna caused a sizeable bycatch of dolphins which the US was concerned to avoid. When two separate GATT panels, the reports of which were leaked, found the US’s import ban in violation of international trade rules, it sparked a wave of protests among environmentalists, US politicians, and engendered a torrent of academic critique. The concerns were twofold: firstly the decisions

---


173 For example, trade and environment concerns arose in the context of the negotiation of NAFTA. See Esty, 1994, above at n 13. See also Charnovitz, 1994, above at n 6, and Bergsten, F.C., *The Future of the International Economic Order: An Agenda for Research* (1973), Chapter 1 at n 20, above.

174 The first panel was constituted at the request of Mexico in *United States – Restrictions on Imports of Tuna* (DS21/R) BISD 398/155; 30 ILM 1594. The decision was not adopted by the GATT Council and, unhappy with this result, the European Economic Community and the Netherlands requested further consultations and the establishment of panels to consider the matter. The complaints were joined and the report was issued as *United States – Restrictions on Imports of Tuna* DS29/R, June 1994; 33 ILM 936. This decision was also not adopted. These two disputes are known as the ‘Tuna-Dolphin disputes’. For a detailed discussion of the disputes and the politics behind them see, for example, Skilton, T., ‘GATT and the Environment in conflict: the Tuna-Dolphin dispute and the quest for an international conservation strategy’ (1993) 26 *Cornell International Law Journal* 454; Vogel, 1995, above at n 156; Snape, W. and N. LeFkovitz, ‘Searching for GATT’s environmental Miranda: are “process standards” getting “due process”?’ (1994) 27 *Cornell International Law Journal* 777.
appeared to call into question the ability of states to use trade measures to achieve environmental objectives, and secondly they appeared to undermine the domestic regulatory ability of states to deal with their concerns in a sovereign manner.

For political reasons these panel decisions were never adopted, so, in the legal sense, they carried little weight.\textsuperscript{175} They were, however, widely supported by the international trade community,\textsuperscript{176} and the general antipathy of the international community towards the use of trade measures to achieve environmental ends was further marked in the Rio Declaration, Principle 12 of which states:

... Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 12 substantially reiterates Article 2.22(i) of Agenda 21. Article 2.22(i) notes that “Domestic measures targeted to achieve certain environmental objectives may need trade measures to render them effective”, and specifies that:

Should trade policy measures be found necessary for the enforcement of environmental policies, certain principles and rules should apply. These could include, inter alia, the principle of non-discrimination; the principle that the trade measure chosen should be the least trade-restrictive necessary to achieve the objectives; an obligation to ensure transparency in the use of trade measures related to the environment and to provide adequate notification of national regulations; and the need to give consideration to the special conditions and developmental requirements of developing countries as they move towards internationally agreed environmental objectives.

UNCED repeatedly stressed the linkages between trade and the environment. In particular, clause 2.3 of Agenda 21 states:

The international economy should provide a supportive international climate for achieving environment and development goals by:

\textsuperscript{175} Note that the GATT/WTO system does not have a system of \textit{stare decisis}. Adopted GATT panel reports are not binding on either WTO panels or on the Appellate Body, but have persuasive authority. As noted by the Appellate Body in \textit{Japan – Taxes on Alcoholic Beverages}, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 (hereinafter \textit{Japan – Alcoholic Beverages}) adopted GATT panel reports “should be taken into account where they are relevant to any dispute” as they “create legitimate expectations among WTO Members” (at 14). Unadopted reports “have no legal status in the GATT or WTO system” but may offer some perspective on how the \textit{General Agreement} may be interpreted. Report of the Appellate Body in \textit{Japan – Alcoholic Beverages}, at 14-15, approving the Panel’s report. See further below at Chapter 4, text accompanying n 112, and Chapter 5, text accompanying n 234.

\textsuperscript{176} Hudec notes that of the 39 of the 40 nations which spoke on the matter at the GATT, all except the US supported the decision. Hudec, 1996, above at 164, at 117, note 108.
• Promoting sustainable development through trade liberalization;
• Making trade and environment mutually supportive;
• Providing adequate financial resources to developing countries and dealing with international debt;
• Encouraging macroeconomic policies conducive to environment and development.

Furthermore, clause 2.8 of Agenda 21 saw the benefit of "[a]n early, balanced, comprehensive and successful outcome of the Uruguay Round of multilateral trade negotiations", and stated that such a conclusion:

would bring about further liberalization and expansion of world trade, enhance the trade and development possibilities of developing countries and provide greater security and predictability to the international trading system.

However the GATT was only ever a reluctant contributor to the trade and environment debate. In 1992, following UNCED, the Chairman of the GATT Council indicated that:

[the] GATT's competence is limited to trade policies which may result in significant trade effects for GATT contracting parties. In respect neither of its vocation nor of its competence is the GATT equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global priorities, setting environmental standards or developing global policies on the environment.177

The 1947 General Agreement was negotiated in an era when environmental concerns were not pressing, indeed the word 'environment' is not mentioned in the document. In contrast, the WTO Agreement shows a greater awareness of the linkages between trade and environmental concerns, although we shall see that the treatment of the linkages is patchy throughout the Agreements.

The starting point for examining the WTO's recognition of the importance of linkages between trade and the environment is to be found in the Preamble of the WTO Agreement where it lends support to the concept of sustainable development and the protection and preservation of the environment. The first paragraph of the Preamble states:

RECOGNIZING that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. (emphasis added)

The Preamble does not itself create rights or obligations under the treaty. It nevertheless plays an important role in providing part of the context within which the ordinary meaning of the words of the treaty must be interpreted.\(^{178}\)

Mechanisms which may be relied upon to contribute to environmental preservation or protection may be found in certain Articles of the Agreements annexed to the *WTO Agreement*. These include Article XX of the *General Agreement*, Article 2.2 of the *TBT Agreement*, Articles 2.2, 3.2, 3.3 and 5.7 of the *SPS Agreement*, Article 8.2(c) of the *Subsidies Agreement*; Article XIV(b) of GATS,\(^{179}\) and Articles 8.1 and 27.2 of the *TRIPs Agreement*.

In addition to the express and other references to the environment found in the *WTO Agreement* and the covered agreements, the WTO initiated a Committee on Trade and Environment (CTE) to consider certain matters with the aim of making trade and environmental policies mutually supportive,\(^{180}\) has held various NGO forums on trade

\(^{178}\) Article 31 of the *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969; 8 ILM 679, 1155 UNTS 331, [1974] ATS 2 (hereinafter the *Vienna Convention*) sets out the general rule of interpretation, and specifies the role the preamble plays in the interpretation of a treaty:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, ... its preamble and annexes.

\(^{179}\) See also the Ministerial Decision on Trade in Services and the Environment, adopted by the Trade Negotiations Committee on 15 December 1993, and by the Council for Trade in Services at its first meeting.

\(^{180}\) The CTE was established by the WTO General-Council in January 1995 and built upon discussions held in 1992-1993 in the GATT Group on Environmental Measures and International Trade (EMIT) and in 1994 in a Sub-Committee on Trade and Environment of the WTO Preparatory Committee. See the Report (1996) of the Committee on Trade and Environment, adopted 8 November 1996, (hereinafter referred to as the 1996 CTE Report). The Marrakesh Ministerial Decision on Trade and Environment of 15 April 1994, 33 ILM 1267 sets out the terms of reference for the CTE and the issues which the Committee has been initially tasked to address. These issues are:
- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
and the environment, and has held a High Level Symposium on Trade and Environment.  

However, while the WTO does not evince the same level of denial as did the GATT as to the negative effects trade can have on the environment, the general approach of the WTO remains consistent with that of the GATT in that the WTO as an institution does not envisage itself as directed to becoming actively involved in: “reviewing national environmental priorities, setting environmental standards or developing global priorities, setting environmental standards or developing global policies on the environment”. The WTO Ministers, when agreeing to establish the CTE, noted the desire “to coordinate the policies in the field of trade and environment” and emphasised that this was to be done:

without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its Members.

However, although the role of the WTO does not include the setting of environmental standards or developing global policy, it is arguable that it now influences the determination of certain environmental standards and priorities to a very great degree. If a national standard exists and is challenged under the SPS Agreement or the TBT

- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- the relationship between the provisions of the multilateral trading system and:
  - charges and taxes for environmental purposes,
  - requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
  - the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
  - the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
  - the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
  - the issue of exports of domestically prohibited goods.

The CTE was established by the WTO General-Council and its first report was made to the First WTO Ministerial Conference, held in Singapore in December 1996. The 1997 report is WT/CTE/2, 1998 WT/CTE/3, 1999 WT/CTE/4, 2000 WT/CTE/5.


182 See, for example, Nordström and Vaughan, 1999, above at n 49, at n 101, above.

183 Remarks of the Chairman of the GATT Council, at n 177, above.

184 Marrakesh Ministerial Decision on Trade and Environment of 15 April 1994, at n 180, above.
Agreement, it will be assessed against the relevant (and generally non-binding) international environmental or consumer standard or guideline. In that way, the international standard or guideline is used by panellists as a benchmark standard, in some cases giving that international standard or guideline something close to binding authority.

Notwithstanding the de facto role these agreements play in the harmonisation of national standards, it would be undesirable for the WTO to take an active role in standard setting. A primary argument against the involvement of the WTO playing a role in setting environmental standards or developing global priorities or policies on the environment is that it lacks the institutional capacity to do so.\textsuperscript{185} The overarching rationale of the WTO, and the GATT before it, is to “liberalize trade that crosses national boundaries, and to pursue the benefits described in economic theory as ‘comparative advantage’.”\textsuperscript{186} We have seen that the theory of comparative advantage implies the removal of government intervention to allow the market to determine the most efficient source and production activity a nation might engage in. Yet often government intervention is necessary to ensure the conservation or protection of the environment and to protect the non-economic values of the environment which the market would otherwise overlook. Given the complexity of devising environmental policies, it is appropriate this is done by those institutions with the appropriate expertise to determine priorities and the manner in which intervention is to occur.

While the liberalisation of international trade may have both positive and negative effects for the environment, the mission of the WTO does conflict with the mission an organisation devoted to the conservation and protection of the environment would be expected to hold. Furthermore, the environment is not the only issue of linkage which the WTO is confronted with, the linkage between trade and labour, intellectual property


The WTO is presently addressing the linkage between intellectual property and competition, and even so its ability to deal appropriately with these issues has been called into question. The WTO has not yet seriously tackled the sensitive issue of labour standards, although they have been discussed in fora such as the high-level symposium on trade and development.

Indeed, when encouraged to examine the incorporation of labour standards into the WTO Agreement by President Clinton at the Seattle Ministerial, many nations baulked at the notion. As stated by Dunoff, “In short, if we applied the theory of comparative advantage to institutions, we might conclude that trade bodies were not terribly well-positioned, by virtue of mission, experience, or expertise, to deal with some of the most contentious linkage issues.”

This thesis thus argues that it is not necessary for the WTO to play an active role in reviewing national environmental priorities, setting environmental standards or developing global priorities or policies on the environment in order to provide a forum for the balanced treatment of trade and environmental concerns. What is necessary is that an appropriate institutional framework exists for both trade and environmental concerns to be heard in a balanced manner and that appropriate recognition is given to environmental norms and law so that they are capable, when the appropriate conditions are satisfied, of outweighing the trade policies and priorities under consideration. Thus when a trade dispute occurs between Members where the environmental policies and priorities of at least one Member is at stake, that these policies and priorities are properly taken into account and are not automatically trumped by the trade policies and priorities of the Members. Similarly, that the dispute settlement body is properly

189 See http://www.wto.org/english/tratop_e/devel_e/hlmdev_e.htm
equipped to review domestic regulatory measures so that those which are supportive of existing global priorities and policies on the environment can be sustained.

**A comparison of the GATT and WTO dispute settlement mechanism**

The settlement of international trade disputes has undergone considerable modification as a result of the creation of the WTO. This has had an enormous impact on the scope for environmental concerns to be considered within the trading system. As we shall be considering a number of GATT and WTO cases, it is useful to contrast the workings of the new WTO dispute settlement system with that of the GATT.

In the early days of the GATT, broad working parties comprised of government representatives heard complaints brought by contracting parties. Reports of the working parties were short and often pointed to a diplomatic resolution of the dispute. It was not until the late 1950's that the practice of constituting a ‘panel’ of individuals was established, panels making findings, determinations and recommendations to Contracting Parties. Slowly a ‘rules-based’ system began to evolve.\(^1\)

In 1979, at the end of the Tokyo Round, the Contracting Parties adopted an understanding on dispute settlement to set down more formally the practice of dispute settlement which had begun to develop, and in the 1980’s, a legal section of the GATT began to assist panels in their deliberations. Panel reports became more detailed and better reasoned, but a ‘negotiation’ style of trade dispute settlement was retained. That is, rather than interpreting the text in a manner faithful to the actual words, the practice of interpreting the text to deliver a desired outcome tended to be followed. While this approach was conducive to the overall ‘consensual’ style of the GATT regime and was generally successful, the 1970s and 1980s saw a number of disputes go unresolved because

---

parties to a dispute either blocked the formation of a panel, or refused to adopt a panel report.\textsuperscript{192}

The Uruguay Round saw the revision of the dispute settlement system and the adoption of the \textit{Understanding on Rules and Procedures Governing the Settlement of Disputes} (DSU), to address the GATT’s procedural inadequacies. Dispute settlement procedures for the majority of parts of the WTO system are now found under one roof, allowing for consistency in approach as to the rules and procedures for the settlement of disputes. The rules for the establishment of consultations, panel and appellate hearings have been formalised, parties may no longer block the formation of a panel hearing, and strict timelines have been established to ensure speedy outcomes of disputes.\textsuperscript{193} Furthermore, the DSU established the Dispute Settlement Body (DSB),\textsuperscript{194} To ‘administer the rules and procedures and the consultation and dispute provisions of the covered agreements’,\textsuperscript{195} which in turn established the Appellate Body of the WTO.

\textsuperscript{192} Waineymer, 2000, above at n 116. Waineymer reports that “a key example was the dispute between the US and a number of European countries over US Domestic International Sales Corporations (‘DISC’) legislation”, \textit{United States – Tax Legislation (DISC) (L/4422) BISD 23S/98} (12 November 1976); \textit{United States – Income Tax Practices Maintained by France} (L/4423) BISD 23S/1.4 (12 November 1976); \textit{United States – Income Tax Practices Maintained by Belgium (L/4424) BISD 23S/127} (12 November 1976); \textit{United States – Income Tax Practices Maintained by the Netherlands} (L/4425) BISD 23S/137 (12 November 1976). \textit{Compare} Hudec, 1990, above at n 10, at 294-5 who, commenting prior to the conclusion of the Tokyo Round, wrote merely that “The major flaw apparent in recent dispute proceedings has been a certain foot-dragging tendency in all aspects of the procedure. GATT has seemed reluctant to begin formal dispute proceedings, and hesitant about bringing them to a conclusion once started. In recent years, U.S. officials, observing these characteristics, have taken to questioning the neutrality of the procedures as well.”

\textsuperscript{193} This is the theory, but note that some disputes have continued for years unresolved, eg, the disputes concerning \textit{European Communities – Regime for the Importation, Sale and Distribution of Bananas}, Report of the Panel in the Complaint by Ecuador, WT/DS27/R/ECU; Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND; Complaint by Mexico, WT/DS27/R/MEX; Complaint by the United States, WT/DS27/R/USA, as modified by the Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997 (hereinafter \textit{European Communities – Bananas}), and \textit{European Communities – Hormones}. On the establishment of panels, see Article 6 of the DSU; Articles 4-5, 7-8, 12, 15-17, 20-22, and 24-25 establish timeframes for different aspects involved in the settlement of disputes.

\textsuperscript{194} This body is a special meeting of the General Council, charged with resolving disputes as provided for in the DSU. The DSB has its own chairman and has established rules of procedure in order to fulfil its responsibilities. The General Council is composed of representatives of all the Members and holds the authority to carry out the functions of the Ministerial Conference between meetings of that body. The Ministerial Conference is composed of representatives of all the Members and meets at least once every two years. It carries out the functions of the WTO, and has the authority to take decisions on all matters under any of the covered agreements. Articles IV(1) and (2) of the \textit{WTO Agreement}.

\textsuperscript{195} Article 2 of the DSU.
It is the Appellate Body in particular which has influenced the development of jurisprudence under the WTO regime. The new approach has resulted in the overturn of a number of established interpretations reflecting the old GATT approach. It is now considerably more faithful to the text of the *WTO Agreement* and its annexes, and is significantly influenced by principles of international law. It is encouraged by Article 3 of the DSU which states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

In contrast to GATT practice, the new dispute settlement procedures make it difficult to block the adoption of a panel or Appellate Body report. Decisions are binding on the parties to the dispute and panel reports must be adopted by the DSB within 60 days of their circulation to Members unless the DSB decides by negative consensus not to adopt the report or a party to the dispute notifies it wishes to appeal the report. In this case consideration of the Panel report may be postponed. Appellate Body reports must be adopted by the DSB within 30 days of their circulation to Members unless a negative consensus exists. The ‘negative consensus’ rule is a reverse of the GATT procedure where adoption could be blocked by one Contracting Party. Now, all Members must vote against the report for it not to be adopted. This includes the ‘victor’, being the Member which the report finds for.

The new procedures also allow the possibility of greater participation in dispute settlement by civil society, thus somewhat improving the democratic processes of the WTO. For example, NGOs and others may seek leave to make submissions to panels.

---


197 Article 16 of the DSU.
and the Appellate Body which may then take into account in their deliberations. Interested observers and participants who are not Members have, however, no right to be heard by panels or the Appellate Body. The transparency of WTO jurisprudence has also improved. All panel and Appellate Body reports, as well as derestricted documents in general, are available on the WTO’s homepage so that interested parties (with an internet connection) can have access and subject them to critical review. Interested observers are no longer constrained to using ‘leaked’ reports and documents, nor subjected to the delay of waiting for material to be published in hard copy, such as the publication of adopted reports in the GATT Basic Instruments and Selected Documents. Note, however, that while many documents are circulated as unrestricted, it may take six months or longer for other categories of documents to be derestricted. Moreover, there is generally some delay in documents being put on the website.

A move towards legalism and a more rule-oriented framework is generally regarded as beneficial as it encourages greater stability and predictability in the system, benefiting rich and poor nations alike. For example, a small or poor nation can negotiate “by reference to what [parties] would expect an international body would conclude about the action of the transgressor in relation to its international obligations”, so disputes

198 See, for example, in Report of the Appellate Body in United States – Shrimp and United States – Hot-Rolled Lead where the amicus submissions were accepted. Compare the Report of the Appellate Body in European Communities – Asbestos, where the Appellate Body established working procedures to allow interested parties to make amicus submissions but found, without explanation, that all submissions had not complied with the requirements of those procedures. This has led some to question whether the WTO is providing transparency in name only. See ICTSD, 2000, above at n 115, and n 115 generally.


200 Note too the time lag between public knowledge of the results of a dispute, and the reasons of the dispute being released. This is particularly so in the case of panel reports which are not publicly available until they have been translated into the official languages of the WTO (English, French and Spanish). This is an unsatisfactory situation for an organisation seeking credibility, as it allows the critics of the WTO to launch an attack prior to the explanations for decisions being available.

201 Shell, above at n 163, at 834; Petersmann, 1991, above at n 164, at xlii; Dillon, 1995, above at n 13. Further, as noted by Jackson, it assists the millions of entrepreneurs which engage in international trade to reduce the rate of return they would otherwise require to accommodate the “risk premium” of doing business, leading to greater efficiencies and increase welfare for all. Jackson, J.H., The World Trade Organization: Constitution and Jurisprudence (1998), at 61.

202 Shell, above at n 163, at 835; Jackson, J.H., ‘The crumbling institutions of the liberal trade system’ (1978) 12 Journal of World Trade 93, at 98. See also Jackson, 1998, above at r 201. Note that there are critics of the move to legalism. For example, Gordon’s concern is that increased legalism undermines the flexibility of national governments to compromise between national and international priorities which may ultimately force nation states to adopt alternative strategies to achieve national policies. She sees this as threatening the credibility of the WTO system and undermining its ability to achieve international
can be settled more according to “persuasion and the rule of law rather than by means of power”. Moreover, a strong dispute resolution and enforcement mechanism which formally allows disadvantaged parties to prevent defecting parties from retaining short term benefits is thought to promote long-term co-operation. The new dispute settlement system of the WTO is generally regarded by analysts as a success, with both developed and developing countries strongly participating. Indeed, in addition to a few protracted disputes between the US and the EC requiring delicate political manoeuvring to be resolved, the issue seen as most challenging is the caseload confronting panels and the Appellate Body.

Conclusion

This chapter has considered two powerful theoretical currents which define the trade and environment debate, and the relevance of that debate to the WTO. The first was comparative advantage and how it supports the liberalised trading agenda and the work of the WTO. The second was environmental protection. While some regard these
theoretical foundations as competing, both of these traditions have positive elements to contribute to a lasting resolution of the trade and environment debate:

- The theory of comparative advantage introduces the idea of *strong markets*, where it is the self-interested actions of producers and consumers which can generate economic growth.
- The environmental discourses suggest that economic growth is not an end in itself, but a means to an end, and that comparative advantage which takes notice of environmental effects ("*environmental comparative advantage*") is more appropriate. These discourses call for a strong practical commitment to *sustainable development*, requiring at least a commitment to a long-term anthropocentric approach. They suggest that there can be a competitive advantage to being green ("*environmental competitive advantage*"). The environmental discourses also introduce the concept of strong, participatory *democracy* as strengthening the legitimacy of decision-making systems. Sustainability in particular suggests strong democracy at the local, national, regional, global and the transnational level.
- Central in all of these theories is the role of law – that a strong legal framework is necessary to guard the system against abuses.

The conclusion of the Uruguay Round and creation of the WTO has seen a dramatic strengthening of the international trade regime, yet in the same period, the state of the global environment has declined dramatically. According to Klaus Töpfer, Executive Director of UNEP:

> In the almost seven years since the trade-environment debate surfaced in the GATT and now the World Trade Organization, as well as in several other international organizations, approximately 10,000 species have become extinct, approximately 40,000 megatonnes of carbon dioxide have been emitted, together with roughly 200 megatonnes of NOx. In the seven years that the trade-environment debate has progressed, 80 million hectares of arable land have been lost to desertification, roughly 40 million hectares of forests have been cleared for agricultural use, some 10 million people have become partly or wholly blind because of the depletion of the ozone layer, 2 billion tonnes of hazardous waste have been generated, and 14 million children in developing countries have died because of water-borne diseases.207

---

207 In Vaughan and Defilavi, 1998, above at n 154, at 5.
While countless instruments exist at the international level to coordinate international action to address the global environmental crisis, environmentalists worry that the WTO undermines the discretion and ability of Members to implement strong domestic environmental laws and policies to prevent their own consumers from contributing to global environmental degradation.

While countries could adopt an isolationist approach to achieve this result, this thesis rejects such an approach as politically, economically and environmentally untenable. Rather, it argues for an international trading regime which allows the environmental costs of production to be reflected in the price of goods.

The theories on environmental protection and on trade provide us with set of principles to guide this thesis:

- Theoretical and practical commitment to sustainable development (a strong environment).
- Commitment to development through trade (strong markets that nurture comparative advantage).
- Commitment to sustainability through trade (strong markets that nurture environmental comparative advantage).
- A Rule of Law regime – principles of international law.

Democracy in local, national, regional, transnational and global institutions is also important. While the scope for democratic participation is an important strand of the trade and environment debate, it shall not be a central focus here. It is recognised that private business interests and NGO groups play an important role in lobbying governments to ensure that each of Vogel’s factors necessary to bring about a

---

‘California effect’ are met, and that they remain important to spur states on in the event of a dispute.\textsuperscript{209} Also acknowledged is the importance of having a structure at the domestic level which allows the contestation of viewpoints which is responsive to the contestations made.\textsuperscript{210} The concern of this thesis is, however, the extent to which WTO rules constrain states from achieving sustainability through trade by adopting domestic regulatory measures to implement higher environmental standards and encouraging sustainable production and consumption patterns among their consumers. Accordingly, while it is important that the international system is structured so that viewpoints not advanced by states are able to find representation at the international level, this thesis adopts a ‘realist’ approach and proceeds on the assumption that the internal struggles brought to bear by interest groups, bureaucratic and electoral politics have been worked out at the domestic level and that a common position is available.\textsuperscript{211}

\textsuperscript{209} For example, as noted by Lowenfeld speaking with reference to cases heard before GATT panels “there usually is some kind of a private dispute behind these GATT cases.” Helfer, L.R. and A-M. Slaughter Burley, ‘Towards a theory of effective supranational adjudication’ (1997) 107 Yale Law Journal 273, at n 508, quoting Lowenfeld, A.F., ‘Transcript of Discussion Following Presentation by Kenneth W. Abbott’ (1992) Columbia Business Law Review 151, at 155, 161. Ehlermann also echoed these comments stating ‘The GATT dispute settlement procedures are, of course, intergovernmental and cannot be used by private parties. There is, however, an increasing tendency of governments to take up complaints by private parties and involve outside lawyers in the preparation of cases they bring before the GATT. Jackson, 1998, above at n 201, at 62, quoting Ehlermann, C-D., ‘The European Community, its law and lawyers’ (1991) 29 Common Market Law Review 213. In the case of environmental disputes, NGO groups are invariably active – whether it be behind the scenes in the preparation of a case, or in making submissions to the panels and Appellate Body in a dispute.

\textsuperscript{210} Civic republicanism offers a model for such a democracy. According to the republican ideal, the state must be deliberative, or discursive, allowing “ordinary people to contest the doings of government” inclusive by allowing all groups to participate, and responsive to the contestations made. Pettit, P., Republicanism: A Theory of Freedom and Government (1997), at 277 and 278. See also Dryzek, J., Discursive Democracy: Politics, Policy and Political Science (1990); Braithwaite, J., ‘On speaking softly and carrying big sticks: neglected dimensions of a republican separation of powers’ (1997) 47 University of Toronto Law Journal 305. As Pettit points out, civic republicanism “points us towards the ideal of a democracy based, not on the alleged consent of the people, but rather on the contestability by people of everything that government does: the important thing to ensure is that governmental doings are fit to survive popular contestation, not that they are the product of popular will” (at 277).

I acknowledge, however, that given the membership of countries in the WTO (including Burma), that in practice domestic structures which allow for, and are responsive to, the contestation of viewpoints are not always available. See Atik, 1998, above at n 208.

An important tool in achieving sustainability through trade is allowing Members to distinguish between products on the basis of how they are made. In the next chapters we shall trace the response made by the WTO to the introduction of such measures by examining the recommendations of relevant GATT and WTO panels and the Appellate Body of the WTO. We shall use our set of principles to help analyse and assess the extent to which the covered agreements allow, and so far have allowed, such domestic regulatory measures to flourish.
Part II: Trade and Environment Jurisprudence of the WTO
3

Strengthening Development Through Trade: reinforcing comparative advantage through Articles I and III of the General Agreement

Introduction

Chapter 2 introduced a set of principles to guide this thesis. These can be distilled as a theoretical and practical commitment to a strong environment and strong markets, a commitment to development and sustainability through trade, and a commitment to the rule of law.

In order to evaluate the work of the WTO in terms of this framework, we must come to grips with the historically-conventional jurisprudence of the GATT regime. This jurisprudence has been one of strengthening strong markets and comparative advantage. Understanding its evolution and then searching for its limitations in terms of the normative framework of Chapter 2 is the objective of this Part.

This Chapter introduces two of the core obligations of the multilateral trading system and examines how they have been interpreted during dispute resolution. The two core obligations are 'most-favoured-nation' and 'national treatment' expressed in Articles I and III of the General Agreement. These obligations rely on the concept of 'like products' as a litmus test to determine whether domestic regulatory measures are permissible. Domestic regulatory measures can differentiate between products on the basis of their physical characteristics, and also on the basis of how they are produced. This Chapter explains why this may be important in an environmental context, and identifies a number of different ways in which domestic regulatory measures may be framed in order to distinguish between sustainably produced products. It discusses whether such distinctions are permissible on the basis of the text of those Articles, and then analyses both GATT and WTO cases dealing with Articles I and III of the General Agreement to determine to what extent these Articles have been interpreted to allow such regulatory distinctions to be used to distinguish between 'like products'.
The Core Principles of the GATT/WTO Regime

The core principles of the GATT/WTO are designed to encourage openness, economic integration and international trade. They are a commitment to the abolition of quantitative restrictions or quotas, a reduction in tariffs over time, and non-discrimination.

Article XI of the General Agreement sets out the rule against quantitative restrictions which prevents Members from banning or otherwise limiting the number of products entering their territory.\(^1\) Members retain the right to use import tariffs, although this right is constrained by various provisions in the General Agreement. Annexed to the General Agreement are Schedules in which Members have listed the maximum amount of tariff they agree to impose upon imported products. This is known as the ‘bound’ rate of the tariff. The act of agreeing to be bound at a particular rate is known as giving a concession, so bound tariffs are also known as tariff concessions. Members do not have to agree to the same tariff concessions as one another. Rather, once bound, Members must not accord treatment to the products of another Member which is less favourable than that set out in the Schedule, and must exempt such products from ordinary customs duties and other import duties in excess of the bound rate. This rule is established in Article II:1.\(^2\)

The primary rules against discrimination are found in Articles I and III of the General Agreement.\(^3\) These are the main subjects of this chapter. Article I requires that the most favourable treatment afforded to the products of one importing country (whether or not it is a Member of the WTO) be afforded to the ‘like products’ of all Members of the WTO. This is called the most-favoured-nation (MFN) principle.

---

1. See in Appendix A.
2. Ibid.
3. Ibid.
Article III requires Members to treat all products which have been imported from another Member in a manner which does not afford protection to domestic production. That is, Members are required to provide “equality of competitive conditions for imported products in relation to [like] domestic products.” This is known as the national treatment principle.

**Articles I and III and ‘like products’**

Articles I and III are seen as key in preventing WTO Members from distinguishing between products for protectionist ends. They help to secure the operation of comparative advantage by maintaining strong markets which allow for the self-interested actions of producers and consumers to generate economic growth, free of discriminatory government intervention.

These Articles afford Members a broad regulatory discretion to implement measures to protect their domestic environment where those measures are not discriminatory and do not afford protection to domestic production. Most laws implemented by a state to protect its own domestic environment do not raise any incompatibility with these Articles, but note that such laws may be subject to the disciplines of the *SPS Agreement* and *TBT Agreement*, considered below.

Articles I and III are used to examine whether treatment accorded to ‘like products’ is discriminatory. The boundaries for determining when products are ‘like’ for the purposes of these Articles can be difficult. Is recycled paper ‘like’ non-recycled paper; are high fuel efficient cars ‘like’ low fuel efficient cars; is a prawn caught with a high turtle bycatch ‘like’ a prawn caught with a low turtle bycatch? One of the effects of international trade is the separation of the pollution effects of production and

---


5 Article III:2 also examines treatment accorded to ‘directly competitive’ and ‘substitutable’ products to see if it is discriminatory.
consumption, with consumers left unaware of the damage of their demands. Two products may be physically alike or identical, but whereas the production of one might have had only a relatively small environmental impact, the other’s production might have caused significant environmental harm. That is, the harm may be an inherent characteristic of the product resulting from its method of being produced, harvested, manufactured or grown (its ‘PPMs’). A Member might wish to distinguish between such products in order to promote sustainable consumption habits among its consumers and protect the global environment.

As noted by the Appellate Body in a recent case, ‘like’ is defined according to one dictionary as:

Having the same characteristics or qualities as some other ... thing, of approximately identical shape, size, etc., with something else; similar.6

The traditional method of determining whether products are ‘like’ in Articles I and III begins with a comparison of the physical characteristics of a product such as the product’s properties, nature and quality, as it crosses the border. The method then generally takes into account the end-uses of the product in a given market, the consumers’ tastes and habits towards the product, and the product’s tariff classification.7 Where the physical characteristics of products are identical or very similar, they are more likely to be considered to be ‘like’ for the purposes of these Articles, and a measure which distinguishes between products on the basis of how they were made will generally be found to be inconsistent with either Article I or III.

Moreover, even if products with different environmental histories are not ‘like’, they may be directly competitive or substitutable. If an imported product is directly competitive or substitutable with a domestic product, Article III requires that Members


7 These criteria were established in the Working Party Report on Border Tax Adjustments, L/3464, adopted on 2 December 1970, BISD 48S/97, 102, at para 18, which examined the issue of ‘like products’.
not tax or otherwise impose charges on the imported product so as to afford protection to domestic production. As pointed out by Charnovitz:

In the market of the 1990s, dissimilar products can be competitive (or substitutable) with each other. For example, bottles are competitive with cans. Biodegradable packaging is competitive with non-biodegradable packaging. Solar energy is competitive with carbon energy. Many environmentalists would think it important that governments retain authority to craft policies based on such distinctions. While it seems unlikely that the WTO would want to subvert environmental policy, the potential for interference exists whenever tax incentives are applied in a way that affords protection to domestic products.8

The more widely the term ‘like product’ is interpreted – that is, the greater the category of products considered ‘like’ – the greater the constraint on the policy options of states to differentiate between such products.9 This in turn impacts upon the ability of leader states to initiate a ‘California effect’ by raising domestic environmental regulatory standards.

The General Agreement does contain exceptions and other procedures, such as waivers, which allow Members some flexibility to introduce measures to influence their consumers.10 The so-called ‘environmental exceptions’ to the General Agreement are examined in the next Chapter. Thus, even if products with differing environmental histories are found to be ‘like’, it does not necessarily mean that a Member is unable to differentiate between the two. The Articles of the General Agreement form an integral

---


9 See, for example, Roessler, F., ‘Diverging domestic policies and multilateral trade integration’ in J Bhagwati and R E Hudec (eds), Free Trade and Harmonization: legal analysis (1996) 21-56.

10 A waiver allows certain obligations of a Member to be suspended, Article XXV:5 of the General Agreement. It is subject to the authorisation of WTO Members (a two-thirds majority), so relies on a discursive and political process. Moreover, it is time-limited so operates as only a temporary solution. While the redistributive effects of the conduct the subject of the waiver is more likely to be taken into account when negotiating the waiver, given the inherently political nature of the process, it is more difficult to predict whether the waiver will be granted, and whether it will be entirely appropriate to the circumstances at issue. See McDonald, J., ‘Greening the GATT: harmonizing free trade and environmental protection in the new world trade order’ (1993) 23 Environmental Law 397; Caldwell, D.J., ‘International environmental agreements and the GATT: an analysis of the potential conflict and the role of a GATT “waiver” resolution’ (1994) 18 Maryland Journal of International Law and Trade 173; Schlagenhof, M., ‘Trade measures based on environmental processes and production methods’ (1995) 29(6) Journal of World Trade 123; Jackson, J.H., ‘World trade rules and environmental policies: congruence or conflict?’ (1992) 49 Washington and Lee Law Review 1227.
whole, so in practical terms it could be said that it is largely irrelevant whether a measure is justified under an ‘exception’ or is consistent with another part if the final result is the measure can be sustained. It does have a legal impact however, with political consequences, as it affects the burden of proof which a state defending its measures must bear in the event of a dispute. While a state must be prepared to carry that burden if a challenge to the measure is made, its existence will tend to have a chilling effect. States are less likely to implement domestic regulatory measures if a risk of a challenge is present. Accordingly, while there may be no actual constraint on Members differentiating between products on the basis of their environmental histories, the structure of the agreement is such that strong states will be less likely to accede to calls to adopt higher environmental standards. Opportunities for a ‘California effect’ to occur will accordingly be missed.

Since the interpretation of the term ‘like product’ fundamentally affects the regulatory scope of Members to differentiate between products, it fundamentally impacts upon the degree Members can foster sustainable consumption habits among their consumers. To resolve this, the term could be modified or interpreted to allow the environmental production history to be taken into account. Yet even if it could be said that the global environment would benefit from an express modification of the terms of Articles I and

---

11 Given the negative redistributive effects associated with trade measures, it is arguable from a policy perspective that the structure of the General Agreement should emphasise that trade measures be used only in exceptional circumstances. This structure is not, however, reflected in another of the covered agreement relevant to the environment – the SPS Agreement – and does not affect the interaction of the Articles of that agreement. More important is the requirement of the test used by the relevant Article to balance the interests at stake (for example free trade or environmental protection), and the constraint which is placed on the ability to use domestic regulatory measures which may inhibit free trade. Trachtman notes that a number of tests exist: national treatment rules, simple means-ends rationality tests, necessity or least trade restrictive alternative tests, proportionality, balancing tests and cost-benefit analysis. He considers that the General Agreement only uses national treatment rules (for example in Article III), a simple means-ends rationality test (in Article XX), and a necessity or least trade restrictive alternative test (in Article XX). He explains however that a national treatment rule can itself incorporate other tests, such as simple means-ends rationality tests, proportionality tests, cost-benefit analysis. Trachtman, J.P., ‘Trade and ... problems, cost-benefit analysis and subsidiarity’ (1998) 32 European Journal of International Law 37. See also Wirth, who argues that a cost-benefit test could be interpreted into “the ‘chapeau’ of GATT Article XX making the exceptions in that provision unavailable in cases of ‘a disguised restriction on international trade.’” Yet he is concerned that if used “methodological questions about the validity of cost-benefit analysis, particularly about the measurement and quantification of environmental or public health benefits,” would be “exacerbated in international multilateral organizations such as the WTO that have limited experience with such matters”. Wirth, D.A., ‘International trade agreements: vehicles for regulatory reform?’ (1997) University of Chicago Legal Forum 331, at 345.
III, and that this could be done without compromising their capacity to maintain strong markets, the Articles are regarded as so fundamental to the overall integrity of the General Agreement that it would be almost impossible to see them changed. This leaves interpreting the term ‘like product’ to allow products to be able to be distinguished on the basis of their environmental history: their PPMs.

This chapter will next explore the arguments for and against the use of PPM-based trade measures, setting out a typology of such measures, and will then trace the development of Article I and III law relating to the determination whether products are ‘like’. It shows that at one stage Article III (but not Article I) was interpreted so that the test of ‘likeness’ depended on the intention of the regulator as well as the effect of the measure. Only if the aim or effect of the measure was to afford protection to domestic production were the products considered to be like. This test, since overruled, allowed GATT panels considerable discretion to examine the rationality of domestic regulatory categories. The focus has now been returned to a comparison of the products in their own right, and only a generous reading of the current jurisprudence would encourage a panel to determine physically identical products to be ‘unlike’ on the basis of their environmental history.

**PPM-based trade measures**

Product-based trade measures are those measures which scrutinise a product in its ‘final’ form, that is as the product crosses the border. They are designed to assess the quality of the product, including the environmental externalities generated by the product, for example as it is being consumed or used (consumption externalities), to ensure that the product complies with domestic product standards. Generally, product

---

12 Jackson notes, for example, that Article I:1, which is largely based on the standard League of Nations clause, has only been modified once and, save for the deletion of the final sentence of the draft advanced and some minor editing changes, all other attempts to modify the scope of Article I:1 (the MFN clause) which the US advanced have failed. Jackson, J.H., *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (1969), at 252-253, §11.3. See Chapter 1, n 2, above, for a discussion of the amendment procedure under the General Agreement.

---
inspections can verify whether a product meets the product standard upon which the trade measure is based.

Process or PPM-based trade measures are those measures which scrutinise the manner in which a product has been made, manufactured, produced, harvested, extracted or grown. As such, PPM-based trade measures may assess not just the quality of the product, but also assess the quality of the production of the product. Generally, product inspections cannot verify whether a product meets the process standard upon which the trade measure is based, and recourse must be made to certification procedures. Because PPM-based trade measures assess and aim to address the externalities generated by a product throughout the product’s lifecycle, rather than the externalities generated by the product in its final form, many environmentalists consider that they are an essential tool to achieving sustainable development. Not only can PPM-based trade measures encourage sustainable purchasing patterns, they can also

---


15 See Charnovitz, S., ‘A taxonomy of environmental trade measures’ (1993) 6 Georgetown International Environmental Law Review 1. Although, as Charnovitz notes at 5, “As analytical techniques improve (e.g., chemical and nuclear), more process standards may be converted to product standards”. The Montreal Protocol provides an example of the difficulty of distinguishing between products on the basis of their processes. It allows parties to ban the importation of products made with, but not containing, controlled substances if such a ban is determined to be feasible. Yet so far, the Parties have decided that it is not feasible to enact such a ban. It has been found that Parties generally consider that it is not technically feasible to distinguish between production methods for the “vast majority” of products and “extremely costly and expensive” to make such a distinction for the remainder. This is partly because “[t]he process would involve either identifying trace residues in the products or inspecting manufacturing processes, and such inspections would only be administratively feasible with the co-operation of exporting companies and their governments.” Report of the Technology and Economic Assessment Panel in Response to Decision IV/27 of the 4th Meeting of the Parties in Copenhagen, Denmark, November 1992, in Twum-Barima, R. and L.B. Campbell, Protecting the Ozone Layer through Trade Measures: Reconciling the Trade Provisions of the Montreal Protocol and the rules of GATT (1994), at 39-40. See the Montreal Protocol at Article 4.4; 4 bis. Compare United States – Gasoline, discussed in Chapter 5 below, where the Appellate Body considered certification to verify compliance feasible.

help implement the ‘Polluter Pays Principle’ by requiring the producer to bear the cost of environmental damage when such damage occurs during the production phase.\textsuperscript{17}

If a product generates negative environmental externalities, that is, it is harmful to the environment, the relevant issues in ecological terms are the magnitude of harm, the locus of the harm, and the capacity of the environment to adapt to or recover from the harm. How the harm came about, whether it occurred while the product was being produced or consumed, is only relevant in devising an approach for future preventative action. Similarly, according to economic theory, if a product generates negative externalities resulting in a welfare loss, it is not relevant whether the welfare loss came about as a result of a product being produced or consumed. What is relevant is that a welfare loss has occurred.\textsuperscript{18} The welfare loss may not always be considered to have occurred in the same place as the environmental harm. If the country in which the product is produced and the harm occurs does not recognise the resulting environmental externalities as negative, but the importing country does, we can say that the harm occurred in the exporting country and the externalities or welfare loss occurred in the importing country. In economic terms however, the nature of the externalities or the welfare loss is not changed as a result of it arising through the production or consumption of the product.\textsuperscript{19} Accordingly, it is arguable that in both ecological and economic terms, a distinction between trade measures made on the basis of whether the

\textsuperscript{17} Housman and Zaelke report that in the first UNCED background study (The International Economy and Environment and Development: Report of the Secretary-General of the Conference, Preparatory Committee for United Nations Conference on Environment and Development, 3d Sess, UN Doc A/CONF.151/PC/47 (1991)), “[i]n discussing the trade implications of national standards that regulate the process by which a product is produced, ... the report conclude[d] that it is reasonable to impose such standards [PPMs] on imports, at least where the production process degrades common resources and thus affects the importing as well as the exporting country”. They note that ultimately, however, this language was not reflected in the final results of UNCED. Housman, R.F. and D.J. Zaelke, ‘Trade, environment, and sustainable development: a primer’ (1992) 15 Hastings International and Comparative Law Review 535, at 586.

\textsuperscript{18} Pearce, D., ‘The greening of the GATT: some economic considerations’ in J Cameron, P Demarct and D Geradin (eds), Trade & the Environment: The Search for Balance (1994) 20-38; Schlagenhof, 1995, above at n 10 at 128.

\textsuperscript{19} Pearce, 1994, above at n 18. See in particular at 29 and 31. See also Trebilcock, M.J. and R. Howse, The Regulation of International Trade: Political Economy and Legal Order (1995), at 349 who argue that “There seems little basis for ... [the] conclusion” that “foregone welfare gains due to trade restrictions imposed for domestic environmental reasons will as a rule be any less than in the case of comparable restrictions imposed for global environmental reasons”. Moreover, [t]here is no obvious reason why the welfare gains from greater domestic environmental protection would be more likely to
measure is targeted at the production or consumption stage of a product is anachronistic.

Yet in both ecological and economic terms, if a pollution or conservation policy is to be put in place, its optimal position is directed at the source of the harm.\textsuperscript{20} Trade measures such as trade bans, tariffs and duties are applied at the time a product crosses a border. PPM-based trade measures are regarded as an inefficient means of targeting environmental harm partly because they only target the behaviour of those exporting to the country imposing the measure, but also because they can cause unwanted distortions to competition, considered further below.\textsuperscript{21}

**Formulation of PPM standards**

PPM standards or measures may be formulated in a number of ways. Churche notes that:

A key issue, from both a trade and environment perspective, is how the standard is developed, particularly who sets the standard and what considerations are taken into account in the decision-making process.\textsuperscript{22}

The measure could impose mandatory production requirements, or allow some flexibility. For example, it could specifically disallow a certain production process or could specify “emission or performance effects which are meant to be avoided or


achieved.” The measure could require the harmonisation of PPM requirements, or work on the basis of mutual recognition of PPM requirements.

**Product and Non-product related measures**

PPM-based trade measures may be classified as ‘product-related’ and ‘non-product-related’. Product-related PPM-based trade measures target aspects of the process or methods of production of a product which are evident in the characteristics of the final product. They “regulate processes which influence the environmental effects of a product when it is consumed”. Product-related PPM-based trade measures include measures concerned with the “physical or chemical properties of a product, the avoidance of health and sanitary risks, the improvement of consumer information, limitations on the environmental hazards of transportation, mandatory types of packaging and containers, waste disposal, retrieval and recycling of the products or their packaging.”

Non-product-related PPM-based trade measures establish requirements which address the production externalities of a product not evident in the characteristics of the final product. They regulate processes which have an environmental effect during the production phase, but which do not change the nature of the product. They include measures which specify:

- how to control the environmental pollution effects of production, such as air, water pollution or soil degradation. This may include emission controls which set maximum pollution levels by plant or region; performance requirements which specify pollutant releases per unit of output from a given plant; technology requirements which determine the technology to be used in the production process (e.g., introduction of cultivation methods that conserve the soil or avoid use or abuse

---

24 Ibid, at 10.
26 Ibid, at 10.
27 A measure prohibiting the use of purse-seine nets to catch tuna is an example of a non-product-related PPM-based trade measure. Tuna so caught will be physically identical to tuna caught using other methods, though the life-cycle impact of the tuna will differ.
of fertilisers, the regulation of animal husbandry that creates pollution, use of CFCs or certain solvents in the manufacturing process); or

- the methods to be used to produce goods or the methods of resource management other than the above. Examples include management for forest conservation; methods for catching fish or conserving certain species; provisions connected with animal welfare related to raising or slaughtering.  

Country and Origin-Neutral measures, Producer and Impact-based measures

PPM-based trade measures may be applied to target the behaviour of a country, or be origin-neutral. Origin-neutral measures “make no explicit distinction between foreign and domestic goods” or between individual countries. If Australia refused to accept timber imports unless the country of export belonged to a nominated timber labelling scheme, it would be applying a country-based measure. Origin-neutral PPM-based trade measures may be applied to target the behaviour of producers or to target the environmental externalities of the particular product. If Australia refused to accept a timber shipment unless the timber producer belongs to a nominated timber labelling scheme, the measure would target the behaviour of producers. If Australia refused to accept a timber shipment unless the timber has been certified as having been grown in a well-managed (and certified) forest, the measure would target the environmental externalities of the particular product. Most of the PPM-based trade measures considered by the GATT/WTO dispute settlement mechanism have been country-based, or ones where the characteristics of the producer, not the product, have been at issue.

Distinguishing between products upon the basis of the producer’s characteristics focuses more on who makes the product. How the product is made receives less attention. From a policy perspective, it seems appropriate that if production factors are to be taken into account when determining one products’ likeness to another product on

28 OECD, 1997, above at n 21, at 11.
environmental grounds, that the only factors which should be considered are those which are evidence based. That is, where objective evidence exists to show that the factors do affect the environmental impact of the product during its production stages. Moreover, it would be appropriate that the factors considered are well targeted to specific and serious environmental harms rather than harms of a relatively minor nature. This would help ensure that measures properly address genuine environmental problems and are not merely implemented to serve protectionist ends.

The consequences of distinguishing between two products on the basis of their environmental impact, as opposed to the characteristics of the producer, is perhaps made clear by the following example. Suppose two chairs arrive at the border. Both are made from sustainably managed plantation timber. The first chair is made by a company which only uses sustainably managed plantation timber, the second by a company which uses both sustainably managed plantation timber and old-growth timber to make its products. Suppose further that a country wishes to prevent its consumers from purchasing chairs made from old-growth timber. Either a non-product-related PPM-based trade ban assessing the environmental impact of production (an impact-based PPM ban) or a ban based on the characteristics of the producer (a producer-based PPM ban) could be chosen to achieve that country’s environmental policy. If the country chose to use an impact-based PPM ban, the products of the first company would be unaffected and the products of the second company would be affected only if the particular chair to be imported was made from old-growth timber. A producer-based PPM ban could, however, depending on how the measure was designed, ban all chairs made by the second company since the characteristics of that company are such that it uses old-growth timber to make at least some of its chairs. Under an impact-based PPM ban, both the chairs in our scenario could be imported;

---

30 This is consistent with the international obligation of state responsibility for environmental harm, where the threshold is generally considered to be that of ‘substantial’ or ‘significant’ environmental harm. Taylor, P., An Ecological Approach to International Law: Responding to the Challenges of Climate Change (1998), at 86-87, 93. See, eg, the Trail Smelter Case where the harm was of ‘serious consequence’ (at 1965). Compare Principle 21 of the Rio Declaration, where the magnitude of harm is not quantified or qualified.
under a producer-based PPM ban, it is likely that only the chair from the first company would be allowed in.\textsuperscript{31}

Origin-neutral PPM-based measures may be further classified according to whether the PPM attributes are evident in the final product and according to the characteristics of the environmental harm caused by the production process. The OECD has developed one such framework, which can be used to determine the PPM-based trade measure most suited to target the point of harm.\textsuperscript{32} Although sometimes used in policy discussions of PPM-based trade measures,\textsuperscript{33} the framework has not been introduced into WTO jurisprudence.\textsuperscript{34} As noted in Chapter 1, PPM-based trade measures may be implemented in a number of different ways, including directly through government regulation, market-based intervention, indirectly through measures influencing consumer choice and voluntarily by agreement of the industries concerned.\textsuperscript{35} As noted, we shall focus primarily upon non-product-related PPM-based trade measures implemented by government regulation.

\textsuperscript{31}I note that in relation to non-product-related PPM-based trade measures advocated for the protection of workers (i.e. in the labour standards debate) “who” made the product remains the central issue. A more tailored ban is one which targets the working conditions of the maker of the actual product being imported compared to one which targets the company which has high labour standards for some production activities (and/or products) and low standards for others.

\textsuperscript{32}OECD, 1997, above at n 21. See also Schlenhof, 1995, above at n 10, who has discussed the preliminary version of the OECD framework. For alternative frameworks, one for example dealing with the external reach of both product and process measures and the degree of unilaterism involved, another dealing with the degree of intrusiveness of the measure, see Charnovitz, 1993, above at 15. Charnovitz’ framework includes examples of measures which have been implemented and conform to these characteristics.

\textsuperscript{33}For example at the UNCTAD meeting on Positive Measures to Promote Sustainable Development UNCTAD Secretariat, \textit{Positive Measures to Promote Sustainable Development, Particularly in Meeting the Objectives of Multilateral Environmental Agreements TD/B.COM.1/EM.3/2} (1997).

\textsuperscript{34}While conceptually useful, since the covered agreements do not use the same level of detail to differentiate between PPM-based trade measures, it is unlikely that such a framework will be used.

\textsuperscript{35}Reiterer, M., ‘The international legal aspects of process and production methods’ (1994) 17(4) \textit{World Competition} 111, at 113. See also OECD, 1997, above at n 21.
Policy motivations for using PPM measures and some concerns

The common environmental policy motivations driving the use of PPM-based trade measures include:

- The promotion and enforcement of internationally agreed environmental standards, for example encouraging non-parties to join Multilateral Environmental Agreements (MEAs);
- The provision of ‘incentives’ to raise environmental standards within the jurisdiction of the importing country, within common areas and within the jurisdiction of other countries;
- The protection of the environment of the importing country from the transboundary effects of production;
- The protection of common areas and phenomena such as migratory species, not protected by international agreements; and
- The protection of areas and phenomena within the jurisdiction of countries where the environmental costs have not been internalised during the production process.

Government-imposed PPM-based trade measures can be problematic as the standard is set not by the country in which the environmental harm occurs, but by the importing country. The importing country may or may not consult with the exporting country when developing the standard, and while the standard might be appropriate to the environmental conditions and priorities of the importing country, it may be quite incompatible with those of the exporting country.36

Studies of the manner in which governments implement legislation to achieve policy goals indicate that governments do not necessarily choose the tools which are most effective in achieving the policy goal, rather they choose tools which will benefit them most politically.37 In addition to environmental policy concerns, competitive policy concerns also drive the use of PPM-based trade measures and include:

36 Reiterer, 1994, above at n 35; OECD, 1997, above at n 21.
• The protection of domestic markets, particularly those using a more environmentally efficient method of production or processing to make competing products; and
• Obtaining trade leverage to suit domestic agendas.

Examining products on the basis of their PPMs is not novel within the context of the General Agreement. As Snape and Lefkovitz note, no language within the agreement specifically prohibits trade measures from distinguishing between products on the basis of production processes, and the words of some panel reports indicate that trade mechanisms such as “tax and pricing systems, tariff schedules, consumer perceptions, and international agreements” can legitimately be employed to distinguish between sustainable and unsustainable process and production methods. As Brack points out, several of the covered agreements distinguish between products on the basis of their PPMs. For example, within the context of the Subsidies Agreement, products which have been favoured by the use of subsidy payments to minimise the effect of production or export costs can be singled out by an importing nation vis-à-vis products which have not been so favoured. Likewise, under the TRIPS Agreement, the treatment of intellectual property ‘products’ can be distinguished on the basis of whether they have created using misappropriated intellectual property or property properly transferred. Moreover, Article XX(e) of the General Agreement allows products to be distinguished based on whether or not they have been made using prison labour, and Article XX(g) has recently been interpreted to allow shrimp to be distinguished on the basis of how they were caught.

However, a primary concern regarding the use of PPM-based trade measures in the trade and environment context is the overall effect this will have on progress towards

38 Snape, 1994, above at n 16, at 796.
39 Brack, 1995, above at n 16, for example Articles 14 and 28 of TRIPs.
the liberalisation of international trade.\textsuperscript{42} Churche is concerned that their use "could seriously undermine concessions made by countries in the WTO and seriously reduce the value of the WTO system in providing a predictable basis for the conduct of international trade."\textsuperscript{43} The SPS Agreement, made during the Uruguay Round, can be seen as a recent normative embodiment of international concern at the growing trend of protectionist related trade barriers being couched in environmental and consumer health and safety related terms.\textsuperscript{44}

Also noteworthy is the competitive impact on producers who have to adapt their facilities and operations in order to meet the new production requirements. Such impact is particularly relevant in the case of small producers and for less developed countries, and is compounded when different states impose different PPM requirements making it difficult for producers to develop economies of scale.\textsuperscript{45} Changes to production processes will have financial and technical implications. For example, alternative technologies may need to be implemented to meet the PPM standards, and while some of those technologies may be free, some may need to be licensed or bought. Producers may be faced with higher costs because the PPM requirements of different


\textsuperscript{43} Churche, 1996, above at n 22, at 3.

\textsuperscript{44} Patterson, E., 'International efforts to minimize the adverse trade effects of national sanitary and phytosanitary regulations' (1990) 24 Journal of World Trade 91; Wynter, M., 'Beefing up our trade: environmental and consumer concerns and rural exports' in Robertson A.I. and R Watts (eds), Preserving Rural Australia: Issues and Solutions (1999) 69-81.

\textsuperscript{45} Roht-Arriaza also notes that differing standards can lead to confusion and difficulties in monitoring compliance. Roht-Arriaza, N., 'Precaution, participation and the "greening" of international trade law' (1992) 7 Journal of Environmental Law and Litigation 57; Bernazani, J.A., 'The eagle, the turtle, the shrimp and the WTO: implications for the future of environmental trade measures' (2000) 15 Connecticut Journal of International Law 207. Compare Howse, 1999, above at n 42, at 400-401, who argues that product certification and conformity assessment procedures can make this task simple and lower costs for exporters and at the border.
countries might be incompatible and the verification processes burdensome. In some cases the costs of modifying operations can be passed on to the consumer, but not always. This may prompt a shift in the location of production or the level of production, or producers may abandon the activity in favour of an even more environmentally harmful, but unregulated, activity.

Finally, the unilateral imposition of PPM-based trade measures, particularly country-based measures, gives rise to claims that the exporting country’s sovereignty has been compromised as its environmental practices and priorities are determined by the importing country. Moreover, since in reality it is only the economically more powerful countries which are in a position to effectively use PPM-based trade measures, it is they who are able to ‘dictate’ to the weaker countries their environmental standards and priorities. This raises charges of eco-imperialism and paternalism, and adds fuel to North-South tensions, particularly since the past use of environmentally framed trade measures has been associated with protectionist elements.

Environmentalists and protectionist groups may lobby individually for tightened PPM standards, or they may join forces to form effective ‘baptist and bootlegger’ coalitions. Business recognition and support for (or unsuccessful opposition to) a

---

46 OECD, 1997, above at n 21, at 21.
48 See Charnovitz, S., ‘Free trade, fair trade, green trade: defogging the debate’ (1994) 27 Cornell International Law Journal 460; Esty, V., ‘GATT law and environment-related issues affecting the trade of developing countries’ (1994) 28(3) Journal of World Trade 95. This was the basis for Mexico’s argument regarding ‘extraterritoriality’ in the Tuna-Dolphin I dispute, at paras 3.31, 3.37, 3.48; and the Panel’s ruling, at paras 5.27 and 5.32. In United States – Shrimp, India, Pakistan, Thailand and Malaysia all argued that the US’s measures sought to undermine their sovereignty in terms of conducting trawling activities and conserving sea turtles; See, for example, at paras 32, 38, 67, 196 and 301 of the Panel report. In fact, the sovereignty of the exporting country is not compromised by the use of PPM-based trade measures. At international law a country has no right of sovereignty to export, nor duty to import. A country retains the choice as to whether it wishes to adapt its environmental practices and priorities in order to continue trading with the importing state, or find a new market. McDonald, 1993, above at n 10; Charnovitz, 1994.
49 Churche, 1996, above at n 22.
50 ‘Eco-imperialism’ is the concept of nations using their market strength to dictate to other nations, reliant on the former’s buying power, their environmental standards. Developing countries regularly accuse the US of being eco-imperialistic. For discussion, see Charnovitz, 1994, above at n 48, at 492 and Esty, 1994, above at n 16, at 159.
51 As explained by Vogel, D., Trading Up: Consumer and Environmental Regulation in a Global Economy (1995), at 20, “This phrase comes from study of the politics of prohibition in the United States: political support from keeping certain southern counties ‘dry’ has come from both Baptists, who favour
move towards higher environmental PPM standards is the first element of the ‘California effect’ working to pull environmental standards higher.

The next element of the ‘California effect’ is that strong states must be able to prevent the importation of goods which do not meet their standards. It is here that the rules of the WTO become relevant, as they condition a state’s ability to prevent the importation of goods. Under customary international law, states are free to deny market access and impose discriminatory trade restrictions at their discretion. Until recently, however, it was generally believed that although Members could regulate the non-product-related PPMs of domestic products, trade measures specifying non-product-related PPM requirements for imported products were a violation of GATT/WTO rules. Thus, in relation to non-product-related PPM requirements for imported products, the second element of the ‘California effect’ could not operate.

The next section traces the development of the jurisprudence relevant to the unilateral use of non-product-related PPM-based trade measures as governed by Articles I, III and XI of the General Agreement, and the following two chapters trace the development of the jurisprudence relevant to Article XX of the General Agreement. From this it can be seen that the General Agreement allows states some ability to exert an upwards pull on PPM standards, but includes mechanisms to minimise the influence of protectionist forces on the process. Thus, the agreement as it is now interpreted largely allows Members to adopt a strong-trade-strong-environment approach to international trade, should they be so willing.

---

prohibition on moral grounds, and bootleggers, whose business depends on keeping alcohol sales illegal. Prohibition not only affects public morality but the market shares of legitimate and illegal alcoholic beverage producers and distributors.” Thus, the two groups campaign for the same goal, even though they are motivated for different reasons.


53 As will be recalled, Vogel considers that a ‘California effect’ can occur if, firstly, businesses see a competitive advantage in moving to higher standards, secondly, strong states prevent the importation of goods which do not meet those standards, and thirdly, strong states then negotiate market access conditions for weaker states in exchange for them adopting higher product and production standards. It also occurs, de facto, if weaker states, or producers in those states, adapt their production processes to meet those requirements.
'Like Product' case law

It will be recalled that Articles I and III require ‘like’ products to be treated in a manner which is not discriminatory, and that the traditional method of determining whether products are ‘like’ is grounded on a comparison of their physical characteristics, an assessment of their end-uses in a given market, consumers’ tastes and habits towards the products, and their tariff classification. This method does not generally include an examination of a product’s non-product-related PPMs, yet as noted, in both environmental as well as economic terms, distinguishing between measures on this basis could be considered anachronistic.

The concept of ‘like product’ appears in a number of the Articles of the General Agreement and the other covered agreements.\(^{54}\) It is generally not defined, and the interpretation is considered to vary according to which Article is being discussed.\(^{55}\) This has been so since the drafting of the Draft ITO Charter. At the London session of the Preparatory Committee, it was stated that “the expression ['like product'] has different meanings in different contexts of the Draft Charter”.\(^ {56}\) According to the GATT Analytical Index, the “Preparatory Committee did not think it necessary to

---

54 These include Articles I:1, II:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4, XIX:1 and as well as note Ad Article V of the General Agreement. The term ‘like commodity’ appears in Article VI:7; ‘like merchandise’ in Article VII:2; and ‘like or competitive products’ in Article XIX:1. Article 5.5 of the TRIMS, Article 9 of the Agriculture Agreement, and Articles 2 and 5 of the TBT Agreement also use the term ‘like products’, as does Article D of the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the TBT Agreement. In each of these agreements, the term ‘like product’ is not defined. Only in Article 2.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A, Final Act, Marrakesh, 15 April 1994 (Antidumping Agreement) is the term defined in relation to that agreement. The same definition appears in footnote 46 the Subsidies Agreement and is relevant for that agreement.

55 This is explained in Japan – Alcoholic Beverages, at 21 where the Appellate Body said “... there can be no one precise and absolute definition of what is ‘like’. The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.” See below at text accompanying nn 220-223.

56 EPCT/C.II/65, at 2 in GATT, Guide to GATT Law and Practice: An Analytical Index (6th ed, 1994), at 35, and Jackson, 1969, above at n 12 at 260. For example, Jackson notes that “it was noted in particular [during the 1946 preparatory conference] that when this phrase was used in the MFN obligation [Article I:1] that it had nothing to do with quantitative restrictions [Article XI]”. Jackson, 1969, at 260, §11.4.
define this phrase and recommended that such definition be studied by the ITO."57 The
Index further notes that during the preparation of the Draft Charter "and later at the
Havana Conference, it was suggested that the method of tariff classification could be
used for determining whether products were 'like products' or not."58

By 1970 a definition of 'like product' in the context of the General Agreement had still
not been reached, however the Working Party Report on Border Tax Adjustments,
adopted by the CONTRACTING PARTIES in 1970, observed:

With regard to the interpretation of the term 'like or similar products', which occurs
some sixteen times throughout the General Agreement, it was recalled that considerable
discussion had taken place ... but that no further improvement of the term had been
achieved. The Working Party concluded that problems arising from the interpretation
of the terms should be examined on a case-by-case basis, whether a product is 'similar':
the product's end-uses in a given market; consumers' tastes and habits, which change
from country to country; the product's properties, nature and quality. ... 59

The Working Party's formulation formed the basis of much of the subsequent
interpretations of the term 'like product' within the context of Articles I and III of the
General Agreement.

The interpretation of the term 'like product' in Article I

Article I requires that 'any advantage, favour, privilege or immunity' which is granted
by a Member to the product of one country is granted to the 'like products' of all
Members. The 'like product' issue arises in Article I:1.60 While the ordinary meaning
of the term in its context could be interpreted to include only those characteristics

57 EPCT/C.II/PV/12, at 6-7; London Report, at 9, at para A1(c) note 46 in GATT, 1994, above at n 56. As
noted by Mr Shackle (UK), "'like products' has occurred in commercial treaties for many years. There
has not, I think, been a precise international definition, though one was suggested by the Economic
Committee of the League of Nations. That has not prevented previous commercial treaties from
functioning, and I think it would not prevent our Charter from functioning until such time as the ITO is
able to go into this matter and make a proper study of it. I do not think we could suspend other action
pending that study." At EPCT/C.II/PV/12, at 7
58 ECPT/C.II/PV/12, at 7-8; E/CONF.2/C.3/SR.5, at 4, in GATT, 1994, above at n 56, at 35. See also
Jackson, 1969, above at n 12, at 260, §11.4.
59 L/3464, adopted on 2 December 1970, BISD 185/97, 102, at para 18 in GATT, 1994, above at n 56, at
141. Note the term 'CONTRACTING PARTIES' refers to the contracting parties of the General
Agreement acting jointly, Article XXV of the General Agreement.
60 See in Appendix A.
detectable in the product as it crosses the border (the final product), it could also include the characteristics of the product generated by it and its method of production during the product's lifecycle. As noted, the negotiating history on point provides little assistance in clarifying the term. The following section examines how the term has been interpreted in the jurisprudence of the GATT and the WTO.

**GATT jurisprudence**

The first case to raise the issue of 'like products' within the context of Article I of the General Agreement was *Australian Subsidy on Ammonium Sulphate*. In that case it was found that the two fertilisers ammonium sulphate and sodium nitrate were not 'like products'. What constituted a 'like product' was not defined, although reference was made to tariff schedules to support the conclusion that the products were not like. In the Australian schedule they were listed as separate concessions and had different rates of duties, only one of which was bound. The products were also listed separately in the schedules of other nations, only some of which gave the same rate for the different products. Although the term 'like product' was not defined, the working party examining the case clarified that 'like products' were distinct from 'directly competitive or substitutable products' and that Article I did not apply to directly competitive or substitutable products.

The case *Treatment by Germany of Imports of Sardines* gave little further insight into what constituted a 'like product' within the terms of Article I. In that case, Germany imposed higher tariffs, a countervailing tax and quantitative restrictions on preparations of *clupea harengus* (herring) and *clupea sprattus* (sprats) compared to that imposed on *clupea pichardus* (sardines). Norway argued that Germany's treatment of the preparations of the clupeoid family coming from Norway (*clupea harengus* and *clupea sprattus*) was less favourable than that given to preparations of the same family coming from Portugal (*clupea pichardus*), contrary to the provisions of Article I.1. The

---

61 Adopted 3 April 1950, GATT/CP.4/39, BISD II/188.
63 Adopted 31 October 1952, G/26 BISD 1S/53.
Panel noted that the difference in treatment given by Germany was not as a result of discrimination based on the country of origin, but because the three types of preparations were not ‘like products’. The Panel did not define what a ‘like product’ entailed, and looked only to see whether the parties had treated the products as ‘like’ in the tariff negotiations of the Torquay Round, which they had not. The Panel found that insufficient evidence had been presented to show a violation of Article I.

The next case to consider the ‘like product’ argument was the Belgian Family Allowances (Allocations Familiales) Report. In that case, Belgium charged a 7.5% levy on products bought by public entities, however products supplied by countries which provided a system of family allowances which conformed to the requirements of the Belgian law were allowed an exemption on the levy. The Panel found that Belgium’s discrimination between products on the basis of country of origin was inconsistent with Article I and was “based on a concept which was difficult to reconcile with the spirit of the General Agreement”.

This case is generally considered to be the starting point in GATT jurisprudence for the proposition that the General Agreement, and particularly Articles I and III, provides no basis upon which to distinguish between products on the basis of their non-product-related PPMs. Howse and Regan argue, however, that rather than this case standing as authority for such a conclusion, because the country of origin violation was so patent, the case is “completely unrevealing about the approach to origin-neutral process-based measures”. Furthermore, Hudec suggests that this statement “look[s] very much like alternate, non-legal grounds for the Recommendation [to remove the discrimination complained of]”. Certainly the brevity and ambiguity of the Panel’s

---

64 Note also that the Panel differentiated between ‘like products’ and ‘directly competitive or substitutable products’, and pointed out that Article I only limited conduct in relation to ‘like products’.
65 Held in 1951.
68 Howse and Regan, 2000, above at n 13. See, for example, Reiterer, 1994, above at n 35.
69 This is particularly so in relation to their treatment under Article III of the General Agreement. Howse and Regan, 2000, above at n 13, at 263.
70 Hudec, R.E., The GATT Legal System and World Trade Diplomacy (2nd ed, 1990), at 147.
reasons on point leave some doubt as to whether, and if so, the types of non-product-related PPMs ruled out by this case.

In the case of EEC – Measures on Animal Feed Proteins, the panel was asked to consider whether animal, marine and synthetic proteins were ‘like’ vegetable proteins. The Panel took into account the number of products and tariff items carrying different duty rates and tariff bindings in tariff schedules, and also assessed the physical characteristics of the product flowing from the varying protein contents of the products and the different vegetable, animal and synthetic origins of the protein products. It concluded that the products were not ‘like’.

In the case of EEC – Imports of Beef from Canada, Recourse to Article XXIII:2 by Canada, the ‘like product’ concept was not itself defined. It is interesting to note, however, that product-related PPM requirements were used to determine whether products were ‘like’. These requirements were written into the tariff schedule for the product the subject of the dispute, and no issue arose as to whether or not they should be used to compare the products.

73 The EEC had granted a tariff concession for “high quality cuts” of fresh, chilled or frozen meat of bovine animals under tariff heading 02.01 during Multilateral Tariff Negotiations. This was in the form of a global levy free tariff quota of 21,000 tons (product weight) at a tariff of 20 per cent ad valorem. The EEC granted within this global quota a tariff concession for 10,000 tons of high quality grain fed, fresh, chilled or frozen beef. A footnote to the concession stated that entry under this sub-heading was “subject to conditions to be determined by the competent authorities.” (para 2.2). Commission Regulation No. 2972/79 specified the conditions for access to the 10,000 ton quota. It stated in Article 1(1)(d) “Carcasses or any cuts from cattle not over 30 months of age which have been fed for 100 days or more on a nutritionally balanced, high energy feed concentration ration containing 40% less than 70 per cent grain and at least 20 pounds total feed per day. Beef graded USDA ‘choice’ or ‘prime’ automatically meets the definition above.” (para 2.4). A certificate of authenticity was required and this had to be completed and endorsed by one of the issuing authorities listed in Annex II. For meat falling into the Article 1(1)(d) category, the issuing authority was the Food Safety and Quality Service of the United States Department of Agriculture. This authority could only certify meat coming from the US (para 2.5).

The Panel considered that products which met the Article 1(1)(d) specifications were ‘like products’ for the purposes of Article I of the General Agreement, and that they were accorded less favourable treatment in a manner inconsistent with Article I because the only issuing authority authorised to certify eligible products was a US’s authority empowered to certify US’s products. It further found that while the EEC had reserved its right to set conditions in relation to entry under the levy-free tariff quota, that Article II:1(b) of the General Agreement, which allowed such a right, “could not be interpreted to mean that countries could explicitly or by the manner in which a concession was administered actually limit a given concession to the products of a particular country”.

While the Panel referred to the Article 1(1)(d) requirements as ‘product specifications’, they could more properly be considered to be product-related PPM specifications. The Article 1(1)(d) requirements set
The case of Spain – Tariff Treatment of Unroasted Coffee: Claim of Brazil concerning a Spanish Royal Decree which divided unroasted coffee into five tariff classifications with different tariff treatment\(^7^4\) further emphasised the importance of the physical characteristics of the product, its end-uses and tariff schedules. Spain argued that coffee could be distinguished on the basis of organoleptics (ie, differences in taste, aroma, and body) which were due to differences in geographical factors, climatic and growing conditions, cultivation methods, preparation and processing of beans, and genetic factors. It used this argument to justify why it accorded less favourable tariff treatment to unroasted non-decaffeinated unwashed Arabica and Robusta coffees to that of ‘mild’ coffee. The Panel found, however, that the differences which occurred were not sufficient to warrant different tariff treatment. It noted that “it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ because of one or several of the above-mentioned factors.”\(^7^5\) The end-uses of the various forms of roasted coffee were essentially the same, indeed coffee was “universally regarded as a well-defined and single product intended for drinking”,\(^7^6\) mainly sold in the form of blends, and that no other contracting party distinguished between unroasted, non-decaffeinated coffee in the way Spain had. Accordingly, the Panel held that the products should be treated as ‘like products’ within the meaning of Article I:1.

While this case is used by some to demonstrate that the PPMs of a product are not sufficient grounds to justify different tariff treatment,\(^7^7\) the measures at issue were not in fact aimed at the PPMs of the coffee, but at the product characteristics of the coffee (which were the result of the product-related PPMs). The case certainly gives no insight into how non-product-related PPMs might be considered to affect the ‘likeness’

---

\(^7^5\) Spain – Tariff Treatment of Unroasted Coffee, at para 4.6.
\(^7^6\) Ibid, at para 4.7.
\(^7^7\) See, for example, Reiterer, 1994, above at n 35.
of a product. Rather, it makes the point that products do not have to be identical to be ‘like’.

Tariff classification nomenclature was again used in Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber. In that case, Canada argued that Japan unfairly applied a tariff on SPF dimension lumber when other types of lumber entered duty free. This effectively discriminated against Canada which had a high proportion of SPF dimension lumber compared to other types of lumber (such as Hemlock or Douglas Fir) to export. In Canada’s view, all dimension lumber was ‘like’, regardless of the genetic and environmental history of the tree. Japan argued, however, that “Canada admitted that SPF planed lumber generally, and planed lumber of other coniferous species generally, were not like products”. It argued that Canada was attempting to create a sub-position of goods with a degree of similarity (dimension lumber) not presently in existence and so was “forcing Japan into a concession that had not been negotiated.” The Panel noted that the General Agreement “left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure” and that adoption of the Harmonised System of tariff classification was one means of harmonising tariff classifications between countries. It noted that it was within the rights of contracting parties to adapt the tariff scheme to satisfy their own trade policy interests with the proviso that ‘like products’ be treated similarly. The Panel considered that arguments going to whether products are ‘like’ should be based on the tariff treatment of the goods on importation, ie, be based on the classification scheme used by the importing state. It noted that Japan had no tariff line for dimension lumber, and that dimension lumber was not recognised in any internationally accepted customs classification. Accordingly, it rejected Canada’s submission that the concept of dimension lumber was “an

---

79 Generally “2 inches nominally in thickness (1.5 inches or 38mm actual) by five standard widths: 4, 6, 8, 10, 12 inches nominally (respectively 89, 140, 184, 235, 286mm actual)” Canada/Japan: SPF Dimension Lumber, at para 2.8.
80 Canada/Japan: SPF Dimension Lumber, at para 3.35.
81 Ibid.
82 The Panel referred to Spain – Tariff Treatment of Unroasted Coffee, above at n 74, at para 4.4.
appropriate basis for establishing ‘likeness’ of products under Article I:1 of the General Agreement”.83

Summary

These cases show that GATT panels have considered the tariff classification scheme of the importing state,84 the physical characteristics of the product and its end-uses relevant to determining whether products are ‘like’ for the purposes of Article I. They also show that products do not have to be ‘identical’ to be considered ‘like’, but may have similar qualities. How similar those qualities must be for products to be considered ‘like’ has been a matter which panels have determined on a case-by-case basis.85 If a tariff classification includes details as to the PPMs of a product, it appears that differentiating between products on this basis is not contentious.86

These cases give little guidance on whether the non-product-related PPMs of products can affect their ‘likeness’. In the Belgian Family Allowances Report, there was no discussion as to whether products purchased from different contracting parties with or without a given family allowance scheme in place were unlike, although the Panel did rule that “the consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in ... respect” to granting an exemption on a levy.87 This could either be because of the country of origin nature of the exemption, or because the nature of the exemption was not “related” to the product. In Spain – Tariff Treatment of Unroasted Coffee, the measures were not non-product-related PPM-based trade

---

84 This is particularly so if similar tariff classifications are used by other nations. See further in Zedalis, R., ‘A theory of the GATT “like” product common language cases’ (1994) 27 Vandabilt Journal of Transnational Law 33.
85 This point was emphasised in Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, adopted 10 November 1987, L/6216 BISD 34S/83, at para 5.6, referring in particular to Spain – Tariff Treatment of Unroasted Coffee.
86 Indeed this has been suggested by some as a means of resolving the PPMs debate, for example Thomas Cottier in discussions at the Trade, Investment and Environment Conference, Royal Institute for International Affairs, London, 29-30 October, 1998; Brett Williams, private communication. Given the timeframes involved in negotiating such concessions, this approach is inadequate when a rapid response is required to an environmental problem.
measures, but were based on the characteristics of the product itself. Finally, in *Canada/Japan: SPF Dimension Lumber*, dimension lumber obtained from trees with different genetic and environmental histories were able to be accorded different tariff treatment, but this was because dimension lumber itself did not form such a universal product category that it had been classified as such in any internationally accepted customs classification scheme.

**WTO jurisprudence**

Only a few WTO dispute settlement panels have considered Article I to date. In the first case, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, the issue of whether the products in issue (bananas) were ‘like’ was not contentious. All parties to the dispute based their legal arguments on the view that the products in question were ‘like products’ “in spite of any differences in quality, size or taste that may exist.”

In *Indonesia – Certain Measures Affecting the Automobile Industry*, the Panel took it for granted that if products were considered to be like, then any advantage accorded to a Member could not “be made conditional on any criteria that is not related to the imported product itself”. It referred to the case of the *Belgian Family Allowances Report* in this regard.

---

87 *Belgian Family Allowances Report*, at para 3.
89 At para 7.62. The Panel did note however that the “factors commonly used in GATT practice to determine likeness,” included “for example, customs classification, end-use, and the properties, nature and quality of the product”, and referred to the Appellate Body Report on *Japan – Alcoholic Beverages* for a “general discussion of relevant factors for determining the likeness of products”. *European Communities – Bananas*, at note 355. *Japan – Alcoholic Beverages* is considered further below in relation to Article III of the *General Agreement*.
91 Ibid, at para 14.143. The Panel qualified this finding in *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body report (hereinafter *Canada – Automobiles*). In *Canada – Automobiles*, Japan argued that “by making [an] … import duty exemption conditional upon criteria which are unrelated to the imported
The Indonesian measures allowed eligible cars (known as National Cars) manufactured in Indonesia to be exempt from import duties on parts and components and luxury tax on sales if local content requirements were fulfilled.93 It also allowed National Cars manufactured in a foreign country to be similarly exempt if local content requirements and the requirement that cars be manufactured by Indonesian nationals were met.94 In contrast, cars which were not National Cars were subject to customs duties as high as 200%, and a 35% sales tax.95 The Panel noted that, in essence, tax exemptions for imported motor vehicles were dependent upon “whether or not PT TPN [PT Timor Putra Nasional] had made a ‘deal’ with that exporting company to produce that National Car, and [was] … covered by the authorization of June 1996 with specifications that correspond[ed] to those of the Kia car produced only in Korea”96 and had “achiev[ed] a certain local content value for the finished car”.97 It further noted that the tax exemptions for imported parts was conditional on them “being used in the assembly in Indonesia of a National Car”, being used by a company producing National Cars which had achieved a certain status, and the finished car having a certain local content value.98

The Panel did not specify what it meant by “criteria that is not related to the imported product itself”, nor did it consider whether such criteria could change the ‘likeness’ of the products at issue. It did state, however, that “[i]n the GATT/WTO, the right of

... product itself, Canada fail[ed] to accord the import duty exemption immediately and unconditionally to like products originating in all WTO Members” (at para 10.18). Accordingly, it argued that “the subjecting of an advantage to any condition unrelated to the product is inconsistent with Article I:1” (at para 10.19). The Panel rejected this approach. It found that the case law did not support the view that the word “unconditionally” in Article I:1 meant that any advantage granted in connection with the importation of a product to conditions not related to the imported product itself will violate Article I:1, whether or not such conditions discriminate on the basis of the origin of products. Rather, violation will depend upon whether or not such conditions discriminate with respect to the origin of products (para 10.29). Accordingly, the Panel found that “[t]he statement in the [Indonesia – Automobiles] Panel Report that an advantage within the meaning of Article I ‘cannot be made conditional on any criteria that is not related to the imported product itself’ must … be seen in relation to conditions which entailed different treatment of like products depending upon their origin” (at para 10.28).

92 At para 14.144.
93 See the measures relating to the February 1996 Programme in Indonesia – Automobiles at para 2.16.
94 See the measures relating to the June 1996 Programme in Indonesia – Automobiles at para 2.17.
95 Indonesia – Automobiles at para 14.145.
Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place.99 It thus appears that the Panel considered that such ‘private contractual obligations’ were criteria ‘not related’ to the imported product, as were local content requirements and conditions on the end use of the product. Certainly these criteria would not have changed the product in a manner which was ‘detectable’.

At first blush it could be argued that this case builds upon the ruling in the Belgian Family Allowances Report to provide that Article I does not allow products which are seemingly ‘like’ to be distinguished on the basis of non-product-related PPM criteria. Yet it could be argued that the criteria considered to be ‘not related’ to the product in Indonesia – Automobiles are quite distinct in character to the type of criteria used to distinguish between environmentally harmful and environmentally benign production processes. Unlike the criteria used in Indonesia – Automobiles, environmental harm caused by production processes can be scientifically assessed and quantified by internationally recognised techniques.100 While not all environmental externalities may be detected in the final product, they may be detected and measured at some stage during the production process with a ‘cause and effect’ relationship being discernible. In this sense, the criteria relating to the harm and the production process is clearly ‘related’ to the imported product, even if it is not detectable in the final product. In contrast, any ‘externalities’ generated by a failure to implement the Indonesian

99 Ibid, at para 14.145. The Panel further referred to Canada – Administration of the Foreign Investment Review Act (the FIRA case, see n 154, below) in this regard and stated at note 717 “For instance in the FIRA case, the Panel rejected Canada’s argument that the situation under examination was the consequence of a private contract with an investor: ‘5.6 The Panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-a-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this were so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters.””
100 Environmental valuation is complex, although techniques are becoming more established. For a discussion of various environmental valuation methodologies, see Pearce, D., A. Markandya and E.B. Barbier, Blueprint for a Green Economy (1989); Costanza, R., R. d’Arge, R. de Groot, S. Farber, M. Grasso, B. Handor, K. Limburg, S. Naeem, R. O’Neill, J. Paruelo, R.G. Rassín, P. Sutton and M. van den Belt, ‘The value of the world’s ecosystem services and natural capital’ (1997) 387 Nature 253;
measures are of a more ephemeral nature, difficult to quantify, and related more to the characteristics of the producer rather than that of the product.  

Article I was also raised in United States – Shrimp, where the US banned the importation of shrimp and shrimp products from nations not appropriately certified. Some nations received an initial phase-in period of three years prior to the application of the measure, others received a significantly shorter phase-in period. The measure was a country-based non-product-related PPM-based trade measure which distinguished between physically identical products (shrimp). The Panel did not find it necessary to make a finding in relation to Articles I or XIII of the General Agreement, instead finding the measure amounted to a violation of Article XI.

**Summary**

The WTO jurisprudence on Article I confirms that the physical characteristics of a product, its tariff classification, end-uses in a given market, and consumers’ tastes and habits in relation to it, are the primary means for determining the ‘likeness’ of products. Except for the case of Indonesia – Automobiles, the jurisprudence provides little further insight into whether ‘like products’ can be distinguished on the basis of their non-product-related PPMs. In Indonesia – Automobiles, the Panel stated that any advantage accorded to a Member “cannot be made conditional on any criteria that is not related to the imported product itself”, however it did not go into detail as to what factors it considered to be ‘not related’. As discussed, the type of criterion examined in that case is arguably distinguishable from criteria which could be used in an impact-based PPM measure, as unlike the measure in Indonesia – Automobiles, the environmental externalities generated by a particular production method are capable of quantification


101 See further below at text accompanying nn 200-202.

by recognisable scientific techniques and may be considered to be ‘inherently objective’.\(^{103}\)

Article I is relevant if products from different nations are treated differently. If the entry of products from any nation is banned or otherwise limited by way of a quantitative restriction, then Article XI of the *General Agreement* is relevant.\(^{104}\) However, if it can be shown that the measure is not a border measure, but an *internal* measure applied at the border to imported products in accordance with Note Ad Article III, then it will not be considered to be an Article XI violation.\(^{105}\) In that case, the measure will be tested pursuant to Article III to determine whether the imported product is treated less favourably than a ‘like’ domestic product. If the products are found to be not ‘like’, then the imported product can be treated less favourably.\(^{106}\) Article III is considered below.

### The interpretation of the term ‘like product’ in Article III

Article III requires that Members “avoid protectionism in the application of internal tax and regulatory measures”\(^{107}\) to imported products. The ‘like product’ issue arises in


\(^{104}\) Article XI:1 establishes the general prohibition against quantitative restrictions. Article XI:2(c) contains an exception to the prohibition on agricultural or fisheries products which refers to the like domestic product, however, it is generally considered that products must be virtually identical to be considered ‘like’ for the purposes of this Article. Jackson, 1969, above at n 12, at 263. This aspect of Article XI is not considered in this thesis.


\(^{106}\) Note, however, if the products are directly competitive or substitutable with one another, and the measure is a tax, then Article III:2, second sentence is relevant. If the products are in competition with one another, but are not similarly taxed, then the measure will be examined to determine whether it has been applied so as to afford protection to domestic production. If this is the case, then the measure will be found to be in violation of Article III:2, second sentence. This aspect of the jurisprudence is not examined in any detail as the focus of this thesis is products which are physically similar or identical. Note, however, the comments of Charnovitz that dissimilar products, one more ‘environmentally friendly’ than the other, can often be competitive. See at text accompanying Chapter 2, n 8, above.

\(^{107}\) *Japan – Alcoholic Beverages*, at 16.
Article III:2 which deals with internal taxes and other internal charges, and in Article III:4 which deals with laws, regulations and requirements affecting a product’s internal sale, offering for sale, purchase, transportation, distribution or use. Note Ad Article III allows internal measures to be applied to imported products at the border, and Note Ad Article III:2 clarifies the manner in which it applies to both ‘like products’ and ‘directly competitive and substitutable products’, a category wider than ‘like products’.  

Like Article I, the ordinary meaning of the term ‘like product’ could, in its context, be interpreted to include only those characteristics detectable in the product as it crosses the border (the final product). Alternatively, it could include the characteristics of the product generated by it and its method of production during the product’s lifecycle. Article III has been considered by a number of GATT and WTO panels. These are examined in the following section.

It is to be noted that due to the textual differences of Articles III:2 and III:4, the term ‘like product’ in each article encompasses a different range of products. As held by the Appellate Body in European Communities – Measures Affecting Asbestos and Asbestos Containing Products:

the scope of “like” in Article III:4 is broader than the scope of “like” in Article III:2, first sentence. ... we note [however] ... that Article III:2 extends not only to “like products”, but also to products which are “directly competitive or substitutable”, and that Article III:4 extends only to “like products”. In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2 of the GATT 1994.  

Although this result was foreshadowed by the Appellate Body in Japan – Alcoholic Beverages, there was no marked distinction in the case law as to how the term ‘like product’ was interpreted in Articles III:2 and III:4 until the Appellate Body decision in European Communities – Asbestos. Accordingly, this section deals with the Article III cases together, in chronological order. Moreover, notwithstanding the difference in

---

108 See in Appendix A.
110 Report of the Appellate Body in Japan – Alcoholic Beverages, at 21; see n 55, above.
The first case to raise Article III was the working party report on Brazilian Internal Taxes. The working party relied on the assurances of the Brazilian delegate that the two products under consideration, French cognac and conhaque, a locally made beverage containing aromatic or medicinal substances, were quite distinct. No further inquiry into the 'like product' concept was made.

In the unadopted report Canada – Measures Affecting the Sale of Gold Coins, the Panel investigated whether the taxes imposed by the Province of Ontario on Maple Leaf (Canadian) and Krugerrand (South African) gold coins were applied in accordance with Article III:2. The Panel found that the Maple Leaf and Krugerrand coins were both legal tender in their respective countries of origin, although they were normally purchased as investment goods. Accordingly, it considered that the coins were not only

---

112 Adopted 30 June 1949, BISD Vol II/181.

116
means of payments, but were 'products' within the meaning of Article III:2. Moreover, the Panel found that the "Maple Leaf and Krugerrand gold coins [were] ... produced to very similar standards, ha[d] the same weight in gold, and therefore compete[d] directly with one another in international markets." It therefore found that the gold coins were 'like' products within the meaning of Article III:2, first sentence.

In United States – Taxes on Petroleum and Certain Imported Substances, a lower tax on petroleum was applied for "crude oil received at a US refinery" than for "petroleum products entered into the US for consumption, use or warehousing." One issue was whether the petroleum products were in fact 'like'. The Panel found that the domestic imported products subject to the tax were either identical (crude oil, crude oil condensates, and natural gasoline) or served substantially identical end-uses (liquid hydrocarbon products). Accordingly, the Panel found them to be 'like'.

113 L/5863 (unadopted, 1985).
114 Ibid, at para 51.
116 The ‘Superfund’ case at para 2.2.
117 Ibid, at para 5.5.1.
118 The ‘Superfund’ case is primarily relevant to the issue of border tax adjustments for articles which have been physically incorporated into products during the production phase. The US Superfund Amendments and Reauthorization Act of 1986 (Superfund Act) imposed a tax to cover cleanup costs on certain feedstock chemicals used in the processing of chemical derivative products. The tax was imposed on the domestic feedstock chemicals, unless they were exported. It was imposed on imported products made from feedstock chemicals in the amount equal to that which would have been imposed "if the taxable chemicals had been sold in the United States for use in the manufacture or production of the imported substance" (at para 2.5 of the report). The Panel noted the conclusions of the Working Party on Border Tax Adjustments “that taxes directly levied on products were eligible for tax adjustment” (at para 5.2.4). It found that the tax in issue was directly levied on the product and so was, in principle, eligible for border tax adjustment (at para 5.2.7). The Panel concluded the tax was consistent with Article III:2, first sentence (at para 5.2.10).

Note that the issue of border tax adjustments is complicated. The eligibility of adjustment to taxes on processes and certain product inputs is uncertain, yet will become relevant if carbon taxes are adopted, for example, as a mechanism to implement commitments made under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 ILM 22. Hereinafter the Kyoto Protocol. The Kyoto Protocol is not yet in force.

In the case of taxes on imports, Article II:2(a) allows the border tax adjustment of "a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part" (emphasis added, footnote omitted). The Superfund case appears to confirm that taxes on physical inputs may be eligible for border tax adjustment. Whether taxes related to the carbon emitted or energy consumed during the production of the product, or some other aspect of the production process (such as transportation or storage) would also be eligible for adjustment for imported products is unclear. Demaret, P. and R. Stewardson, ‘Border tax adjustments under GATT and EC law and general implications for environmental taxes’ (1994) 28(4) Journal of World Trade 5, at 18; Brack, D., 'Energy tax, border tax adjustments and the multilateral trading system' (Papar presented at Institute for Environmental Studies (IVM) International Workshop on Market-Based Instruments and
Similarly, in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*,\(^\text{119}\) the Panel found that similar properties and end-uses of products (such as gin, vodka, whisky, certain brandies and “classic” liqueurs, still wine and sparkling wine) were important in determining whether they were ‘like’. It also found the tariff classification nomenclatures to be influential.

The Panel noted ‘like products’ did not have to be identical. It noted that in the French Text of the *General Agreement*, ‘like product’ read ‘produits similaires’ and stated:

\[\text{International Trade, Amsterdam, 19 March 1998, at 7-8; Fauchald, O.K., *Environmental Taxes and Trade Discrimination* (1998), at 178ff. As noted by Demaret and Stewardson, Article III:2 applies to taxes applied ‘directly or indirectly’. They argue that “In a sense, a tax on any input to a final product or aspect of its production may be considered to be imposed indirectly on that final product, so that Article III:2 could, in principle, be read so as to allow the adjustment of taxes on any input to any stage of production or distribution.” Demaret and Stewardson, 1994, at 18; see also Fauchald, 1988, at 181, 186-188. The tax on the imported product could not, however, be in excess of the tax applied to the like domestic product, nor otherwise applied in a manner contrary to the principles of Article III:1. Note also the possible application of Article XX to border tax adjustment schemes. As Brack points out, the measure at issue would be the adjustment of the tax at the border, not the existence of an energy tax. A panel could find such a measure arbitrarily or unjustifiably discriminatory or a disguised restriction on international trade because its main purpose would not be to reduce carbon emissions or energy use, but to achieve the goal of border tax adjustments, i.e., “to protect domestic industry from the actual or perceived competitiveness impacts of the tax.” Brack, 1998, at 11. Compare the position of taxes on exports, regulated by the *Subsidies Agreement*. Tax rebates on product exports may be considered to be export subsidies except where the exemption is from taxes and duties borne by the like domestic product or the remission is of taxes and duties not in excess of those accrued (footnote 1 to Article 1.1(ii)). Tax rebates for input taxes are permissible if the goods or services taxed are consumed in the production of the exported product and are not in excess of the taxes levied on goods and services used in the production of like domestic products sold for domestic consumption (Annex I, para (h) and footnote 60). As noted in footnote 61, “Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts consumed in the course of their use to obtain the exported products.” On this basis, an energy tax is rebatable. McDonald, J., ‘Mainstreaming ESD - trade and the environment in the Millenium Round’ (Paper presented at *Trade and Environment Round Table*, Parliament House, Canberra, 29 August 1999), at 35; Brack, 1998, at 8; Schoenbaum, T.J., ‘International trade and protection of the environment: the continuing search for reconciliation’ (1997) *91 The American Journal of International Law* 268, at 311. Footnote 61 is allegedly the subject of a ‘gentleman’s agreement’ to the effect that it was intended to addresses “a narrow issue involving certain energy-intensive exports from a limited number of developing countries. It was never intended to fundamentally expand the right of countries to apply border tax adjustments for a broad range of taxes on energy, especially in the developed world.” Letter from Donald M. Phillips, Assistant United States Trade Representative for Industry, to Abraham Katz, President, United States Council for International Business. Cited by Demaret and Stewardson, 1994, at 30; Brack, 1998, at 9; McDonald, 1999, at 35, note 189; and Schoenbaum, 1997, at 311. As Schoenbaum notes, the ‘gentleman’s agreement’ is not part of the public record and should be disregarded in favour of the ordinary meaning of the text in its context and in light of its object and purpose. The requirement remains, however, that there must be an equality of treatment for like products.
\]
Last GATT practice has clearly established that 'like' products in terms of Article III:2 are not confined to identical products but cover also other products, for instance if they serve substantially identical end-uses.\textsuperscript{120}

Moreover, it noted in the context of Council discussions on the interpretation of Article III:4 in relation to \textit{Spain – Measures concerning Domestic Sale of Soybean Oil},\textsuperscript{121} (unadopted) where ‘like product’ was held to mean “more or less the same product”, that several contracting parties had criticised this interpretation for being too strict.\textsuperscript{122}

The Panel noted in \textit{Japan – Customs Duties} that products must be determined to be ‘like’ on a case-by-case basis, and that both objective criteria, “such as composition and manufacturing processes of products”, as well as the “more subjective consumers’ viewpoint (such as consumption and use by consumers)” should be taken into account when deciding the issue.\textsuperscript{123} The Panel was not specific, however, as to whether only product-related PPM criteria could be seen to influence the manufacturing process or whether non-product-related PPMs could also be influential. In that case, the Panel found Japanese shochu and vodka to be ‘like products’. It noted them to be “both white/clean spirits, made of similar raw materials, and [with] ... end-uses [which] were virtually identical (either as straight ‘schnaps’ type of drinks or in various mixtures).”\textsuperscript{124} It found that those products could also be considered to be directly competitive and substitutable, as could certain other beverages under consideration.

\textit{The introduction of the ‘aim and effect’ test into GATT jurisprudence}

GATT panels traditionally examined products by comparing their physical characteristics, looking at their tariff classification and end-uses given markets, and noting consumers’ tastes and habits towards products. In \textit{United States – Measures Affecting Alcohol and Malt Beverages},\textsuperscript{125} the Panel implemented a new approach. It introduced a \textit{purposive} test, also known as the ‘aim and effect test’, to augment its

\textsuperscript{120} Ibid, at para 5.5(d).
\textsuperscript{121} L/5142, dated 17 June 1981.
\textsuperscript{122} C/M/152 at 16 in \textit{Japan – Customs Duties}, at para 5.5.
\textsuperscript{123} Ibid, at para 5.7.
\textsuperscript{124} Ibid, at para 5.7.
determination of whether products were 'like'. The test allowed panels to have a broader discretion when examining the legality of measures. While this enabled them to accord greater deference to national regulatory measures, it also allowed them greater discretion to strike down measures.

The adoption of the test represented a move away from a rules-based approach as the test was not found in the text of the agreement. Since there were no established criteria by which the test operated, the test was inherently unpredictable. Moreover, the test was not consistently applied by panels, again introducing uncertainty into the operation of the rules. For example, while it was used in United States – Malt Beverages and in United States – Taxes on Automobiles, it was not used by panels in the intervening dispute – the infamous United States – Restrictions on Imports of Tuna (Tuna-Dolphin II), considered below. This may be explained by the fact that the 'aim and effect test' was introduced in relation to Article III:2 whereas Tuna-Dolphin II was concerned with Article III:4. Despite some difference in the language of the two Articles, the difference is not sufficient to support a reading of the 'aim and effect test' in Article III:2 and not Article III:4. Moreover, the Panel in United States – Malt Beverages applied the test to its reading of the term 'like product' in both of those two Articles.

The following sections largely deal with the cases in chronological order. Firstly, United States – Malt Beverages is discussed, as is the introduction of the 'aim and effect' test. Next, the two Tuna-Dolphin disputes, which ignore the test, are discussed together. Finally, the return of the test in United States – Automobiles is discussed. It

---

128 As noted previously at text accompanying nn 109-111, the difference in language of Articles III:2 and III:4 has recently led the Appellate Body in European Communities – Asbestos to note that the term 'like product' in Article III:4 is to be read more broadly than that in Article III:2, first sentence, although not more broadly than the combined scope of the first and second sentence of Article III:2 (which covers 'directly competitive and substitutable products' as well as products which are 'like'). This interpretation reflects an approach consistent with the principles of customary international law, and provides justification for dealing with the cases raising Articles III:2 and III:4 separately. Under the GATT regime and in the early WTO cases, however, panels made no such distinction between Articles III:2 and III:4 in their interpretation of the term 'like product'. Accordingly, a chronological approach to the discussion of the cases has been adopted in order to reflect more closely the evolution of the term's interpretation.
is to be noted that while the ‘aim and effect’ test introduced a certain level of uncertainty into the system, its application largely favoured the use of taxes by states to protect the environment. It is for this reason that environmentalists have viewed the demise of the test with some concern.

In United States – Malt Beverages, the Panel considered relevant criteria such as the product’s properties, nature and quality, its end-uses in a given market and consumer’s tastes and habits in relation to the product. Importantly, however, it also considered that “the like product determination under Article III:2 also should have regard to the purpose of the Article.” The Panel considered that Article III:1 articulated the “basic purpose” of Article III, being to ensure that contracting parties do not use internal taxes and regulations in relation to imported or domestic products “so as to afford protection to domestic production.” The purpose was not, however, designed:

- to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production.

Thus, the Panel considered that “in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made ‘so as to afford protection to domestic production’.” In essence, the Panel shifted the focus of examination from that of the products at issue to that of the measure distinguishing between the products, examining whether the measure entailed a rational means to an end.

In United States – Malt Beverages, the ‘aim and effect’ test was applied to the Mississippi wine tax, one of the measures at issue in the case. The tax gave special treatment to wine produced by a certain type of grape which, the Panel noted, only

130 Ibid, at para 5.25.
131 Ibid.
132 Ibid. The Panel noted that its interpretation linking the determination of ‘like products’ to the fiscal or regulatory purpose of the measure at issue was limited only to the application of Article III:2 and not other ‘like product’ provisions of the General Agreement.
grew in south-eastern US and in the Mediterranean region. The Panel noted that this “rather exceptional basis for a tax distinction ... implie[d] a geographical distinction which afford[ed] protection to the local production of wine to the disadvantage of wine produced where this type of grape [could not] ... be grown”. The Panel noted that no public purpose for the tax differentiation was claimed by the US other than to subsidise small local producers; that unsweetened still wines had previously been found to be like products; and that tariff nomenclatures and tax laws did not usually distinguish between wines on the basis of grape varieties used in wine production. Accordingly, it found the tax to be inconsistent with Article III:2 on the basis that it afforded more favourable treatment to the domestic producer of the ‘like’ product.

The test was also applied to another measure in that case, the Beer Alcohol Content Requirements, maintained by a number of states of the US. The Measure established certain restrictions on points of sale, distribution and labelling based on the alcohol content of the beer (‘high’ or ‘low’ alcohol beer). It was tested in relation to Article III:4.

In considering whether high and low alcohol beer were ‘like products’, the Panel emphasised that Article III was not intended as a mechanism for harmonising the internal taxes and regulations of contracting parties, which differ from country to country. Thus, it felt that “the particular level at which the distinction between high alcohol and low alcohol beer [was] made in the various states [did] not affect its reasoning and findings.” Moreover, the Panel was conscious of the impact Article III could have on the ability of states to implement domestic regulatory measures, for example, to achieve human health and environmental objectives. At para 5.72 it stated:

the treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the General Agreement

---

133 Tsai, E.S., "Like" is a four-letter word - GATT Article III’s "like product" conundrum’ (1999) 17 Berkeley Journal of International Law 26. See also Trachtman, above at n 11.
136 Note that in Japan – Customs Duties, the Panel found that minor differences in alcohol would not justify products being distinguished as unlike (at para 5.9(d)), however it did recognise that alcohol content could, in some cases, lead to objective differences between products (See, for example, at para 5.9(a)).
137 United States – Malt Beverages, at para 5.71.
and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not “applied ... so as afford protection to domestic production”. In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. The Panel recalled its earlier statement that a like product determination under Article III does not prejudge like product determinations made under other Articles of the General Agreement or in other legislative contexts.

The Panel noted that low and high alcohol beer have similar physical characteristics, yet rather than ending its examination there, it looked to see whether the differentiation was applied “so as to afford protection to domestic production”. The Panel “recalled the US argument that states encouraged the consumption of low-alcohol beer over beer with a high alcohol content specifically for the purpose of protecting human life and health and upholding public morals” and that “the relevant laws were passed against the background of the Temperance movement in the US.” It also noted that in amending those laws, “the primary focus of the drafters ... may have been the establishment of a brewing industry which could serve as a new source of tax revenue.” However, the Panel concluded that:

irrespective of whether the policy background to the laws distinguishing alcohol content of beer was the protection of human health and public morals or the promotion of a new source of government revenue, both the statements of the parties and the legislative history suggest that the alcohol content of beer has not been singled out as a means of favouring domestic producers over foreign producers.

Accordingly, the Panel found that low alcohol and high alcohol beer were not ‘like products’ within the terms of Article III:4.

A third measure considered by the Panel in United States – Malt Beverages was a tax credit scheme provided by various states, available in respect of beer produced by small breweries. Only one state, Minnesota, provided the tax credits on a non-discriminatory basis. The Panel did not apply the ‘aim and effect’ test in this instance. Instead, it noted that the US had not argued that “the size of the breweries affected the nature of the beer produced or otherwise affected beer as a product”, and found in any case that

138 Ibid, at para 5.73.
139 Ibid, at para 5.74.
“beer produced by large breweries is not unlike beer produced by small breweries”.”\textsuperscript{140} This measure was an ‘origin-neutral’ PPM-based measure,\textsuperscript{141} but was a measure based on the ‘characteristics of the producer’ rather than of the product. Thus, while the Panel appeared to apply a stricter test to assess domestic regulatory measures based on PPM-based criteria, it can be argued that the non-application of the ‘aim and effect’ test was not, in this instance, inconsistent with the application of the test discussed above, as there it was the characteristics of the product and not the producer which were the focus of the investigation.

\textit{The Tuna-Dolphin Disputes}

Attention to the impact Article III could have on a state’s ability to implement domestic regulatory measures to fulfil its environmental aspirations was first brought to a head in \textit{United States – Restrictions on Imports of Tuna}\textsuperscript{142} (Tuna-Dolphin I). As noted above, the dispute was decided before \textit{United States – Malt Beverages}. The second Tuna-Dolphin dispute, Tuna-Dolphin II, was decided after. Tuna-Dolphin II did not, however, refer to \textit{United States – Malt Beverages} in its reasoning, nor did it apply the ‘aim and effects’ test.

Prior to the Tuna-Dolphin disputes, the \textit{General Agreement} went generally unremarked except in trade circles. These disputes brought it instant fame and infamy, not the least because they seemed to stand in the way of states adopting a strong environmental position. Tuna-Dolphin I and II were both based on the same factual circumstances. Both remain unadopted.\textsuperscript{143} Tuna-Dolphin I was concerned with the US’s ban on the importation of certain yellowfin tuna and tuna products caught in the Eastern Tropical Pacific Ocean (ETP) using the ‘purse-seine’ net technique. Tuna and dolphins in the ETP have a particular ecological relationship – shoals of tuna tend to swim under dolphins which remain visible on the surface of the water. To catch the tuna

\textsuperscript{140} The Panel found the tax credit scheme to have been maintained in violation of Article III:2, first sentence. \textit{United States – Malt Beverages}, at para 5.19.

\textsuperscript{141} For example, Howse and Regan, 2000, above at n 13, at 263.

\textsuperscript{142} DS21/R BISD 39S/155 (unadopted).
underneath, fishermen found and chased dolphins, intentionally encircling them with nets.

Mexico argued that the ban violated Article XI of the General Agreement, the rule against quantitative restrictions. The US argued that its measures were in fact internal regulations under Article III:4, enforced at the border pursuant to Note Ad Article III. It therefore argued that the prohibition was as a result of this enforcement and that no violation of Article XI was present.

The US measures were non-product-related PPM-based trade measures as they regulated the process by which the tuna was harvested, that process leaving no discernible characteristics on the tuna as a product. They were country-based measures as they prohibited the importation of tuna from countries unable to prove that “the average rate of incidental taking of marine mammals by [their] ... tuna fleet operating in the ETP [was] ... not in excess of 1.25 times the average incidental taking rate of US vessels operating in the ETP during the same period.”144

The Tuna-Dolphin I Panel based much of its reasoning on whether the US measures affected tuna “as a product”. It based this approach on its reading of the text of Article III and Note ad Article III, noting their frequent reference to ‘products’. Yet as Howse and Regan argue:

the repeated reference to “products” tells us nothing about the product/process distinction. It merely reflects the fact that GATT is about trade in goods, not about trade in services or the movement of capital or labour.145

The Panel concluded that the frequent reference to products meant that Article III and Note ad Article III “cover[ed] only those measures that are applied to products as

---

143 Accordingly, they had no legal significance in the GATT system, although they did provide guidance on how future cases might be decided. See Chapter 2, n 175, above.
144 Report of the Panel in Tuna-Dolphin I at para 5.2.
145 Howse and Regan, 2000, above at n 13, at 254. Compare Jackson, who considers that the reference to ‘like product[s]’ in this and other parts of the agreement does serve to emphasise the focus is on products and does not include a comparison of processes. Jackson, J.H., ‘Comments on Shrimp/Turtle and the product/process distinction’ (2000) 11(2) European Journal of International Law 303.
such."  

Although it did not define what it meant by “products as such”, its words suggested that measures which do not target the physical characteristics of a product do not affect the ‘product as such’.  

For example, the Panel concluded that the US measures:

[regulate] the domestic harvesting of yellowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product.

Since the Panel found that the measures did not affect tuna “as a product”, it found that they “did not constitute internal regulations covered by the Note Ad Article III”. It found in the alternative that if the measures could be regarded as regulating the sale of tuna ‘as a product’, that they would not be covered by Article III:4 since that Article requires products to be compared ‘as products’ to determine whether national treatment has been observed. The Panel was of the view that “Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product”, thus the incidental taking of dolphins by Mexican vessels was no basis to differentiate between the treatment provided to domestic and imported tuna. Rather, Article III:4:

obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.

Since the measures were found not to be internal measures applied at the border per Note ad Article III, they were tested against Article XI of the General Agreement. They were found to be inconsistent with that Article.

146 Report of the Panel in Tuna-Dolphin I at para 5.14 in relation to Note ad Article III. See also at para at para 5.11 where it stated “Article III covers only measures affecting products as such”.

147 See Howse and Regan, 2000, above at n 13, at 254, who state that the Panel’s reasoning suggests that “products as such” are defined by their physical constitution” at 5.

148 Tuna-Dolphin I at para 5.14. See also at para 5.10 where the panel considered that the regulations also did not “prescribe fishing techniques that could have an effect on tuna as a product.”


150 Ibid, at para 5.15.

151 Ibid, at para 5.15.
The 'like product' issue and 'affecting the product as such'

The main thrust of the Panel’s reasoning in relation to Article III was not so much whether tuna caught in compliance with the US’s measures was a product ‘like’ tuna which was not caught in compliance, yet this was their underlying assumption.

The Panel’s primary focus was their view that the measures did not regulate, and thereby affect, the sale of tuna ‘as a product’. Yet as noted by Howse and Regan:

> Who could doubt that, giving terms their ordinary meaning, process-based measures “affect the sale of products”? This is true even of the ban on the use of dolphin-unsafe fishing techniques by US fishermen (the Panel’s prime example of a regulation not affecting tuna) “as a product”, since the ban almost certainly affects the price and quantity of tuna sold. But more important, the whole complaint about the US’s regime is that it affects the sale of products by reducing the sales of foreign tuna.\(^\text{152}\)

Howse and Regan correctly point out that the grounds upon which the Panel in *Tuna-Dolphin I* found that the US measures could not be considered to be internal regulations for the purposes of Article III were extremely shaky as the term ‘affecting the sale’ has received a wide reading in past GATT cases. For example, in *Italian Discrimination against Imported Agricultural Machinery*,\(^\text{153}\) the Panel stated at para 12:

> The selection of the word “affecting” would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market. (emphasis added)

That is to say, if the conditions of competition between the domestic and imported products were adversely modified, the measure could be said to have affected the sale of the product. This point was upheld in *Canada – Administration of the Foreign Investment Review Act*,\(^\text{154}\) where the Panel found that a Canadian foreign investment requirement to buy from Canadian suppliers would prevent the purchase of imported goods directly from foreign suppliers. The Panel surmised that less advantageous conditions of importation would usually be offered by Canadian suppliers than by the relevant foreign suppliers, and so foreign products would be disadvantaged. Thus,

---

\(^{152}\) Howse and Regan, 2000, above at n 13, at 254.

\(^{153}\) Adopted 23 October 1958, L/833 BISD 78/60.

\(^{154}\) Adopted 7 February 1984, L/5504 BISD 308/140.
while the Canadian measure may not have affected the foreign products directly, the conditions of their competition could have been adversely affected.

A similar finding was made in *United States – Section 337 of the Tariff Act of 1930*, where the Panel considered that the procedural provisions of Section 337 of the US Tariff Act of 1930, designed to ensure compliance with US patent law, were covered by Article III:4. Section 337 applied when an imported product was alleged to infringe US patent law, and the case would be heard by the US International Trade Commission. When the infringing product was of US origin however, the case would be determined according to US patent law in the US federal district courts. The Panel held that the fact that “most of the procedures in the case before the Panel are applied to persons rather than products” did not mean that Article III:4 did not apply since “the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of US origin or imported.” Moreover, the Panel found that “enforcement procedures ... [could not] be separated from the substantive provisions they serve to enforce”. It reasoned that if the “procedural provisions of internal law were not covered by Article III:4”:

contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin.

Again, while the US measure may not have affected the foreign products directly, the Panel considered that the conditions of their competition could be adversely affected by less favourable enforcement procedures.

---

156 United States – Section 337, at para 5.10.
157 Ibid.
158 The wide reading of measures which ‘affect the sale of products’ has also been confirmed in WTO jurisprudence. In *European Communities – Bananas*, the Appellate Body stated at para 220 “The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application.” In *Canada – Automobiles*, the Panel found that a requirement which “confer[ed] an advantage upon the use of domestic products and den[ied] that advantage in case of the use of imported products” was regarded as measure which ‘affected’ the “internal sale,... or use” of imported products, notwithstanding the use of domestic products was not a mandatory requirement set down in law (at para 10.82ff).
Moreover, as discussed above in *United States – Malt Beverages*, the Panel considered that a tax credit scheme triggered by ‘characteristics of the producer’ was a measure which *could* fall within the scope of Article III, even if it constituted a *violation* of that Article; and as discussed further below, in *United States – Taxes on Automobiles*, the Panel found that a policy based on the non-product-related PPMs of a product *could* be considered under Article III:4, and indeed would amount to a *violation* of (not non-coverage by) that Article.

Howse and Regan also correctly point out that “the claim that Article III does not cover process-based measures, if taken seriously, would have totally unacceptable consequences.”159 In *Tuna-Dolphin I*, the domestic regulatory measure was a quantitative restriction, so even though it was found not to be covered by Article III, it was still assessable under Article XI. But what if the measure had been a tax as it was in *United States – Malt Beverages*? There, if the measure had been found not to have been assessable under Article III, it would have:

> escape[d] review entirely, as will any process-based measure that is enforced internally even against foreign products. This insulates internally-enforced process-based measures from an inquiry into disguised protectionism and puts them in a better state than product-based measures, which no one intends.160

In *Tuna-Dolphin II*, the Panel ignored the purposive test for ‘like products’ introduced in *United States – Malt Beverages*. Instead, it largely followed the reasoning of the Panel in *Tuna-Dolphin I*, although it was more explicit in its assumption that dolphin-friendly and dolphin-unfriendly tuna were ‘like’. It reasoned:

> [Article III] calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the *policies or practices* of the country of origin with those of the country of importation.161

Since it considered that Note ad Article III “could only permit the enforcement, at the time or point of importation, of those laws, regulations and requirements that affected or were applied to the imported and domestic *products considered as products*”, it could not apply:

159 Howse and Regan, 2000, above at n 13, at 256.
160 Ibid.
161 *Tuna-Dolphin II* at para 5.8 (emphasis added).
to the enforcement at the time or point of importation of laws, regulations or requirements that related to policies or practices that could not affect the product as such, and that accorded less favourable treatment to like products not produced in conformity with the domestic policies of the importing country."162

The Panel noted that the import embargoes of the US:

distinguished between tuna products according to harvesting practices and tuna import policies of the exporting countries; ... and that none of these practices, policies and methods could have any impact on the inherent character of tuna as a product.163

Accordingly, notwithstanding that its views diverged from existing GATT jurisprudence and had an unworkable practical effect, the Panel again found that Note Ad Article III was not applicable. The alternative was an interpretation of the General Agreement which would potentially allow Members to distinguish between products not only on the basis of environmental standards, but labour standards or any other process they found offensive. This would have totally undermined the strength of the discipline.

A return to ‘aim and effect’ – United States – Automobiles

The Tuna-Dolphin disputes sent shockwaves through the environmental community, which was becoming increasingly convinced that national efforts to protect the global environment could be undone by a strong trade regime unless that regime allowed strong and sanctionable environmental commitments to be observed. The Tuna-Dolphin cases demonstrated that the disciplines in the General Agreement designed to assist in the liberalisation of international trade and the promotion of comparative advantage were indeed strong. But what of options to protect the environment?

As shall be discussed in Chapter 4, the Panels also considered the US’s measures in the Tuna-Dolphin disputes in relation to Article XX of the General Agreement, but ultimately found that they were not saved by those provisions. The Panels did attempt to soften the blow to environmentalists. In Tuna-Dolphin I, the Panel noted that “its

162 Ibid, at para 5.8 (emphasis added).
163 Ibid, at para 5.9 (emphasis added).
task was limited to the examination of this matter 'in the light of the relevant GATT provisions' and therefore did not call for a finding on the appropriateness of the US’s and Mexico’s conservation policies as such’. It made reassurances that:

the provisions of the General Agreement impose few constraints on a contracting party’s implementation of domestic environmental policies ... as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers.\(^\text{165}\)

In *Tuna-Dolphin II*, the Panel commented that:

the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction.\(^\text{166}\)

Environmentalists were, however, not convinced, and campaigns directed against the further strengthening of trade rules began to gain momentum. Not only did they attract the attention of those concerned about the environment; health and safety standards, working conditions, jobs, sovereignty, and democracy were also seen to be at risk and campaigners responded to the call.

Just as the US was seeking to implement the Uruguay Round, *United States – Automobiles* was decided. Like the *Tuna-Dolphin* disputes, *United States – Automobiles* was never adopted. Accordingly, little weight could be attributed to the decision. In reviving the use of the aim and effects test developed in *United States – Malt Beverages*, however, *United States – Automobiles* took a considerably more flexible approach towards the integration of environmental concerns into the trade disciplines of Article III. Nevertheless, it rejected the view that non-product-related PPM-based trade measures could be consistent with that Article.

Three measures were at issue in *United States – Automobiles*:

- a luxury tax, levied on automobiles sold for more than $30 000, and on other products such as boats, jewellery and furs;
- a gas guzzler tax, levied on automobile models with a low fuel efficiency; and

\(^\text{164}\) Ibid, at para 6.1.  
\(^\text{165}\) Ibid, at para 6.2.  
\(^\text{166}\) Ibid, at para 5.42.
• a corporate average fuel efficiency requirement (CAFE), which fined manufacturers and importers of automobiles if the average fuel efficiency of the automobile fleet fell below a certain level.

For each of these measures, the European Community essentially argued that the automobiles being taxed and treated differently were ‘like products’ as they had the same end uses, basic physical characteristics, and belonged to the same tariff classification. The US argued however that “the key criterion in judging likeness under Article III was whether the measure was applied ‘so as to afford protection to domestic production’.”

The Panel essentially agreed with the US. It noted that:

the ordinary meaning of the term “like” in paragraph 2 and 4 of Article III was “the same” or “similar” ... [but the Panel] recognized however that two individual products could never be exactly the same in all aspects. They could share common features, such as physical characteristics or end use, but would differ in others. These differences between products formed the basis of regulatory distinctions by governments which could result in less favourable treatment to imported products. Thus the practical interpretive issue under paragraphs 2 and 4 of Article III was: which differences between products may form the basis of regulatory distinctions by governments that accord less favourable treatment to imported products? Or, conversely, which similarities between products prevent regulatory distinctions by governments that accord less favourable treatment to imported products? (emphasis added)

Furthermore, the Panel noted that “a primary purpose of the General Agreement was to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them”. It considered that “Article III could not be interpreted as prohibiting government policy options, based on products, that were not taken so as to afford protection to domestic production.” Famously, it concluded that:

the first step of determining the relevant features common to the domestic and imported products (likeness) would in the view of the Panel, in all but the most straightforward cases, have to include an examination of the aim and effect of the particular tax measure. ... issues of likeness under Article III should be analyzed primarily in terms of whether less favourable treatment was based on a regulatory distinction taken so as to afford protection to domestic production. (emphasis added)

167 United States – Automobiles, at para 5.2.
168 Ibid, at para 5.5.
170 Ibid, at para 5.8
171 Ibid, at para 5.8
172 Ibid, at para 5.9.
The Panel further explained that:

A measure could be said to have the *aim* of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal. A measure could be said to have the *effect* of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products.\(^{173}\) (emphasis in original)

The Panel noted the trade flows effect of the measure was irrelevant in terms of Article III in determining whether a measure had an effect of affording protection to domestic production.\(^{174}\)

Applying the aim and effects test to the measures at issue, the Panel concluded that neither the luxury tax nor the gas guzzler tax were applied with the aim or effect of affording protection to domestic production, and so did not distinguish between ‘like products’ for the purposes of Article III:2.\(^{175}\) The gas guzzler tax was in fact calculated on the basis of the fuel efficiency of the ‘model type’, not the individual automobile. Thus, it was possible for an imported automobile with the same low fuel efficiency as a domestic automobile to be taxed, and for the domestic automobile *not* to be taxed, if the domestic automobile belonged to a model type which had a fuel efficiency higher than the tax threshold. It is arguable in this instance that the Panel, in allowing such a measure to be sustained, “approved a tax classification based on production factors unrelated to the product as such”.\(^{176}\)

The Panel considered the CAFE regulation in relation to Article III:4. There were two aspects to the measure which attracted the Panel’s attention. Firstly, the average fuel efficiency of the automobile fleet was calculated separately for imported and domestic fleets. Secondly, fleets could be made up of large and small cars, however the fuel average of small cars and large cars could only be combined if the fleet was wholly

\(^{173}\) Ibid, at para 5.10.

\(^{174}\) Ibid.

\(^{175}\) Ibid, at paras 5.15; 5.26; 5.32 and 5.36.
imported, or wholly domestic. The Panel assumed that imported and domestic large
cars were like products, as were imported and domestic small cars. In the Panel’s view,
both aspects of the measure allowed the like domestic product to be accorded more
favourable treatment in a manner inconsistent with Article III:4.177

It is the Panel’s comments in relation to the fleet averaging methodology which are
most relevant to its views on the treatment of non-product-related PPM-based trade
measures. The Panel noted that the fleet averaging methodology was based on the cars’
non-product-related PPMs. It stated:

the difference in treatment under the averaging methodology depended on several
factors not directly relating to the product as a product, including the relationship of
ownership and control of the manufacturer/importer.178

The Panel noted that “Article III prescribes in general the treatment to be accorded to
imported products in relation to domestic products”, and Article III:4 refers to the
regulation of “the product as a product, from its introduction into the market to its final
consumption”.179 To do otherwise, the Panel claimed, would mean that Article III
could not serve its intended purpose, such as ensure the security of tariff bindings and
unconditional MFN treatment.180 Accordingly, the Panel was of the view that Article
III:4:

does not permit treatment of an imported product less favourable than that accorded to
a like domestic product, based on factors not directly relating to the product as such.
... to the extent that treatment under the CAFE measure was based on factors relating
to the control or ownership of producers/importers, it could not in accordance with
Article III:4 be applied in a manner that also accorded less favourable treatment to
products of foreign origin. It was therefore not necessary to examine whether treatment
based on these factors was also applied so as to afford protection to domestic
production.181 (emphasis added)

Thus, the Panel abandoned the use of the aim and effects test as it did not consider that
a policy based on ‘factors not directly relating to the product as such’ could be

Reporter, November 2 921, at 922.
177 See United States – Automobiles, at paras 5.49 and 5.50.
178 Ibid, at paras 5.50.
179 Ibid, at para 5.52. Note that in this statement, the Panel implicitly found against the use of life-cycle
analysis to differentiate between products.
180 Ibid, at para 5.53.
181 Ibid, at para 5.54.
consistent with Article III:4, nor that such factors could affect one product's likeness to another. This is somewhat startling given the Panel's view that "issues of likeness under Article III should be analyzed primarily in terms of whether less favourable treatment was based on a regulatory distinction taken so as to afford protection to domestic production",\(^\text{182}\) and that it arguably allowed non-product-related PPM criteria to be used in its examination of the gas guzzler tax elsewhere in the case. Yet again, perhaps its finding has parallels with that in United States – Malt Beverages. That is, because the non-product-related PPM criteria at issue were characteristics of the producer (rather than the product) the Panel considered the 'aim and effect' test inappropriate.\(^\text{183}\) If so, this should have been made specific.

**Summary**

These cases reiterate that the traditional method of comparing products on the basis of their physical characteristics, as well as their end-uses and tariff classification, is important under Article III.

This approach is effective in maintaining a strong trade regime, but can unduly restrain contracting parties trying to differentiate between similar products for legitimate policy reasons. It can therefore undermine other goals important to states. Encouraging or maintaining a strong environment is one such a goal. This effect was noted by the Panel in United States – Malt Beverages. To mitigate this, it introduced an 'aim and effect' test to identify and rule out measures applied to, or having the effect of, affording protection to domestic production.

The 'aim and effect' test was not based on the text of Article III, nor was it consistently applied by GATT panels. For example, it was not applied in Tuna-Dolphin II, decided after United States – Malt Beverages, but was applied in United States –

---

\(^{182}\) Ibid, at para 5.9.

\(^{183}\) That is, while the Panel stated that the "difference in treatment under the averaging methodology depended on several factors not directly relating to the product as a product" it specifically identified "the relationship of ownership and control of the manufacturer/importer" to the product as a factor affecting its view. Ibid, at para 5.50. (emphasis added).
Moreover, it was not applied consistently within each dispute to test the measures at issue. In particular, it was not applied to test measures which raised non-product-related PPM issues. In *United States – Malt Beverages*, the non-product-related PPM issue clearly concerned the 'characteristics of the producer' rather than the product. Since the ‘characteristics of the producer’ are not as amenable to objective assessment, in policy terms, the non-application in that case can be viewed as acceptable. In *Tuna-Dolphin II*, the measure was country-based. While both the characteristics of the product and the producer were at issue, the ‘aim and effect’ test was not applied. In *United States – Automobiles*, the Panel arguably took into account non-product-related PPM factors while applying the ‘aim and effect’ test in one part of the case, yet ruled out the test’s application in another part of the case when non-product-related PPM factors were the main point of comparison. It may be rationalised that the measure differentiated between products on the basis of the ‘characteristics of the producer’ rather than of the product, yet the Panel’s statements against the application of the ‘aim and effect’ test when non-product-related PPM factors were at issue were fairly sweeping. Since panellists had not overtly differentiated between non-product-related PPM factors based on the characteristics of the producer and those of the product in GATT case law, it is unlikely that the Panel in *United States – Automobiles* made such a distinction.

As noted, the reports in the *Tuna-Dolphin* disputes and *United States – Automobiles* were not adopted, so even though the reports might have provided guidance on how future reports might be decided, little weight could be attributed to the reports. Moreover, given that the ‘aim and effect’ test was used in one report, and not in the other, little guidance was provided as to the development of the test.

Accordingly, while the ‘aim and effect’ test provided states with a greater amount of regulatory discretion to introduce measures supportive of a strong environment, the test

---

184 As noted, the reports in the *Tuna-Dolphin* disputes and *United States – Automobiles* were not adopted, so even though the reports might have provided guidance on how future reports might be decided, little weight could be attributed to the reports. See Chapter 2 n 175 above. Moreover, given that the ‘aim and effect’ test was used in one report, and not in the other, the reports provided little guidance as to the development of the test.

185 See Chapter 2, n 175, above.
did not assist states wishing to utilise non-product-related PPM-based trade measures. Furthermore, because of the categorical manner in which such measures were dismissed in the two Tuna-Dolphin disputes, their use did not seem viable. This is despite neither of the disputes being adopted, and both containing somewhat questionable reasoning to support their results.

WTO jurisprudence

United States – Automobiles provided no encouragement to states to differentiate between products on the basis of non-product-related PPM criteria. It did, however, allay, to some extent, environmental concerns that the General Agreement created a regime committed to strong trade disciplines which left no room for the environment.

The first case to be adopted by the WTO’s DSB also helped build some confidence that environmental and trade positions could be balanced under international trade rules, although it did not rely on the ‘aim and effect’ test to do so.\(^\text{186}\) The ruling has two elements relevant to this thesis. The first, discussed below, gives insight into the treatment of PPM-based trade measures under Article III. It is discussed here in conjunction with subsequent WTO cases raising the issue of such treatment. The second is the new interpretation of Article XX which allows states greater discretion to introduce measures to promote a strong environment. This is discussed in Chapter 5.

United States – Standards for Reformulated and Conventional Gasoline,\(^\text{187}\) came about as a result of the regulation commonly referred to as the ‘Gasoline Rule’\(^\text{188}\) which the US published in 1994 to fulfil its obligations under the Clean Air Act 1990 (US). That Act aimed to improve air quality in the US. It established that only reformulated

\(^{186}\) While United States – Gasoline was the first case to be adopted, it was not the first dispute to be considered under the WTO’s dispute settlement procedures. That case was Malaysia – Prohibition of Imports of Polyethylene and Polypropylene, complaint by Singapore (WT/DS1), and was settled on 19 July 1995. Singapore withdrew its panel request.


gasoline could be sold in certain areas of the US where pollution was at its worst, and that ‘conventional’ gasoline could be sold in other areas of the US. It specified certain composition and performance specifications for reformulated gasoline so as to reduce emissions of toxic air pollutants, volatile organic compounds and NOx which contributed to ozone depletion and pollution, and it also established requirements to ensure that conventional gasoline sold in the US by refiners, blenders and importers would remain as clean as it had been in 1990, by preventing the dumping of components restricted in reformulated gasoline into conventional gasoline.

The Gasoline Rule set out the requirements for domestic refiners, blenders and importers of foreign gasoline to establish individual baselines reflecting the quality of their gasoline sold in the US in 1990. A statutory baseline was assigned to refineries if they began operation after 1990 or had been in operation for less than six months in 1990. It was also assigned to importers and blenders of conventional gasoline unless they could establish individual baselines according to actual 1990 data. Although refiners of gasoline could choose between three methods to establish their baselines, only one of which required the use of actual 1990 data, importers and blenders were not given this choice as it was considered that they could not reliably establish their 1990 gasoline quality through such methods.

If a domestic industry was established prior to 1990, and could establish an individual baseline, it could sell, in an annual period, gasoline which was ‘dirtier’ than that allowed to be sold by those required to abide by the higher statutory baseline. Accordingly, such domestic industries were accorded treatment more favourable than that accorded to importers unable to establish individual baselines and domestic industries which commenced operation after mid-1990.

189 Method 1: evidence of the gasoline produced or shipped in 1990; Method 2: evidence of the quality of blendstock produced in 1990; or, if the previous two data sets were incomplete; Method 3: evidence of the quality of post-1990 gasoline or blendstock. Panel Report on United States – Gasoline, at para 6.2, see also para 2.6.

190 Importers and blenders were required to use Method 1 to establish their baselines unless the importer was also a foreign refiner which imported at least 75% by volume, of its gasoline into the US in 1990. Only one importer was able to establish an individual baseline, Charnovitz, S., ‘The WTO Panel decision on U.S. Clean Air Act Regulations’ (1996) 19(5) International Environment Reporter 191. See generally
Venezuela and Brazil argued that imported gasoline was ‘like’ domestic gasoline, but was accorded less favourable treatment, contra Article III:4, because it was “subjected to more demanding quality requirements than gasoline of US origin”.\textsuperscript{191} The US responded that in requiring importers of gasoline to meet a statutory baseline on the composition of gasoline, it was treating the importers of the gasoline in the same manner it treated those domestic parties which were \textit{similarly situated} and could not reliably establish their 1990 gasoline quality. The US argued that within each category of seller, no discrimination occurred. The Panel found the \textit{baseline establishment method} of the Gasoline Rule inconsistent with Article III:4 of the GATT and not falling within the Article XX exceptions. It made no finding as to whether the use of \textit{individual} baselines was inconsistent with Article III:4 as this was not raised by Venezuela and Brazil and it was not necessary for the settlement of their dispute with the US.\textsuperscript{192}

\begin{flushright}
\textsuperscript{192} Note, however, that the Panel did not rule that the individual baseline approach was GATT-legal. Had it done so, it would have given some support to distinguishing between products on the basis of the ‘characteristics of the producer’, contra its stated opposition to this approach evident in paras 6.11-13 of the report. This is because treatment would be determined according to the average quality of gasoline handled during an annual period, and not by scrutinising the quality of the gasoline on a batch-by-batch basis. Domestic entities able to establish a baseline lower than importers would be treated more favourable. See Chapter 5, n 162, below.
\end{flushright}
A rejection of producer-based PPM measures

The Panel applied a traditional ‘like product’ analysis, finding that the “chemically-identical imported and domestic gasoline” were “like products under Article III:4”. It found that imported gasoline was treated less favourably than domestic gasoline, and noted that it was the “differences in the characteristics of refiners, blenders and importers, and the nature of the data held by them” which determined the treatment which imported versus domestic gasoline would receive under the US measures. It held:

Article III:4 of the General Agreement deals with the treatment to be accorded to like products; Its wording does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it. (emphasis added)

The Panel referred to United States – Malt Beverages which, although based on Article III:2, had rejected the argument that a tax regulation could accord less favourable treatment to beer based on the size of the producer. Furthermore, it noted that if factors such as the characteristics of the producer and the nature of the data held by it were seen to influence an assessment of what goods were ‘like’, it would mean that:

6.12 ... the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors ... [creating] great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.

6.13 ... [The Panel noted] that even if the US approach were to be followed, under any approach based on “similarly situated parties” the comparison could just as readily focus on whether imported gasoline from an identifiable foreign refiner was treated more or less favourably than gasoline from an identifiable United States refiner. There were, in the Panel’s view, many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were “similarly situated.” Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the

195 Ibid, at para 6.11.
196 Ibid.
197 Ibid. The relevant passage of United States – Malt Beverages is discussed at text accompanying nn 140-141, above.

140
domestic entity to benefit from the advantages of an individual baseline. This consequential uncertainty and indeterminacy on the basis of treatment underlined, in the view of the Panel, the rationale of remaining within the terms of the clear language, object and purpose of Article III:4 as outlined above in paragraph 6.12. \(^{198}\) (emphasis added)

The US measures in this case were based on the non-product-related PPMs of conventional gasoline in the sense that factors not physically evident in the final product were used to make the distinction. Yet the factors used (the characteristics of the producer established according to whether the gasoline was handled by refiners, blenders or producers, and the nature of the data held by these entities) may or may not have had a significant and measurable effect on the environmental impact of the product as it was being produced. While collecting data on the composition of gasoline might serve to guide future improvements of the quality of the gasoline, it could also be used to serve a number of ends unrelated to the environmental impact of the gasoline during its production phase or its final quality. \(^{199}\)

As discussed above, distinguishing between products upon the basis of the characteristics of the producer focuses more on who makes the product. How the product is made receives less attention. How the product is made is, however, significantly more amenable to being assessed according to the ‘inherently objective criteria’ which the Panel searched for in United States – Gasoline if it is the environmental impact of the product during its lifecycle which is being assessed. \(^{200}\) A number of valuation methodologies are now being recognised as acceptable, however there are as yet no internationally agreed criteria or valuation methodology which could be used to compare physically alike products. Moreover, it cannot be said with any

---

\(^{198}\) Although part of the Panel report was overturned on appeal, this section of the report was left untouched.

\(^{199}\) Cf. Charnovitz who states “Environmental regulators may have many reasons to treat gasoline differently depending on a refinery’s pollution profile, its compliance records, and the quality of its recording-keeping. Similarly, trade regulators or customs agencies may want to treat products differently depending on whether the producer has a license to use a trademark or a copyright.” Charnovitz, S., ‘Environment and health under WTO dispute settlement’ (1998) 32 The International Lawyer 901, at 903.

certainty that Article III allows products to be distinguished on the basis of impact-based PPM criteria but not producer-based PPM criteria.\textsuperscript{201}

If Members wish to be certain that they can use Article III (rather than Article XX) to justify the use of impact-based PPM measures, they are well advised to negotiate an agreement establishing criteria to compare physically alike products.\textsuperscript{202} Such an agreement would, however, only apply to parties who signed. The rights and obligations of all other Members would be tested against the ordinary disciplines of Article III.

The inconsistency with Article III:4 in \textit{United States – Gasoline} could have been avoided had all domestic refineries, blenders and importers been required to comply with a statutory baseline. Then all sellers, and correspondingly ‘like products’, would have been treated equally over an annual period. Indeed, the EC advanced this argument although Venezuela and Brazil did not pursue it.\textsuperscript{203} Instead, they argued that importers should be allowed adequate possibility to establish an individual baseline,\textsuperscript{204}

\begin{itemize}
\item[201] The Appellate Body’s decision in \textit{Japan – Taxes on Alcoholic Beverages} arguably provided some ground to use impact-based PPM criteria, however this ground seems to have been eroded by their decision in \textit{European Communities – Asbestos}. See text accompanying nn 218-225, and 264-266, below.
\item[202] In the same way that under the SPS Agreement Members may conduct their own risk assessment or rely on an existing risk assessment conducted by others, Members wishing to regulate the product the subject of the measure would bear the cost of assessing the environmental impact of the product themselves, or rely on an assessment already made. Alternatively, since the results of environmental impact assessments can be seen to be subject to a range of biases, the agreement could specify that the assessment be conducted by an international organisation with relevant expertise. Such an organisation could be seen to be less subject to ‘capture’ than national institutions making the assessment. Cost, administrative and time constraints would necessitate that known serious environmental problems should be assessed before any other product is scrutinised, and again it is appropriate that the Member seeking new assessments on which to rely bear the cost of the assessment.
\item[203] See Report of the Panel in \textit{United States – Gasoline}, at para 4.1ff and in particular at para 4.3.
\item[204] Ibid, at para 3.12ff.
\end{itemize}
possibly because their gasoline was not of sufficient quality to meet the statutory baseline.

**The demise of the ‘aim and effect’ test**

The second adopted case was *Japan – Taxes on Alcoholic Beverages*. Here, the EC, Canada and the US complained that the Japanese liquor tax system discriminated against spirits exported to Japan by levying a substantially lower tax on “shochu” than on whisky, cognac and white spirits, contrary to Article III:2 of the *General Agreement*. The Panel heard some debate as to whether or not the ‘aim and effect’ test should be applied to determine the likeness of products, Japan and US arguing in favour, the EC against.

We saw above that the ‘aim and effect’ test allowed Members greater latitude in drawing regulatory distinctions between products, while providing panellists with a considerably wider discretion to determine the propriety of such distinctions. The ‘aim and effect’ test was born in a culture of diplomatic pragmatism, yet the Appellate Body has placed particular emphasis on legalism in the new system. In its first case, it stressed that the *General Agreement* must be interpreted in accordance with the “customary rules of interpretation of public international law” as required by Article II.

---


206 For example, the US submitted that “in determining whether two products that were taxed differently under a Member’s origin-neutral tax measure were nonetheless ‘like products’ for the purposes of Article III:2, the Panel should examine not only the similarity in physical characteristics and end-uses, consumer tastes and preferences, and tariff classifications for each product, but also whether the tax distinction in question was ‘applied ... so as to afford protection to domestic production’: that is, whether the aim and effect of that distinction, considered as a whole, was to afford protection to domestic production. According to this view, if the tax distinction in question is not being applied so as to afford protection to domestic production, the products between which the distinction is drawn are not to be deemed ‘like products’ for the purpose of Article III:2.” Report of the Panel in *Japan – Alcoholic Beverages*, at para 6.15.

207 The EC argued that a two-step procedure should be applied under Article III:2, that is “the Panel should establish first whether the products in question are like and, if so, then proceed to examine whether taxes imposed on foreign products are in excess of those imposed on like domestic products. ... [the EC] stated that physical characteristics of the products concerned, their end-uses, as well as consumer preferences could provide relevant criteria for the Panel to judge whether the products concerned were like.” Report of the Panel in *Japan – Alcoholic Beverages*, at para 6.14.
3(2) of the DSU.\textsuperscript{208} In particular, this requires that the terms of treaties must be read in good faith in accordance with their ordinary meaning in their context and in the light of the treaty’s object and purpose.\textsuperscript{209} Following this approach, the Panel in \textit{Japan – Alcoholic Beverages} rejected the use of an ‘aim and effect’ test, stating that it was “not consistent with the wording of Article III:2, first sentence”; that it would have “important repercussions on the burden of proof imposed on the complainant”,\textsuperscript{210} and would render Article XX redundant. In adopting this line of reasoning, the Panel rejected both \textit{United States – Malt Beverages} and \textit{United States – Automobiles}. Instead, the Panel decided that the issues it had to determine for the purpose of Article III:2 were:

(i) whether the products concerned ... [were] like, (ii) whether the contested measure ... [was] an “internal tax” or “other internal charge” ... and (iii) if so, whether the tax imposed on foreign products ... [was] in excess of the tax imposed on like domestic products.\textsuperscript{211}

The Panel noted that the term ‘like products’ should be construed narrowly in Article III:2, first sentence. It noted that products did not have to be identical to be like, and that previous panels had established that factors to take into account included “the product’s properties, nature and quality, and its end-uses; consumers’ tastes and habits, which change from country to country; and the product’s classification in tariff nomenclatures.”\textsuperscript{212} The Panel considered however, that with respect to Article III:2, products “must share, apart from commonality of end-uses, essentially the same physical characteristics”.\textsuperscript{213} It found that vodka and shochu were like products as they shared most physical characteristics, and noted that there were “[s]ubstantial noticeable differences in physical characteristics” between the other alcoholic beverages at issue and shochu, disqualifying them from being regarded as like products.\textsuperscript{214}

\textsuperscript{209} This is the ‘general rule of interpretation’, Article 31(1) of the \textit{Vienna Convention}.
\textsuperscript{210} It would require complainants to show, in addition to the effect of a particular measure, the aim “which sometimes can be indiscernible” and which “could be difficult or even impossible for a complaining party to obtain” or assess”. Report of the Panel in \textit{Japan – Alcoholic Beverages}, at para 6.16.
\textsuperscript{211} Ibid, at para 6.19.
\textsuperscript{212} Ibid, at para 6.21.
\textsuperscript{213} Ibid, at para 6.22.
\textsuperscript{214} Ibid, at para 6.23. The Panel considered that these other products were directly competitive or substitutable with shochu within the meaning of Article III:2, second sentence, at para 6.32. Compare the approach of the Panel in \textit{Korea – Alcohol}, where it considered that the evidence presented was
The Appellate Body considered in somewhat more detail the relationship between Article III:1 and Article III:2 on appeal, in particular the influence of the phrase in Article III:1 “internal taxes [etc] ... should not be applied to imported or domestic products so as to afford protection to domestic production” on Article III:2.\textsuperscript{215} In United States – Malt Beverages and United States – Automobiles, this phrase had been used to justify a purposive approach. In the Appellate Body’s view however, Article III:2, first sentence made no explicit reference to the phrase ‘so as to afford protection’ so there was no separate requirement to show that the measure had been applied in a protective manner.

The Appellate Body did not consider the phrase irrelevant to the interpretation of Article III:2, first sentence. Rather, Article III:2, first sentence ensures that like domestic products cannot be protected by preventing imported products from being taxed or charged in excess of like domestic products. In the Appellate Body’s view, only if products have been established to be ‘directly competitive’ or ‘substitutable’ is there the need to show a ‘protective application’ of the measure as a separate determination, that is show that tax favours domestic products.\textsuperscript{216} Accordingly, it retained the ‘effect’ element of the test in relation to Article III:2, second sentence.\textsuperscript{217} In terms of Article III:2, first sentence however, the key focus remains on the products themselves and not on determining the aim and effect of the regulation at issue.

\textsuperscript{215} Emphasis added.

\textsuperscript{216} Similarly, since Article III:4 contains no explicit reference to Article III:1, no investigation of a protective application is required to find a violation of that Article. See Report of the Appellate Body in European Communities – Bananas, at paras 215-16.

\textsuperscript{217} Contrary to some views, for example Matheny, R.L., ‘In the wake of the flood: “like products” and cultural products after the World Trade Organization’s decision in Canada Certain Measures Containing Periodicals’ (1998) 147 University of Pennsylvania Law Review 245, the Appellate Body did not rule out the relevance of the ‘aim’ of the measure in relation to this limb of Article III:2. It merely noted that it “may not be easily ascertained” and it is not necessary for panels to search for it. Instead, the protective application of a measure could be determined objectively, and “most often be discerned from the design, the architecture, and the revealing structure of a measure.” Report of the Appellate Body in Japan – Alcoholic Beverages, at p.29. See also Howse and Regan, 2000, above at n 13.
The Panel in Japan – Alcoholic Beverages considered that products must share “essentially the same physical characteristics”218 to be like, even though they “need not be identical in all respects”.219 It is arguable, however, that the Appellate Body slightly reduced this emphasis. It affirmed that the traditional analysis of like products found in the Report of the Working Party on Border Tax Adjustments could be ‘helpful’ in determining whether products are like, but emphasised that “there can be no one precise and absolute definition of what is ‘like’.”220 It agreed with the Panel that “the definition of ‘like products’ in Article III:2, first sentence, should be construed narrowly”, yet cautioned “[h]ow narrowly is a matter that should be determined separately for each tax measure in each case.”221 According to the Appellate Body, whether two products are ‘like’ depends on how broadly the term is intended to be interpreted in the Article in which it appears, “as well as ...[on] the context and the circumstances that prevail in any given case to which that provision may apply.”222 It agreed that likeness should be determined on a case-by-case basis. It did not explicitly agree that like products should share “essentially the same physical characteristics”, but stated that, taking into account the modifications it made to the Panel’s legal reasoning, it “affirm[ed] the legal conclusions and the findings of the Panel with respect to ‘like products’ in all other respects.”223

The Appellate Body’s finding gives states more flexibility and a greater discretion to introduce measures to distinguish between products. How broad that discretion is remains to be determined. On a generous reading of its views, it could be argued that while the term ‘like product’ in Article III:2, first sentence, is intended to be construed narrowly, circumstances may prevail in a particular case where the non-product-related

221 Ibid.
222 Ibid.
223 Ibid.
PPMs of a product are relevant and should be taken into account. For example, where they affect the nature of the product, its quality and/or its end uses in a manner which can be scientifically assessed (ie, an impact-based PPM measure). To sustain such a reading, a panel would have to accept that a product’s lifecycle could impact upon its likeness with another product. It would no doubt also have to be convinced that the criteria used to distinguish between products were ‘inherently objective’. Since deciding whether products are ‘like’ is generally matter of fact, such a determination would be for a panel to make. Given panels’ general reluctance to adopt anything but a conservative approach to the application of the General Agreement and reading of Appellate Body views, it is unlikely that an approach based on a generous reading of the Appellate Body’s views will be seen in the near future.

A further comment by the Appellate Body arguably supports the prospect of non-product-related PPMs sometimes being taken into account in relation to Article III. Although the Appellate Body warned against use of tariff bindings to determine whether products were like if those bindings were broad, it noted that very precise tariff bindings might provide guidance on whether products may be considered ‘like’. There is no impediment in the General Agreement to states negotiating precise tariff bindings which include non-product-related PPM criteria. We saw, for example, product-related PPM factors being used in European Economic Community – Imports of Beef from Canada, Recourse to Article XXIII:2 by Canada. Nevertheless, if existing tariff bindings for a product have already been set at a low rate, such a negotiation may be of little impact.

The next relevant case to raise the treatment of ‘like products’ in WTO jurisprudence was Canada – Certain Measures concerning Periodicals. The ‘like product’ issue arose in relation to taxes placed by Canada on ‘split-run’ editions of periodicals, the

---

224 Howse and Regan, 2000, above at n 13, argue that the regulatory purpose of the measure should be considered, that is, whether the measure is, or is intended to be, protectionist. See, eg, at 260-261, 266, 268.

225 The Appellate Body could, however, overturn the Panel’s decision if it considered that the error was so substantial that it affected the reasoning, and thus amounted to an error of law.

issue being whether imported ‘split-run’ periodicals were ‘like’ domestic ‘non-split-run’ periodicals.\textsuperscript{227} The Panel explained that a ‘split-run’ edition of a periodical is defined:

in terms of its editorial content (whether more than 20 per cent of the editorial material is the same or substantially the same as editorial material that appears in editions that are primarily distributed outside Canada) and advertising content (whether it contains an advertisement that does not appear in identical form in other editions distributed outside Canada).\textsuperscript{228}

That is, ‘split-run’ editions of periodicals share substantially the same editorial material, whether they are sold in Canada, the US or elsewhere, but the advertisements differ in order to suit the consumers in the market in which the periodical is sold. The Panel applied the definition of ‘like products’ in Article III:2, first sentence, narrowly, examining the product’s properties, nature and quality; its end uses, and consumers tastes and habits towards the product.\textsuperscript{229} While the Appellate Body agreed that the Panel had used the correct test, they found it had not correctly applied the test to the facts of the case.\textsuperscript{230} The Appellate Body overturned the Panel’s finding but did not complete the analysis, taking the view that the Panel had not provided a sufficient analysis of the facts to make a determination as to whether the products were ‘like’.\textsuperscript{231}

It is disappointing that the Appellate Body did not complete the analysis, since a primary argument made by the US in the case was that Canada’s measure was founded upon the non-product-related PPMs of the periodicals at issue. That is, that Canada had distinguished between periodicals on the basis of whether “a similar edition of the magazine ...[was] sold in a country other than Canada” and not on the basis of the “physical characteristics, end-uses, content, advertising, or any other attribute” of the magazine.\textsuperscript{232} Essentially then, it was argued that Canada’s measures were predicated

\textsuperscript{228} Ibid, at para 5.24.
\textsuperscript{230} Report of the Appellate Body in \textit{Canada – Periodicals}, at 22. The Panel “did not base its findings on the exhibits and evidence before it” (at 22) and the hypothetical example it did use to reach its conclusion “involv[ed] a comparison between two editions of the same magazine, both imported products, which could not have been in the Canadian market at the same time.” (at 23)
\textsuperscript{231} Ibid, at 24. The Appellate Body did, however, complete the legal analysis in relation to whether the two types of periodicals were ‘directly competitive’ or ‘substitutable’, and found that they were.
on the publishing behaviour of the producer, and designed to ensure that a particular method of publication – the split-run periodical – could not be used.\(^{233}\)

Against this Canada argued that the determining feature was the editorial content of the magazine and that:

Periodicals with editorial content developed for the Canadian market and split-run periodicals envisaged by the legislation [that is with editorial material copied from foreign publications] … [were] distinct products on the basis of their editorial content.\(^{234}\)

That is, they were not ‘like’. Canada’s legislation did not specify that the editorial content had to be Canadian, rather it could not be “‘the same or materially the same as editorial material’ in editions that circulate primarily in foreign markets.”\(^{235}\) This was because, Canada rationalised, “[f]oreign magazines are almost devoid of content dealing with Canada, and what little there is quite logically fails to reflect a Canadian perspective”.\(^{236}\)

By using the criterion of whether ‘the same or materially the same as editorial material in editions that circulate primarily in foreign markets’, Canada was, as the US correctly pointed out, basing its measure on the publishing behaviour of the producer. According to Canada however, this behaviour had an important influence on the characteristics of the product – its editorial content – which meant that such a product could not be confused with a product published in Canada with Canadian content.

Notwithstanding the lengthy debate between the parties as to whether or not Canada’s measure was based on the non-product-related PPMs of periodicals, neither the Panel nor the Appellate Body made reference to this issue. The closest the Panel came was its view in passing that the definition of whether a periodical was ‘split-run’ appeared to be based on “factors external to the Canadian market – whether the same editorial content … [was] included in a foreign edition and whether the periodical carrie[d]…

\(^{234}\) Ibid, at para 3.61.
\(^{235}\) Ibid, at para 3.69; see also at para 3.79.
\(^{236}\) Ibid, at para 3.69.
different advertisements in foreign editions”. It put these external factors aside when determining whether the products were ‘like’. As noted above, the Appellate Body overturned the Panel’s finding on this issue and made no substitute finding. It therefore avoided the issue altogether.

The issue of ‘like products’ was raised in *Korea – Taxes on Alcoholic Beverages*, however the Panel, finding that “the category of like products is a subset of those products which are directly competitive or substitutable”, compared products primarily on this basis. It found there was insufficient evidence available to make a finding that vodka and soju were ‘like’.

The case *United States – Shrimp* was well placed to consider whether non-product-related PPMs might be used to determine whether products are ‘like’. The issue did not arise however, because the US did not argue the point. Rather, it essentially conceded that its measure violated Article XI:1 of the *General Agreement*. It pointed out that while the complainants bore the burden of proof on this matter:

> [s]ince under Article XX nothing in the GATT 1994 was to be construed to prevent the adoption or enforcement of the measures at issue, there was little practical significance to attempts by the complainants to establish an inconsistency between these measures and other provisions of GATT 1994.

The Panel considered that sufficient evidence existed for it to find a violation of Article XI, and the US did not appeal the point.

---

241 Ibid, at para 10.104. The Panel’s findings were upheld on appeal.
242 The US stated that it “did not dispute that, with respect to countries not certified under Section 609 of Public Law 101-162, Section 609 amounted to a restriction on the importation of shrimp within the meaning of Article XI:1 of GATT 1994”. Report of the Panel in *United States – Shrimp*, at 73, para 169.
243 Ibid. See also at 281-3 of that report. The WTO case establishing that the complainants bear the burden of proving a violation is the Report of the Appellate Body on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted 23 May 1997, WT/DS33/AB/R, at 16: “a party claiming a violation of a provision of the WTO Agreement by another member must assert and prove its claim”. Hereinafter *United States – Shirts and Blouses*.
244 Ibid, at para 7.17.
Most recently, European Communities – Asbestos considered the like product issue in relation to Article III:4 in detail. In that case, Canada challenged a ban placed by France on the importation and marketing of asbestos and products containing asbestos.\(^{245}\) Chrysotile is one variety of asbestos, and is a known carcinogen.\(^{246}\) Canada challenged the ban in relation to chrysotile, claiming that it favoured the French industry which produced substitute products, contra the TBT Agreement and Article III:4 of the General Agreement.\(^{247}\)

The measure at issue was product-based, and the products at issue – chrysotile and its substitute products – were physically different. They differed in structure and chemical composition.\(^{248}\) They also differed in the level of risk they presented to consumers, there being a “serious carcinogenic risk associated with the inhalation of chrysotile fibres”,\(^{249}\) and risk associated with the handling of chrysotile-cement products.\(^{250}\) Notwithstanding these differences, the Panel noted that from a “market access” point of view,\(^{251}\) chrysotile and its substitute products shared similar applications in some situations. Here, their properties were “equivalent, if not identical”,\(^{252}\) and thus ‘like’. The Panel ruled that evidence of risk was not relevant to the determination of likeness of the products under Article III:4. It found that no previous panel had used risk to human life or health as a point of comparison and doing so would “[i]ntroduc[e] the protection of human health and life into the likeness criteria” of Article III, “allow[ing] the Member concerned to avoid the obligations in Article XX” and “largely nullify the effect of Article XX(b)”.\(^{253}\)

245 Decree No. 96-1133 concerning asbestos and products containing asbestos, Official Journal, 26 December 1996; at note 2 of the Appellate Body report.


248 Ibid, at para 8.121.

249 Ibid, at para 8.188.


252 Ibid, at para 8.125. The Panel repeated this finding in relation to the consumer’s end-use of the product criterion, and made no finding in relation to criteria regarding consumers’ tastes and habits and tariff classifications. At paras 8.136; 8.140; 8.143; see also Report of the Appellate Body in European Communities – Asbestos, at paras 105-106.

253 Report of the Panel in European Communities – Asbestos, at para 8.130.
The Panel report raised a storm of controversy, and was extensively criticised by the Appellate Body. In their view, the risk associated with the use of asbestos and its effect on the competitive relationship with other products was a "defining aspect of the physical properties of chrysotile asbestos fibres" and was also relevant to consumers' tastes and habits in relation to the product. These factors should have been considered in relation to Article III:4.\textsuperscript{254} As the Appellate Body pointed out, Article III:4 and Article XX(b) are "distinct and independent provisions" of the General Agreement which contain different enquiries. Evidence as to the health risk of a product used in relation to Article III:4 does not prevent its use in relation to Article XX(b) to justify an otherwise inconsistent measure, rather the evidence serves a different purpose under the different Articles.\textsuperscript{255} The Appellate Body emphasised the importance of the rule of law in interpreting the General Agreement, stating:

The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of effet utile. Article XX(b) would only be deprived of effet utile if that provision could not serve to allow a Member to "adopt and enforce" measures "necessary to protect human ... life or health".\textsuperscript{256}

The Appellate Body examined the meaning of 'like product' in Article III:4 in relation to the context of Article III, and noted that its 'general principle' is "to avoid protectionism in the application of internal tax and regulatory measures".\textsuperscript{257} In order to ensure a consistent application of this principle in Articles III:2 and III:4, it found that 'like product' in Article III:4 must be interpreted more broadly than it is in the first sentence of Article III:2, but not more broadly than the second sentence, which is concerned with directly competitive or substitutable products.\textsuperscript{258} The Appellate Body

\textsuperscript{254} Report of the Appellate Body in European Communities – Asbestos, at para 114.
\textsuperscript{255} As the Appellate Body stated at para 115, evidence as to health risks could be used to assess "the competitive relationship in the marketplace between allegedly 'like' products" in relation to Article III:4 and "whether a Member has a sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health" pursuant to Article XX(b).
\textsuperscript{256} Report of the Appellate Body in European Communities – Asbestos, at para 114.
\textsuperscript{258} Report of the Appellate Body in European Communities – Asbestos, at paras 93-100.
also examined the dictionary meaning of ‘like’ and found it unable to resolve three issues important for determining likeness for the purposes of Article III:4:

1. the characteristics or qualities important to determining likeness;
2. the degree or extent to which products must share the qualities or characteristics; and
3. the perspective from which likeness should be judged.

Once again it approved the use of criteria developed by the Working Party on Border Tax Adjustments to compare products, but saw them to be “simply tools to assist in the task of sorting and examining the relevant evidence” which are “neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products.”

It emphasised that their adoption “does not dissolve the duty or need to examine, in each case, all of the pertinent evidence”, and found that the Panel erred in purporting to apply the Working Party’s criteria while making a finding only in relation to the first criterion, ie, the properties, nature and quality of the products.

The Appellate Body’s decision was welcomed by the environmental community for upholding France’s right to ban the importation of asbestos in order to protect human life and health, and clarifying that risks to human health, and by analogy, the environment, can be a point upon which products can be distinguished. Its task was made easier by the fact that the products at issue were not physically identical, and had significantly different health effects on consumers. Nevertheless, the Appellate Body’s decision does have a sting in its tale for states wishing to differentiate between physically alike or identical products on the basis of non-product-based PPM criteria. In particular, the Appellate Body commented that it sees the Working Party’s first

---

259 See above at text accompanying n 6.
262 Ibid.
263 The Panel in fact blended its finding on this criterion with that of the second, a consideration of the end-uses of the product. That is, it found that from a market access point of view the products had similar properties as “in a ‘small number’ of cases, the products have the ‘same applications’ and can ‘replace’ each other”. (Report of the Appellate Body in European Communities – Asbestos, at para 110, quoting from the Panel Report at paras 8.123 and 8.125.) The Appellate Body criticised this approach, indicating that not only should the Working Party’s criteria be considered separately, that a similarity in end-uses...
criterion "as intended to cover the physical qualities and characteristics of the products", and indicated that it is committed to the view that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products." These comments do not necessarily rule out the possibility of physically alike or identical products being considered 'not like' on the basis of non-product PPM criteria, as such evidence may be relevant to the other criteria developed by the Working Party. However, a state intending to show physically alike or identical products to be 'not like' for the purpose of Article III:4 would have a very heavy burden given the breadth with which the term is to be read in that Article, particularly since such products will in most instances be competitive in economic terms.

does not necessarily indicate a similarity in properties, which is concerned with "the physical qualities and characteristics of the products" and not the uses to which they are put (at paras 110, 111).


265 Ibid, at para 99. Compare at paras 154 where a Member of the Appellate Body noted in a 'concurring statement' that "that the necessity or appropriateness of adopting a 'fundamentally' economic interpretation of the 'likeness' of products under Article III:4 of the GATT 1994 does not appear to me to be free from substantial doubt." See generally paras 153-154.

266 Note however the Appellate Body's comment that the Working Party's formulation is not treaty-mandated nor a closed list, that products must be evaluated on a case by case basis and that all pertinent evidence must be taken into account. Ibid, at para 102.
The first case to be considered by a panel in the new WTO system, United States – Gasoline, was one which raised environmentally based trade measures which used non-product-related PPM criteria as a trigger. The measures at issue were producer-based, and their use was strongly rejected by the Panel hearing the case. The decision reinforced the rules designed to provide strong markets, and continued to restrain states from using Article III to implement non-product-related PPM measures to promote a strong environment. Nevertheless, the rejection of the measures was hardly remarked upon by the environmental community. This is probably because they were more interested in the findings concerning Article XX of the General Agreement, in which the regulatory discretion of states to protect the environment appeared to be slightly extended.

The next case, Japan – Alcoholic Beverages, also eroded state discretion to distinguish between products to promote a strong environment, this time by overruling the ‘aim and effect’ test which had offered occasional support to environmentally motivated measures under the GATT system. Yet the ‘aim and effect’ test was flawed, having no proper foundation in the text of the General Agreement. As such it could not be counted on to provide states with a consistent foundation upon which to build their measures, important to both to strong markets and a strong environment, and so was inconsistent with the goals of development through trade and sustainability through trade.

The Panel’s approach in Japan – Alcoholic Beverages also did little to encourage the use of PPM-based trade measures to achieve sustainability through trade as its interpretation of ‘like products’ tightly constrained the manner in which products could be distinguished. In contrast, the Appellate Body’s approach, if interpreted broadly, offers states slightly more flexibility to develop regulatory distinctions based on impact-based PPM measures so as to encourage a strong environment. Whether or not future panels are willing to read the decision so broadly is for time to tell. History has shown panels to be extremely conservative both in the interpretation of case law and, as shown in Canada – Periodicals, even avoiding PPM issues if raised. While European
Communities – Asbestos  Has indicated that states may distinguish between products according to the risk they present to humans and the environment, subsequent panels acting conservatively are more likely to interpret the Appellate Body’s comments as allowing only PPM criteria which affect the physical characteristics of a product as a point of comparison. The reaction of consumers towards a product might influence a panel’s appraisal (particularly if their tastes and habits are representative of a more global view), but this is by no means guaranteed. Consumer reactions are a subjective frame of reference. Consumers tend to be risk adverse, but perspectives vary across cultures, and are often easily manipulated in favour of anti-import sentiments. If the PPM criteria have no impact on the physical aspects of the product, panels will be more likely to consider the product to be ‘like’ another which is physically identical or similar. This is particularly so as such products are likely to be economically competitive.

Conclusion

This chapter has provided a comprehensive survey of the treatment domestic regulatory measures have received under Articles I and III of the General Agreement in both the GATT and WTO dispute settlement system when attempting to distinguish between products on the basis of non-product-related PPM factors.

It first established that PPM-based measures can be categorised according to whether they are country-based or origin-neutral, and whether they are producer-based and impact-based.

Country-based measures are inherently discriminatory and will violate Articles I and III. This chapter showed, however, that there are good reasons to distinguish between origin-neutral producer and impact-based PPM measures. Measures which target the environmental externalities generated by the production of the product itself will always target environmentally unsustainable products, whereas producer-based measures may also target environmentally sustainable products. Moreover, whereas it could be difficult to formulate objectively assessable criteria to distinguish between
producers, non-product-related environmental externalities are capable of being objectively assessed using environmental valuation techniques. As noted, such valuation techniques are becoming more established, and Members wishing to formalise the process of valuation and the identification of objective impact-based PPM criteria could sign an agreement or understanding to that end. This could be used in the event of a WTO challenge, but would apply only between the parties who have so signed.

This Chapter has demonstrated that panels have provided a number of different grounds to find that non-product-related PPM factors do not provide sufficient justification to authorise different regulatory treatment.

One approach, seen in Indonesia – Automobiles, was the ruling that any advantage accorded to a Member under Article I of the General Agreement “cannot be made conditional on any criteria that is not related to the imported product itself”\(^{267}\). It made no finding, however, as to whether criteria not related to the imported product could affect the ‘likeness’ of a product to another.

Another approach, seen in United States – Malt Beverages, was the finding that the characteristics of the producer could not affect the likeness of a product to another. Although the Panel in that case applied an ‘aim and effect’ test to assess the likeness of products the subject of product-based domestic regulatory measures, it did not apply that test in the case of the process based measures used. Even if the ‘aim and effect’ test should properly be applied to both process as well as product-based measures, the test was ruled out in Japan – Alcoholic Beverages.

A further approach, seen in the unadopted Tuna-Dolphin cases, was the finding that non-product-related PPM-based measures were not covered by Article III or Note Ad Article III. In contrast, United States – Automobiles, also unadopted, found that Article III “does not permit treatment of an imported product less favourable than that accorded to a like domestic product, based on factors not directly relating to the product as
such."\(^{268}\) This latter approach was confirmed in *United States – Gasoline*, where the Panel stated that “Article III:4 of the General Agreement ... does not allow less favourable treatment [to be afforded to imported products] dependent on the characteristics of the producer and the nature of the data held by it.”\(^{269}\)

In the GATT case *Japan – Customs Duties*, the Panel stated that the determination of whether products were ‘like’ included an examination of objective criteria “such as composition and manufacturing processes of products”, as well as the “more subjective consumers’ viewpoint (such as consumption and use by consumers)”.\(^{270}\) However the Panel was not specific as to whether only product-related PPM criteria could be seen to influence the manufacturing process, or whether non-product-related PPMs could also be influential. In the WTO case *Japan – Alcoholic Beverages*, The Panel said little about the manufacturing process. Instead it emphasised the importance of end-uses as well as physical characteristics to decide the issue of likeness. Although the Appellate Body slightly softened the Panel’s findings on the issue of likeness, only a generous reading of their ruling would support the use of non-product-related PPM attributes to differentiate between physically similar products.

In *Canada – Periodicals* the Panel and the Appellate Body avoided considering the PPMs issue, and in *United States – Shrimp* the issue did not arise. In *European Communities – Asbestos*, the Appellate Body made detailed comments as to the interpretation of the term ‘like product’, yet these are likely to be subsequently interpreted as allowing only physically distinct products to be considered not like. Except for the ‘concurring statement’ made by one Member of the Appellate Body, the decision of the Appellate Body was very conservative. The products under comparison were physically different, and carried with them vastly different health effects for consumers. The Appellate Body’s reluctance to declare the products to be ‘not like’, based partly on their commitment to the view that “the nature and extent of a competitive relationship between and among products” plays a fundamental role in

\(^{267}\) *Indonesia – Automobiles*, at para 14.143.

\(^{268}\) *United States – Automobiles*, at para 5.54.


\(^{270}\) Ibid, at para 5.7.
determining their likeness, is indicative of the difficulty states would face if wishing to distinguish between physically alike or identical products on the basis of non-product-related PPM-based criteria.

We can conclude from these cases that panels have tended to interpret Articles I and III in a manner which provides little scope for states to act on their own affirmative authority to use non-product-related PPM-based trade measures to achieve domestic regulatory objectives. While this has maintained conditions for strong markets to nurture comparative advantage and deliver development through trade, it limits the opportunity for states to show a practical commitment to sustainable development by implementing measures capable of nurturing a stronger environment.

Close inspection of these cases has also shown, however, that the measures which have been considered in dispute settlement have been country-based or producer-based, and an origin-neutral impact-based PPM measure has not been considered in relation to Article III or I.271 Accordingly, while these cases272 have commonly been regarded as conclusive in ruling out the use of all non-product-related PPM-based trade measures to distinguish between products, they provide little in the way of such authority. At the same time, while we have tried to limit the applicability of the objections in the cases to the type of non-product-related PPM-based trade measures actually used,273 we have also noted that such distinctions, which could assist in encouraging strong markets that nurture a strong environment, have yet to be drawn by panels in relation to Articles I or III of the General Agreement.

Accordingly, in so far as states have attempted to use process standards or non-product-related PPM-based trade measures to achieve domestic regulatory objectives, we must

---

271 The consistency of an origin-neutral impact-based PPM measure has, however, been considered in relation to Article XX. The Panel found in United States – Shrimp (Recourse to Article 21.5) that, in the circumstances of that case, its application was authorised by Article XX. See Chapter 5 below for discussion.
272 For example the Belgian Family Allowances Report and Spain – Tariff Treatment of Unroasted Coffee.
273 Thus we have distinguished between very blunt and vague measures such as country-based measures and producer-based PPM measures, and more precise measures such as environmental impact-based
conclude that, so far, the rules have primarily been interpreted in a way which hinders rather than assists in the ‘push’ and ‘pull’ dynamic of increased environmental standards for traded goods.

For origin-neutral taxes triggered by product standards, we saw, for a time, a rather different story. This was when the use of the ‘aim and effect’ approach was in place. In United States – Automobiles, for example, we saw automobiles which were largely physically identical, differentiated according to the level of their emissions. In United States – Malt Beverages, we saw beer differentiated according to whether it had a high or low alcohol content. The discretion for states to use regulatory categories to distinguish between products to suit domestic agendas appeared to be widened, as did the discretion of panels to decide whether the regulatory categories implemented were in fact legitimate. Yet the ‘aim and effect’ test was not based on law, having no proper foundation in the text of the General Agreement. As the application of the test was subject to the discretion, or whim, of panellists, the test provided states with only a tenuous and unpredictable basis upon which to build their measures. With such an insubstantial basis, states are more likely to be discouraged from implementing strong environmental product standards.

With the rejection of the ‘aim and effect’ test in Article III, we have seen a strengthening of the rules to maintain strong markets and a corresponding decrease in the discretion of panels to balance this against rules to promote a strong environment. At the same time, as we shall see in Chapter 5, the interpretation of Article XX of the General Agreement now appears to provide more discretion to states to distinguish between products and ‘pull-up’ environmental standards.

Commentators have seen significant difficulties in relying only on the ‘like product’ criteria established by the Working Party on Border Tax Adjustments, and applied in many of the cases discussed above, to judge domestic regulatory measures which distinguish between products. Roessler has argued for example that:

PPM measures which could be used to initiate a ‘move to the top’ to improve environmental standards and allow a ‘California effect’ to occur.

160
the starting point of the [like product] analysis cannot be the concrete objects to which an internal tax or regulation is applied but only the abstract categories of products distinguished by the contracting party. For instance, in the context of an analysis under Article III it is meaningless to say that the imported cup in my left hand is like the cup of domestic origin in my right hand because their properties, nature, quality, and end-uses are the same and that, consequently, the cup in my left hand must be accorded no less favorable treatment than the one in my right hand. It may be true that the two objects might be the same when considered as cups but the fact that they are cups may not at all be relevant under the domestic regulation at issue. One of the cups might under that legislation fall under the category of “nonrecyclable beverage container” (subject to an environmental tax), “material producing poisonous gases when incinerated” (subject to a sales prohibition), or “household utensil” (subject to a reduced value-added tax). To compare the objects as cups when they are not distinguished by the contracting parties as cups is arbitrary. In order to examine whether the contracting party’s measure meets the no-less-favorable standard, one has to compare the categories of products that are distinguished by it, not two individual products that happen to fall within the categories created.274

Instead, he argued that in the context of Article III, the ‘aim and effect’ approach was more appropriate so that protectionist measures could be eliminated.

Hudec has also questioned the utility of relying on “sterile concepts of physical likeness” to determine “important issues of regulatory policy” and notes that:

in most regulatory systems the issue of discrimination is usually addressed by asking whether a difference of treatment is rationally related to a legitimate regulatory purpose, the traditional definition of “like product” appears to have no purpose-oriented criteria at all.275

He has explained:

... there has always been some concern that the “like product” test would fail to prohibit some product distinctions that should be prohibited, and prohibit some product distinctions that should not be prohibited. The latter problem of over-inclusiveness is, to some degree, correctable to the extent that desirable product distinctions can be justified under GATT article XX as being necessary to the achievement of important social policies. However, ... article XX imposes rather severe limitations on this type of regulatory justification. While such burdensome requirements may be appropriate for measures that are explicitly and purposefully discriminatory, it is more difficult to explain why governments must meet such high standards to justify “origin-neutral” regulatory measures which are guilty of nothing more than transgressing certain abstract notions of “likeness.”276

---

274 Roessler, 1996, above at n 9, at 29.
275 Hudec, 1998, above at n 29, at 626.
276 Ibid.
Roessler has also noted that it is not satisfactory merely to rely on Article XX to correct problems of over-inclusiveness, since “there are far more legitimate policy goals that can only be attained by distinguishing between different product categories”277 than are covered by the ten policy goals listed in Article XX. For example, “policies designed to harmonize technical standards, to avoid the accumulation of waste, or to tax the consumption of luxury goods”.278

Charnovitz also worries that by eliminating the use of an ‘aim and effect’ test that “[t]he WTO has laid a serious political trap for itself”279 as:

> Without an aim and effect test, the national treatment requirement takes on very sharp edges. Losing that safe harbor makes it very difficult for governments to use tax or regulatory policy to distinguish products based on policy distinctions.280

Indeed, he suggests that without an ‘aim and effect’ test:

> Future panels might consider a beer can to be a like product to a beer bottle, a non-refillable container to be a like product to a refillable one,23 or a biodegradable package to be a like product to a non-biodegradable package. If so, reasonable environmental taxes and regulations could be held in violation of article III.24281

---

23 In the Canada Alcoholic Drinks case, the panel concluded that a tax solely on non-refillable containers did not violate GATT article III:2. Canada -- Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 27, paras. 5.33, 6.1(h), (1992).282

24 Note that these taxes and regulations might be permitted by GATT article XX if the panel determines that the measure fits a specific exception and that the discrimination is not arbitrary or unjustifiable. This latter determination would involve an analysis very similar to the aim-and-effect test.

Although the ‘aim and effect’ test has never been applied to a consideration of non-product-related PPM characteristics, the concerns as to the effect of not being able to

---

277 Roessler, 1996, above at n 9, at 30.
278 Ibid.
280 Ibid, at 171.
281 Charnovitz, 1998, above at n 199, at 905.
282 But see para 5.33 of that report, where the Panel stated that the concern was not whether a tax was applied to the containers, “but rather their application in a situation where different systems for the delivery of beer to the points of sale applied to imported and domestic beer”. It would be more appropriate to characterise the Panel as having made no finding on whether the tax violated Article III:2 of the General Agreement.
distinguish between product-based origin-neutral domestic regulatory measures are just as apposite to process based regulations, particularly when the criteria targeted are capable of being objectively determined and quantified through scientific assessment by internationally recognised techniques. At the same time, it is apposite to note that the properties, nature, quality, and end-uses of the two cups described in Roessler’s example are quite distinct, and it would be difficult to envisage a panel striking down domestic regulatory measures which made such distinctions on the basis of a superficial comparison of the product. After all, in EEC – Measures on Animal Feed Proteins, when asked to consider whether animal, marine and synthetic proteins were ‘like’ vegetable proteins, the Panel did not halt its comparison after finding that the different substances all acted as proteins, but looked more closely at the chemical make-up of the products at issue and how that affected their functionality. Moreover, in European Communities – Asbestos, the Appellate Body took into account risk factors in relation to the product and how those factors affected the nature of the product and its end-uses.

All in all, Articles I and III are fairly efficient tests in ensuring products which win the ‘comparative advantage’ game remain successful in the international trade arena, and are an efficient means of promoting strong markets. Yet, as we saw earlier, to ensure that sustainable development can occur, a product’s environmental comparative advantage also needs to be reflected.

A product winning the ‘environmental comparative advantage’ game may or may not show this feature in its final product form, as the effect may only be detectable during the production stage of the product. On current interpretations, Articles I and III are deficient in that they cannot differentiate between the winners on the environmental

283 If the cups in Roessler’s example were differently taxed, rather than otherwise regulated, a further analysis could be conducted under Article III:2, second sentence, to see whether they were ‘directly competitive or substitutable’. This category is much more inclusive and extends limitations on the authority of states to distinguish between such products. If the cups were found to be ‘directly competitive or substitutable’, a panel would have to decide whether or not the measure had been differently taxed ‘so as to afford protection’ to domestic production. Only if the answer to this question was ‘yes’, would the regulatory distinction would be struck down, unless was capable of being justified under Article XX of the General Agreement.

284 Note, however, that Articles I and III do not operate efficiently in relation to non-discriminatory measures. It is for this reason that the SPS Agreement, which disciplines such measures in relation to sanitary and phytosanitary issues, was negotiated.
comparative advantage stakes and the losers where it is not evident in the final product. Only if panels begin to accept that non-product-related PPM criteria which are objectively assessable, such as the environmental impact of the product, are a legitimate means for distinguishing between otherwise physically alike or identical products, will Articles I and III begin to make an adequate distinction between such winners and losers. Panels must take care, however, if allowing such a distinction, that the category of allowable distinctions is not opened too wide. An agreement establishing internationally agreed criteria or a valuation methodology to compare physically alike or identical products could assist in this process. Alternatively, an agreement specifically directed to the use of non-product-related PPM-based trade measures could be negotiated. Until then, however, states wishing to ‘trade up’ their environmental standards must rely on Article XX of the General Agreement to justify their domestic regulatory measures. It is to this Article that we now turn.
Introduction

In Chapter 3 we examined the ‘like product’ concept in relation to the principles of ‘most-favoured-nation’ and ‘national treatment’ found in Articles I and III of the General Agreement. We saw that the concept of ‘like product’ is used to determine the permissibility of regulatory distinctions between products, and noted that the interpretation of the term fundamentally affects the scope of regulatory distinctions a state can make between products.

Chapter 3 evaluated the scope to differentiate between physically similar or identical products on the basis of non-product-related PPM factors under Articles I and III. The use of non-product-related PPM-based trade measures to solve environmental problems is an option of last resort, yet, because they encourage producers to internalise the environmental costs of production, such measures have the potential to nurture a strong environment during the conduct of international trade. Chapter 3 argued that measures aimed at a product’s non-product PPMs could be differentiated in a number of ways, but that measures using objectively determined criteria and targeted at the environmental externalities generated by the production of the product were in a policy sense more optimal.

A survey of GATT/WTO jurisprudence demonstrated that the type of non-product-related PPM factors generally considered in disputes have been country-based or targeted at the characteristics of the producer. It also showed that panels have provided various grounds to find that such factors do not provide sufficient justification to authorise different regulatory treatment under Articles I and III of the General Agreement. Chapter 3 concluded that, while there may be some argument that physically identical or similar products may be differentiated on the basis of objectively
determined criteria not detectable in the final product, panels are likely to take a
conservative approach and find physically identical or similar products to be ‘like’.

This approach, which sharply curtails the type of regulatory distinctions which states
may make to implement domestic policy agendas, supports a ‘strong trade’ position. It
allows the ‘invisible hand of the market’ scope to ensure that the comparative
advantage of Members can be maximised, yet hinders the creation by states of
conditions for a ‘strong environment’ to exist. Whether or not relevant international
environmental law exists to shape state behaviour, a ‘strong environment’ depends
upon the implementation and compliance at the domestic level with relevant
environmental law to prohibit or deter environmentally unsustainable conduct. As
pointed out by Howse and Regan, while:

[i]t may seem that the consumption of physically identical products which differ only in
their processing history cannot have different consequences; but in fact it can. In the
normal course of economic activity, when a product is sold to the consumer, the seller
will tend to replenish his supply from the same source. This means that the purchase of
a can of dolphin-safe tuna tends to encourage the subsequent production of dolphin-safe
tuna, while the purchase of a can of dolphin-unsafe tuna tends to encourage the
subsequent production of dolphin-unsafe tuna. This is not the invariable result, but it is
quite general enough so that we can say the sale of dolphin-safe and dolphin-unsafe
tuna have different consequences, ....1

For the environment, the replenishment of stock from a source which uses
environmentally unsustainable PPMs will mean the affected environment will be
degraded. Domestic regulatory measures which distinguish between products on the
basis of the environmental impact caused during the production phase play a vital role
in building a body of environmental law adequately equipped to prohibit or deter
unsustainable conduct.

Yet even if the interpretation that non-product-related PPM factors do not provide
sufficient justification to authorise different regulatory treatment under Articles I and
III of the General Agreement is maintained, this does not mean that non-product-related
PPM-based trade measures cannot be sustained by states. Article XX is the ‘general
exceptions’ clause of the General Agreement, designed to act as a defence for certain
violations under that Agreement. Two subparagraphs of Article XX are considered to be ‘environmental’ exceptions, Article XX(b) and Article XX(g). There has, however, been considerable scepticism among various actors in the trade and environment community as to whether these are sufficient to protect global ecosystems.\(^2\)

In this chapter and the next, we trace the story of how Article XX has been interpreted to understand the latitude it has allowed states to implement their national priorities in domestic legislation and use trade policy as an instrument for environmental protection. In particular, we shall see what scope has been allowed to states to use trade policy to ‘pull up’ environmental production standards for internationally traded products, so that a ‘California effect’ might occur. It shall be seen that while interpretations under the

---


2 For example, one concern is that even a measure taken by Members pursuant to a Multilateral Environmental Agreement (MEA) against another Member may violate Article I, III or XI of the General Agreement and not be regarded as falling within an Article XX exception. Difficult legal issues are raised in particular when the complainant is not a party to the MEA. See Lennard, M., Avoiding and resolving disputes with both trade and environmental aspects - disputes raising issues of overlap between the World Trade Organization Agreement and Multilateral Environmental Agreements (unpublished LLM thesis, Cambridge University, 1996, on file with author); Housman, R., D. Goldberg, B. Van Dyke and D. Zaelke, The Use of Trade Measures in Select Multilateral Environmental Agreements (1995); Mattoo, A. and P.C. Mavroidis, ‘Trade, environment and the WTO: the dispute settlement practice relating to Article XX of the GATT’ in E-U Petersmann (ed), International Trade Law and the GATT/WTO Dispute Settlement System (1997) 327-343. The CTE has focused considerable discussion on means to reconcile trade provisions in MEAs with the WTO Agreement. The EC has submitted a proposal suggesting amendment of Article XX to grant a specific exemption for measures taken pursuant to an MEA, Non-paper by the European Communities on the Relationship between the provision of the Multilateral Trading System and trade measures for environmental purposes, including those pursuant to Multilateral Environmental Agreements (MEAs), 19 February 1996, and more recently a proposal suggesting an note understanding be negotiated which would allow measures taken pursuant to an MEA to be prima facie, WTO consistent, Resolving the Relationship between WTO Rules and Multilateral Environmental Agreements, 19 October 2000, WT/CTE/W/170. Other Members have submitted proposals to interpret the existing exceptions to cover such measures or grant waivers to excuse violations. See the 1996 CTE Report and Brack, D., ‘Reconciling the GATT and multilateral environmental agreements with trade provisions: the latest debate’ (1997) 6(2) Review of European Community Law and International Environmental Law 112. See also Caldwell, D.J., ‘International environmental agreements and the GATT: an analysis of the potential conflict and the role of a GATT “waiver” resolution’ (1994) 18 Maryland Journal of International Law and Trade 173; Reiterer, M., ‘GATT, the WTO and the Environment: the agenda of the CTE, in particular MEAs, eco-labelling and trade liberalisation’ (Paper presented at Asia Conference on Trade and Environment, Singapore, 27-28 June 1996); Wold, C., ‘Multilateral environmental agreements and the GATT: conflict and resolution?’ (1996) 26 Environmental Law 841; Hudec, R.E., ‘GATT legal restraints on the use of trade measures against foreign environmental practices’ in J Bhagwati and R E Hudec (eds), Free Trade and Harmonization: legal analysis (1996) 95-174; and Blank, D.P., ‘Target-based environmental trade measures: a proposal for the new WTO committee on trade and environment’ (1996) 15 Stanford Environmental Law Journal 61, commenting on an early proposal for MEA coverage by the EC. This chapter focuses on the
GATT regime afforded comparatively little regulatory latitude to states, current interpretations now seem to sustain a broader regulatory authority.

In this Chapter, the jurisprudential history of Article XX under the GATT regime is considered. It shows Article XX was interpreted to strengthen strong markets and comparative advantage to the detriment of the environment, disallowing the unilateral use of PPM-based trade measures in relation to imported goods. This prevented the operation of the second and third factors Vogel considers necessary for the 'California effect' to take place, such that strong states could not use domestic regulatory measures to 'pull up' environmental production standards for internationally traded products.

Jurisprudential developments under the WTO regime will be considered in Chapter 5. In particular Chapter 5 considers a recent decision of the Appellate Body which reverses the notion that PPM-based trade measures cannot be applied in relation to imported goods, and discusses the sea-change in the interpretative style of Article XX which has heralded a move to a more rules-based approach to interpretation in WTO jurisprudence. Chapter 5 will demonstrate that a number of the rulings of the Appellate Body deliver an interpretation of Article XX which allows sustainability through trade. Strong states can now begin to rely on that Article to lead the trend towards higher environmental standards, although strong controls are placed on the unilateral use of trade measures. Thus, while Article XX allows states to unilaterally use non-product-

unilateral use of PPM-based trade measures to protect the environment. It does not discuss measures taken directly pursuant to an MEA.

3 These factors are that:

- strong states must be able to prevent the importation of goods which do not meet the standards, and
- strong states can then negotiate market access conditions for weaker states in exchange for them adopting higher product and production standards.

See text accompanying Chapter 2, n 157, above, and Vogel, D., Trading Up: Consumer and Environmental Regulation in a Global Economy (1995), at 259-263. Note that the California effect will occur, de facto, if weaker states, or producers in those states, adapt their production processes to meet those requirements.

4 These are the concerns of Esty, D., Greening the GATT: Trade, Environment and the Future (1994), and others, for example, Dunoff, 1994, above at n 185; Charnovitz, S., 'Environment and health under WTO dispute settlement' (1998) 32 The International Lawyer 901 Compare Farber, D.A. and R.E. Hudec, 'GATT legal restraints on domestic environmental regulations' in J Bhagwati and R E Hudec (eds), Free Trade and Harmonization: legal analysis (1996) 59-94.
related PPM-based trade measures to ‘pull’ up environmental standards and bring about a ‘California effect’, their discretion to do so is not unlimited.

**The legal requirements of Article XX**

The relevant ‘environmental’ exceptions of Article XX appear in subparagraphs (b) and (g). To be consistent with Article XX, at least one of the subparagraphs must be satisfied as well as the chapeau.

Article XX(b) requires a three-step analysis. The respondent bears the burden of proof in showing:

1. that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
2. that the ... measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
3. that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

Once it is established that the policy behind the measure falls within the range of policies designed to protect human, animal or plant life or health, the necessity of the measure must be examined. It is not the necessity of the *policy goal* which is examined, rather whether the *measure* is necessary for achieving the policy goal. Therefore, if the measure is an import ban, it is the necessity of using an import ban rather than, for example, environmental labelling to achieve such a goal which is at issue.

A ‘least GATT-inconsistent’ test is used to determine whether a measure is *necessary*. The party defending a domestic regulation bears the burden of proving that there is “no

---

5 The use of subparagraphs (a) and (d) to sustain environmentally motivated measures has not yet been tested. See Petersmann, E-U., ‘International trade law and international environmental law: prevention and settlement of international disputes in GATT’ (1993) 27(1) *Journal of World Trade* 43, at 54, note 26.
6 The text of Article XX is set out in Appendix A.
9 See also Report of the Panel in *European Communities – Asbestos*, at para 8.207; Report of the Appellate Body in *European Communities – Asbestos*, at para 170ff; and Report of the Appellate Body in
other measure consistent, or less inconsistent” with other parts of the General Agreement which “are reasonably available to force compliance with” the policy objectives. This test is generally regarded by environmentalists as very restrictive, as it requires the respondent to prove a negative – that no other measure which is consistent with the General Agreement exists which is reasonably available to it – and to rank all alternatives according to their consistency with the General Agreement, choosing only the ‘least inconsistent’. Moreover, in relation to Article XX(b), panels have not tended to examine the effectiveness of a proposed alternative measure in achieving the policy goal. This has undermined the ability of states to choose a measure which balances the benefits to the environment against the cost to trade according to their own national priorities.

Various proposals have been put forward to modify the words of Article XX(b) or reinterpret the ‘necessary test’ in the General Agreement, yet recent comments of the

---


Report of the Panel in United States – Gasoline, at paras 6.22-6.28; Report of the Panel in European Communities – Asbestos, at para 8.207. This test was previously used in Thailand – Restrictions on Importation and Internal Taxes on Cigarettes, at para 74, see n 39 below, quoting from United States – Section 337, at para 5.26.


See in particular Thailand – Restrictions on Importation and Internal Taxes on Cigarettes, discussed at text accompanying n 39ff, below. But see the Report of the Panel in European Communities – Asbestos, where the Panel did consider this aspect; at para 8.208ff; approved by the Appellate Body at para 174. See also Report of the Panel in Korea – Beef, at para 665ff and the Report of the Appellate Body at para 176ff. See also the situation in relation to Article XX(d), where some panels have made this enquiry. See United States – Imports of Certain Automotive Spring Assemblies, L/5333, adopted 26 May 1983, BISD 30S/107, hereinafter United States – Spring Assemblies, at n 33ff, below.

See Dunoff, 1994, above at n 11. Note that this criticism appears to have been taken up in relation to the SPS Agreement, where a measure is judged to be “not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade”. (Note 3 to Article 5.6, emphasis added.) According to Article 2.2 of the TBT Agreement, trade measures should be “not more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” Protection of the environment is specifically listed as a legitimate objective. This test would appear to be stricter than the test in the SPS Agreement because it omits any comparison of how trade restrictive the measure is. Note that environmentalists have been concerned about the inclusion of this test in the TBT Agreement, see, for example, Staffin, E.B., “Trade barrier or trade boon? a critical evaluation of environmental labeling and its role in the “greening” of world trade” (1996) 21 Columbia Journal of Environmental Law 205.

See, for example, Esty, 1994, above at n 4, at 222; Hudec, 1996, above at 2, at 128, 130, 150; Charnovitz, S., ‘Green roots, bad pruning: GATT rules and their application to environmental trade

170
Appellate Body suggest some moderation of the discipline imposed by the term.\textsuperscript{15} Since the discipline of Article XX(b) in relation to sanitary and phytosanitary issues has recently been strengthened by the adoption of the \textit{SPS Agreement}, proposed changes to weaken Article XX(b) through amendment to the text are unlikely to be met with Members’ approval in the foreseeable future.

Article XX(g) requires a four-step analysis. Again the respondent bears the burden of proof in showing:

1. that the \textit{policy} in respect of the measures for which the provision was invoked fell within the range of polices related to the conservation of exhaustible natural resources;
2. that the measures for which the exception was being invoked – that is the particular trade measures inconsistent with the General Agreement – were \textit{related to} the conservation of exhaustible natural resources;
3. that the measures for which the exception was being invoked were made effective \textit{in conjunction} with restrictions on domestic production or consumption; and
4. that the measures were applied in conformity with the requirements of the \textit{introductory clause} of Article XX.\textsuperscript{16}

In \textit{United States – Gasoline}, the Appellate Body emphasised that the test for whether a measure falls within subparagraph (g) or (b) of Article XX is quite distinct. Rather than imposing a ‘necessary’ test and the stringency which that entails, under Article XX(g), the measure must merely be “related to the conservation of exhaustible natural resources”. Further, Article XX(g) “needs to be read in context and in such a manner as

\begin{itemize}
  \item measures’ (1994) 7 \textit{Tulane Environmental Law Journal} 299, at 327-328; Brunner, A.E., ‘Conflicts between international trade and multilateral environmental agreements’ (1997) 4 \textit{Annual Survey of International \& Comparative Law} 74.
  \item Report of the Panel in \textit{United States – Gasoline}, at para 6.35. The analysis of the factors to be considered basically follows that articulated in \textit{Tuna-Dolphin II}, see para 5.12. Although the reasoning of the Panel in \textit{United States – Gasoline} in relation to Article XX(g) was overruled on appeal by the Appellate Body, their analysis was largely unaffected except for one important point. That was, whereas the Panel only tested the GATT-inconsistent aspect of the measure – the less favourable treatment – to see whether it complied with Article XX(g), the Appellate Body stated that the measure itself must be examined to see whether it is ‘related to’ the conservation of natural reasons. That is, a violation of the \textit{General Agreement} is assumed. \textit{United States – Gasoline}, at 16. See Appleton, A., ‘GATT Article XX’s chapeau: a disguised ‘necessary’ test?: The WTO Appellate Body’s ruling in \textit{United States - Standards for Reformulated and Conventional Gasoline}’ (1997) 6(2) \textit{Review of European Community Law and International Environmental Law} 131; Hudec, R.E., ‘GATT/WTO constraints on national regulation: requiem for an “aim and effect” test’ (1998) 32(3) \textit{The International Lawyer} 619. The Appellate Body’s reasoning applies equally to an examination carried out under Article XX(b) of the \textit{General Agreement}.\textsuperscript{17}
\end{itemize}
to give effect to the purposes and objects of the *General Agreement.*" According to the Appellate Body:

The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase “relating to the conservation of exhaustible natural resources” may not be read so expansively as to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the “General Exceptions” listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.\(^\text{18}\)

The test for whether a measure generally falls within the scope of Article XX(g) has historically been whether it is ‘primarily aimed at’ the conservation of exhaustible natural resources.\(^\text{19}\) In *United States – Gasoline*, the Appellate Body noted, with an implicit invitation for future re-examination, that “the phrase ‘primarily aimed at’ is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).”\(^\text{20}\) Indeed, it seemed to refine the test so that where there was a “substantial relationship” between the inconsistent measure and conservation goal of the whole of legislation, Article XX(g) would apply. Measures “merely incidentally or inadvertently aimed” at conservation would not fall within that Article.\(^\text{21}\) The ‘substantial relationship’ test was confirmed by the Appellate Body in *United States – Shrimp*, which found that such a relationship was established by the “close and genuine relationship of means and ends”\(^\text{22}\) evident in “general structure and design of the measure … at stake … and the policy goal it purport[ed] to serve”.\(^\text{23}\)

---

17 *United States – Gasoline*, at 18.
18 Ibid.
19 This test was formulated in *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, at para 4.6; adopted 22 March 1988.
20 *United States – Gasoline*, at 18.
21 Ibid, at 18.
23 Ibid, at para 141.
GATT jurisprudence on Article XX

United States – Prohibition of Imports of Tuna and Tuna Products from Canada, considered in 1982, was the first adopted GATT case to raise directly Article XX. In that case, the US imposed sanctions on Canada by banning the importation of Canadian tuna and tuna products pursuant to s.205 of the Fishery Conservation and Management Act 1976 (US). This action followed the seizure of nineteen US fishing vessels and a number of their fishermen by Canadian authorities. The Canadian authorities made the arrests upon finding that the fishermen were fishing for tuna in waters which it regarded as being under its fisheries jurisdiction. The US did not recognise Canada’s jurisdictional claim. If the US Secretary of State found that a US fishing vessel had been seized by a foreign nation while fishing “in waters beyond any foreign nation’s territorial sea … as a consequence of a claim of jurisdiction which was not recognized by the US”, s.205 authorised the US Secretary of Treasury to “immediately take such action as may be necessary and appropriate to prohibit the importation of fish and fish products from the foreign fishery”.

The US argued that Article XX(g) justified their action. While the Panel noted that the US’s restrictions were not necessarily arbitrary or unjustifiable, and did not amount to a disguised restriction on international trade, it found that they had not been taken in

24 L/5198 adopted 22 February 1982, BISD 29S/91. Hereinafter United States – Tuna from Canada. It was, however, probably not the first time a country relied on Article XX to sustain a measure. As Jackson has noted, Article XX does not require countries to notify when they rely on Article XX other than in dispute situations, therefore such reliance is not reflected in GATT documents. Jackson, J.H., ‘The legal meaning of a GATT dispute settlement report: some reflections’ in N Blokker and S Muller (eds), Towards More Effective Supervision by International Organizations, Essays in Honour of Henry G. Schermers (1994) 149. Members have now established an Environmental Database in which they may notify national measures or provisions related to the environment. This provides some indication as to the provisions on which they rely. See Trade and Environment Bulletin, PRESS/TE 023, 14 May 1998, WTO Committee on Trade and Environment adopts its work programme for 1998, agrees to develop a WTO Environmental Database, and discusses eco-labelling and the environmental benefits of sectoral trade liberalization. For the document containing the Environmental Database (EDB) for 1999 see WT/CTE/W/143, for 1998 WT/CTE/W/118, for 1997 WT/CTE/W/77 + CORR.1 and for 1996 WT/CTE/W/46.
26 Ibid, at para 2.2.
27 Ibid.
28 The Panel found that if a measure had been publicly announced as a trade measure, then it did not constitute a disguised restriction on international trade, at para 4.8. Similarly, in United States – Spring Assemblies, the Panel found that the measures were not disguised because they had been published and
conjunction with restrictions on domestic production or consumption. Even though the US had implemented domestic restrictions to conserve some species of tuna, it had not done so in respect of all the species of tuna covered by their import prohibition. The Panel found that the measures were not justified by Article XX(g) as they did not meet the third requirement of the test, and that having been taken in response to Canada arresting certain US ships “would [not] in [themselves] … constitute a measure of a type listed in Article XX.”

Article XX was subsequently raised in 1983 in United States – Imports of Certain Automotive Spring Assemblies, in 1984 in Canada – FIRA, and in 1989 in United States – Section 337. Each of these cases examined the application of Article XX(d). While Article XX(d) is not an ‘environmental’ exception, like Article XX(b), its provisions include a ‘necessary’ test. The interpretation of the term ‘necessary’ in the context of Article XX(d) is therefore considered.

In United States – Spring Assemblies, the Panel considered that in determining whether a measure was ‘necessary’, scrutiny should be given to “whether a satisfactory and effective alternative existed … which would have provided … a sufficiently effective remedy” against the conduct against which the measure was taken. In that case, the US had banned the importation and sale of certain spring assemblies as they infringed a US product patent and a process patent. They claimed that both the product, and the process by which certain spring assemblies were produced, violated US patents. The Panel noted that rather than an import ban being applied, the patent holder could have used civil court proceedings to seek redress. It found, however, that such a remedy would only be effective against known patent infringers, not against those infringers applied in a procedurally fair manner. This unsatisfactory interpretation was overruled in United States – Gasoline, where the Appellate Body held “[I]t is … clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of ‘disguised restriction.’” at 25.

31 Canada – FIRA did not examine the meaning of Article XX(d) or the term ‘necessary’ in any depth. Its jurisprudential importance stems from establishing the general principle that the party relying on an Article XX exception must prove its application. Approved in United States – Section 337 and Tuna-Dolphin I (unadopted); applied in WTO cases including United States – Gasoline and United States – Shrimp.
32 See at Appendix A.
who were unknown. It noted that the manufacturing process for automotive spring assemblies was relatively simple and could "without major difficulties be produced by other foreign producers infringing ... the [patent holder's] patent and subsequently imported for use in the US." Accordingly, it found that this would not effectively protect the patent holder's rights, and that the import ban was 'necessary'.

The two points to note about this case are first, that the import ban was imposed both in respect of products as well as their non-product-related PPMs, and that there was no question that this fact would, in and of itself, exclude the applicability of Article XX(d). Secondly, when applying the 'necessary' test, the Panel examined whether an alternative measure would be as effective as the measure at issue, not whether an alternative measure would be less inconsistent with the General Agreement as the test was subsequently applied. Accordingly, greater scope was granted to the respondent to choose a measure which could be effectively tailored to the problem at issue according to the respondent's national priorities.

In United States - Spring Assemblies, the import restrictions were authorised under the Tariff Act 1930 (US). In United States - Section 337, Section 337 of the Tariff Act itself became the subject of GATT scrutiny, and the 'necessary' test was strengthened. The Panel found:

a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

The Panel did not examine whether a 'satisfactory and effective alternative' providing 'a sufficiently effective remedy' was available, merely whether a 'less GATT-inconsistent' measure was available. Its approach was softened slightly by the Panel enquiring whether the measure was one the respondent 'could be reasonably expected

33 United States - Spring Assemblies, at para 58.
34 Ibid, at para 59.
to employ’, yet this enquiry does not amount to an examination of whether the alternative measure would be ‘satisfactory’ or ‘effective’. While such a formulation could employ an ‘effectiveness test’ within its scope, this is not a sine qua non. A Panel could merely ask whether it was possible for the respondent to use such a measure when examining whether a respondent could be ‘reasonably expected to employ’ an alternative measure, and not consider whether it would fulfil the respondent’s national priorities.

The test enunciated in United States – Section 337 allowed panels significantly greater scope to find that measures would not fall within the confines of Article XX(d). At the same time, because of the increased ambit of the panels’ discretion, and because the efficiency limb of the necessary test was largely discarded, the boundaries of freedom within which national law-makers could or would act to implement national policies were tightened and blurred.

The ‘least GATT-inconsistent’ approach to the ‘necessary’ test was applied in relation to Article XX(b) in the 1990 case of Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes. In that case, Thailand banned the importation and exportation of certain tobacco products from Thailand, except by licence of the

37 Charnovitz, S., ‘Exploring the environmental exceptions in GATT Article XX’ (1991) Journal of World Trade 37; Esty, 1994, above at n 4, at 48, note 15, commenting “A ‘least GATT-inconsistent’ or ‘least trade-restrictive’ test could work as an efficiency precept, forcing attention to the means chosen to pursue environmental goals, without threatening the goals chosen. Unfortunately, the GATT jurisprudence has developed without regard to this ends-means distinction and without regard to the political difficulty of adopting optimal environmental policies that serve both trade and environmental purposes, effectively eviscerating Article XX.”
38 The effect of striking down national legislation is that states which wish to remain in compliance with the international trade regime will curtail the implementation of national law which might be subject to challenge. Atik, J., ‘Identifying antidemocratic outcomes: authenticity, self-sacrifice, and international trade’ (1998) 19 University of Pennsylvania Journal of International Economic Law 229. Thus a ‘chilling’ effect on the implementation of national law occurs. Mander, D. and P.E. Perkins, ‘Trade disputes and environmental “regulatory chill”’ (1994) 18(2) World Competition 57; Ekins, P., Proposals for Reconciling Trade and Environmental Sustainability (1996). Of course, nations may choose to disregard the boundaries set by the international trade regime by enacting inconsistent legislation, such as the US’s Cuban Freedom and Democratic Solidarity (Libertad) Act of 1996 (the Helms-Burton Act), or may implement inconsistent legislation unawares of the constraints set by the trade regime, (Atik, 1998). Article 22 of the DSU allows Members to pay compensation or have the DSB authorise the suspension of concessions or other obligations under the covered agreements of the WTO if that Member chooses not to comply with its recommendations and rulings.
Director-General of the Thai Excise Department or a competent officer authorised by him. The only licences granted were to the Thai Tobacco Monopoly which had, since 1966, imported cigarettes only three times – in 1968-70, 1976 and 1980. The Panel heard evidence from the Parties in the case, and also heard evidence from a World Health Organization expert on the technical aspects of the health effects of smoking and patterns of consumption in Thailand and elsewhere, pursuant to a memorandum of understanding between the Parties. On the evidence, the Panel accepted that "smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b)". However, in considering whether Thailand could have taken "measures consistent, or less inconsistent, with the General Agreement" to reduce the consumption of cigarettes, the Panel noted that although a number of alternative strategies for reducing consumption were open to Thailand, they had not been put into effect. These strategies included labelling and banning cigarette advertising. The Panel therefore concluded that the particular measure chosen by Thailand was not 'necessary' within the meaning of Article XX(b).

The Thai measures were clearly discriminatory. Nevertheless, the 'necessary test' which was employed placed severe restraints on states' ability to choose appropriate domestic regulatory measures to improve their citizens' health. In particular, commentators noted that by interpreting 'necessary' to mean 'least GATT-inconsistent', panels had established a test which was "almost impossible" to meet.

---

40 Section 27 of the Tobacco Act 1966; Thai – Cigarettes at para 6. Tobacco was defined for the purposes of that Act as "cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing tobacco" (s.4).
41 The US also argued that Thailand placed certain internal taxes on cigarettes which were discriminatory, however the Panel found that the taxes were not applied in a manner inconsistent with Article III. Thai – Cigarettes, at paras 84-86.
42 Thai – Cigarettes set out the memorandum of understanding at para 3.
43 Ibid, at para 73.
44 Ibid, at para 77.
45 Ibid, at para 77 and 78. Thailand had instituted health warnings and bans on cigarette advertising and promotion, and it retained these following its removal of the import bans. Dunoff, 1994, above at n 11, at 1062 note 74, referring to Kanchanalak, R. "GATT rules against Thai ban on foreign cigarettes" Bangkok Post, October 1, 1990 at 1; Ungphakorn, P.M. "U.S. won't object to cigarette ban" Bangkok Post, October 11, 1990 at 1.
46 Thai – Cigarettes at para 81.
47 Dunoff, 1994, above at n 11; Esty, 1994, above at n 4; Charnovitz, 1991, above at n 37.
because “Creative counsel challenging trade measures should always be able to posit an *ex post facto* measure that is less restrictive on trade”. This would not be the case if the complainant had to demonstrate that an alternative measures would be as effective as the measure in place, but the Panel made no such an investigation in *Thai – Cigarettes*.

Charnovitz has argued that the term “necessary” in Article XX(b) should not be read “as meaning ‘absolutely necessary’ in the sense that without the action, achievement of the policy goal would be impossible”, but that it could encompass measures providing a means of achieving the policy goal at stake. He has also noted that the preparatory history of the *General Agreement* suggests that ‘necessary’ was meant in the scientific sense, rather than a ‘market dominated definition’ of the term being evident. Roessler has commented however that had the drafters of the *General Agreement* intended panellists to examine the scientific necessity of maintaining, for example, certain health policies, that “[o]ne can safely assume that the drafters ... would have given some guidance on the criteria to be used in assessing the necessity of the contracting parties’ health policies”. Given the:

significant differences between the health policies of the contracting parties, the conflicts of values that have to be resolved when a health policy is adopted, the enormous difficulty of agreeing among the now 128 (sic) contracting parties on common criteria for judging health policies, and the inappropriateness of undertaking such a task in a body not composed of representatives of health ministries.

While it is dangerous to make any such assumption about ‘what might have been’ in any negotiation process, Roessler’s comments aptly point out the difficulties panellists would confront were they to judge on the necessity of a policy in the scientific sense. Moreover, there is a danger that such a test would be applied too strictly. As Principle

---

48 Dunoff, 1994, above at n 11, at 1062-3; see also Charnovitz, 1994, above at n 14; Esty, 1994, above at n 4.
49 Charnovitz, 1994, above at n 14, at 327.
15 of the Rio Declaration points out, states should not wait until it is shown to be ‘necessary’ to take action to protect the environment, rather they should take action on a precautionary basis.\textsuperscript{54}

Notwithstanding the comments of critics, the ‘least GATT-inconsistent’ approach to the ‘necessary’ test went on to be approved in the WTO disputes of United States – Malt Beverages and Korea – Beef in relation to Article XX(d),\textsuperscript{55} and was also applied in the Tuna-Dolphin disputes and European Communities – Asbestos, discussed further below.\textsuperscript{56}

The next case to raise Article XX was Canada – Measures Affecting Exports of Unprocessed Herring and Salmon,\textsuperscript{57} where Article XX(g) was considered. In that case, Canada banned the exportation of certain salmon and herring unless it had been canned, salted, smoked, dried, pickled or frozen, and had been properly inspected. The US argued that Canada’s ban was in breach of Article XI and was prima facie, a nullification and impairment of benefits under the General Agreement. Canada argued its measures “were an integral and longstanding component of Canada’s overall West Coast fisheries conservation and management regime” and justifiable under Article XX(g).\textsuperscript{58}

In considering the case, the Panel said that it would examine the words of Article XX(g) “in the light of the context in which Article XX(g) appears in the General

\textsuperscript{53} Ibid, at 35.

\textsuperscript{54} Principle 15 states “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

\textsuperscript{55} United States – Malt Beverages, at para 5.43.

\textsuperscript{56} But note that in European Communities – Asbestos, the Appellate Body appears to have reintroduced the effectiveness requirement, examining whether the less GATT-inconsistent measure satisfied the chosen level of protection of the respondent. Report of the Appellate Body in European Communities – Asbestos, at para 174, and text accompanying Chapter 5, n 292, below. This approach was followed by the Panel in United States – Shrimp (Recourse to Article 21.5), at text accompanying Chapter 5, n 257, below.

\textsuperscript{57} BISD 35S/98, at para 4.6; adopted 22 March 1988, hereinafter the Herring and Salmon case.

\textsuperscript{58} Herring and Salmon case at para 3.3.
Agreement and in the light of the purpose of that provision”. However, it deliberately chose a restrictive interpretation of the words ‘relating to the conservation of natural resources’ and ‘in conjunction with restrictions on domestic production or consumption’ which did not conform to their ordinary meaning. Noting that Article XX(g) differed from Articles XX(a), (b), (d) and (j) in that it did not use the words ‘necessary’ or ‘essential’, and therefore covered “a wider range of measures” than those Articles, the Panel stated:

... as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as “relating to” conservation within the meaning of Article XX(g). The Panel, similarly, considered that the terms “in conjunction with” in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective “in conjunction with” production restrictions if it was primarily aimed at rendering effective these restrictions.

Canada had argued that “the export prohibitions were not conservation measures per se but had an effect on conservation because they helped provide the statistical foundation for the harvesting restrictions and increase the benefits to the Canadian economy arising from the Salmon Enhancement Program”. The Panel noted, however, that Canada had been able to collect similar data without export prohibitions on other types of fish, including salmonids, and that the export prohibition did not prevent the export of salmon and herring generally, only the export of unprocessed salmon or herring. It found that the Canadian measures were not ‘primarily aimed at’ the conservation of salmon and herring stocks or rendering effective the restrictions on their harvesting.

59 Ibid, at para 4.5. This approach echoes the approach to treaty interpretation set out in Article 31 of the Vienna Convention. Note however that the Vienna Convention states that the interpretation must be in accordance with the ordinary meaning of the words, not the words as read narrowly. See below at n 99.
60 Herring and Salmon case at para 4.6, emphasis added.
62 Ibid.
The ‘primarily aimed at’ test was used until *United States – Gasoline*, when the WTO Appellate Body signalled that it might be incorrect. As in the case of refinements made by panellists to the Article XX(b) ‘necessary’ test, the adoption of the ‘primarily aimed at’ test severely limited the discretion of states to use domestic regulatory measures to achieve environmental policy objectives. This restrictive approach served the GATT agenda of liberalising international trade and maintaining strong markets free of government intervention. It also allowed a semblance of administrative simplicity to be retained in applying GATT rules. Yet its consistent use attracted increasingly hostile attention which, arguably, had a destabilising influence on the system. Attention reached a crisis point when the *Tuna-Dolphin* decisions were leaked. These decisions are examined in the next section.

**Tuna-Dolphin I**

*Tuna-Dolphin I* was the first dispute to raise Article XX to defend an environmentally motivated importation ban in which the production process of the good was at issue. As explained in Chapter 3, the dispute arose when the US banned the importation of certain tuna and tuna products from Mexico caught using the ‘purse-seine’ net technique, the Panel finding that the measures contravened Article XI of the *General Agreement*. The Panel then considered whether the measures fell within the scope of Article XX(g) and Article XX(b).

The US bore the burden of proving that its measures fell within the terms of these subparagraphs. Mexico argued that they only applied to measures taken to protect or conserve the relevant environmental attributes *within the territory* of the Contracting Party taking the measure, and submitted:

> Permitting one contracting party to impose trade restrictions to conserve the resources of others would introduce the concept of extraterritoriality into the GATT. This would threaten all contracting parties, especially when restrictions were established unilaterally and arbitrarily as in the case of the United States MMPA.63
This argument resonated strongly with the Panel. In the case of Article XX(b), the Panel noted that the words of the provision did not indicate whether it prohibited measures taken 'extrajurisdictionally'\textsuperscript{64} so it:

decided to analyze this issue in the light of the drafting history of Article XX(b), the purpose of this provision, and the consequences that the interpretations proposed by the parties would have for the operation of the General Agreement as a whole.\textsuperscript{65}

This method of interpretation does not follow that established in customary international law, as set out in the \textit{Vienna Convention}. As noted by Jennings and Watts, "A treaty is to be interpreted in the light of general rules of international law in force at the time of its conclusion – the so-called inter-temporal law."\textsuperscript{66} The \textit{Vienna Convention} only came into force in 1980, significantly after the 1947 \textit{General Agreement}. To the extent, however, that the \textit{Vienna Convention} codifies customary rules of international law on treaties, it was relevant to the dispute as its provisions may be considered as 'shorthand' for these customary rules. The rules on treaty interpretation in Articles 31 and 32 of the \textit{Vienna Convention} are considered to constitute customary international law. As noted by Palme and Mavroidis however, the approach taken by the Panel in \textit{Tuna-Dolphin I} was "illustrative of the tendency of GATT panels to disregard public

---

\textsuperscript{63} \textit{Tuna-Dolphin I}, at para 3.48. See also at para 3.31. Mexico's approach on the issue of extraterritoriality was supported by Australia and Thailand as third parties to the dispute. 'MMPA' stands for the Marine Mammal Protection Act 1972 (US).

\textsuperscript{64} There are a number of bases upon which a state may exercise jurisdiction, the territorial principle being just one of them. Other bases, of varying degrees of acceptance, include the nationality principle, the protective principle, the universality principle and the passive personality principle. Shearer, I., 'Jurisdiction' in S Blay, Piotrowicz, R., Tsameny, M. (ed), \textit{Public International Law: An Australian Perspective} (1997) 161-192; see also Cheyne, I., 'Environmental unilateralism and the WTO/GATT system' (1995) 24(3) \textit{Georgia Journal of International and Comparative Law} 433; Lennard, M., 'Weaving nets to catch the wind: extraterritorial and supraterritorial business regulation in international law' (Paper presented at \textit{The Attorney-General's Legal Practice 23rd International Trade Law Conference}, Australian National University, 29 May 1997). Whereas the territorial principle allows a state the right to legislate on matters with respect to its territory and matters occurring within its territory (i.e. national boundaries) and with respect to matters occurring on ships and aircraft carrying the state's flag (with certain limitations), the other principles of jurisdiction allow states to legislate with respect to matters occurring in the territory of other states. Shearer, 1997, above. Perhaps by using the term 'extrajurisdictional protection' rather than 'extraterritorial protection', the Panel was implicitly recognising that the concept of jurisdiction encompasses something more than territory. Nevertheless, it still limited its interpretation of Article XX(b) and Article XX(g) to authorising only those environmental harms occurring within the territory of the state imposing the measure.

\textsuperscript{65} \textit{Tuna-Dolphin I}, at para 5.25.

international law when it came to interpreting the General Agreement". Rather than taking a textual approach supported by the Vienna Convention, the Panel adopted a purposive approach, narrowly confining the use of the Article XX exceptions.

It will be recalled that Article 31 of the Vienna Convention States:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall ... [include] its preamble and annexes ...

The Panel’s purposive approach can be in part demonstrated by its use and analysis of the negotiating history of Article XX. Article 32 of the Vienna Convention provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.68

The Panel, however, examined the negotiating history prior to establishing the ordinary meaning of the words of Article XX. Moreover, its interpretation of the negotiating history was curious. The Panel stated:

5.26 ... the proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, “Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures: ... (b) necessary to protect human, animal or plant life or health”. In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: “For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country”. This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of the Preparatory Committee in Geneva agreed to drop this proviso as unnecessary. Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the

use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country. (footnote omitted)\footnote{69}

EPCT/A/PV/30/7-15, which is on point, indicates that the drafters intended to prevent a contracting party from banning the importation of a product from a country with a particular disease if that contracting party also had the disease, unless it was taking steps to eradicate it by using the words “if corresponding domestic safeguards under similar conditions exist in the importing country”. They found, however, the text unclear and generally in need of an explanatory note. With some discussion, the US proposed that the words be dropped as they added nothing to the text. This proposal was adopted. The fact that the drafters “focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country” does not, however, tell us anything about whether Article XX(b) was or was not intended to authorise the use of trade restrictions to safeguard life or health of humans, animals or plants outside the jurisdiction of the importing country. A number of international treaties were in existence which authorised such conduct, plus states such as the US and Britain had domestic laws which also had that effect.\footnote{70} There is no indication that the drafters intended to override these laws, laws which they were aware of.\footnote{71} What is more likely is that either they intended to make room for these laws,\footnote{72} or the question of whether Article XX(b) authorised trade restrictions to protect human, plant or animal life outside the jurisdiction of the importing country was not considered.\footnote{73}

\footnote{69} Tuna-Dolphin I, at para 5.26.


\footnote{72} Ibid.

\footnote{73} Dunoff, J.L., ‘Reconciling international trade with preservation of the global commons: can we prosper and protect?’ (1992) 49 Washington and Lee Law Review 1407, at 1417. Dunoff notes at 1416-1417 that the negotiations which the Panel relied on contained no evidence, nor even hinted “that nations are limited to protecting animal or plant life within its borders”. He considers that “the additional proviso
The Panel found that the drafting history supported its concern that Article XX(b), if allowed to apply beyond the jurisdictional boundary of a country, would mean that:

each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations. 74

Accordingly, the Panel ruled (as noted by Dunoff, more by way of assertion rather than analysis) against the application of Article XX(b) to the US measures. 75 The Panel did not confine its finding of fault with the US measures to the jurisdiction issue alone. It also considered that the US:

had not demonstrated to the Panel ... that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international co-operative arrangements. 76

The Panel ignored evidence that the US had spent 10 years trying to negotiate an Inter-Americas Agreement on dolphins though the Inter-American Tropical Tuna Commission, 77 and did not discuss how far such negotiations should be pursued in the face of another country proving unwilling to co-operate. 78 It found that the US had not

was dropped for two separate reasons. Firstly, as the Chairman of the Preparatory Committee that drafted this Article stated, it is ‘not clear and practically impossible to explain in a satisfactory way.’ Secondly, because its meaning was ‘already covered in the headnote [i.e., the language prohibiting disguised restrictions on trade] to the Article.’ Dunoff, 1992, referring to Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. Doc. E/PC/T/A/PV/30, at 13 (remarks of Chairman) and Dam, K., The GATT Law and International Economic Organization (1970); Charnovitz, 1991, above at n 37.

74 Tuna-Dolphin I, at para 5.27.
75 Dunoff, 1992, above at n 73, at 1420. This concern for the integrity of the General Agreement also occurred in the Panel’s decision on United States - Shrimp, see Chapter 5 below.
76 Tuna-Dolphin I, at para 5.28.
77 These efforts are reported in Dunoff, 1992, above at n 73; Snape, 1994, above at n 51. See the Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, June 1992, 33 ILM 936. Compare the Appellate Body’s comments in United States - Gasoline, at 27 where it suggested that Article XX requires parties to negotiate at least “to the point where [the party relying on the Article XX exception] encountered governments that were unwilling to cooperate”. See also United States - Shrimp (Recourse to Article 21.5), where the Panel found at para 5.67 “We are consequently of the view that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection and conservation of sea turtles in order to comply with Article XX. However, we reach the conclusion that the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We
sufficiently searched for a least-GATT inconsistent measure which was reasonably available.

The US’s measures were problematic in that they served an environmental purpose, but also satisfied protectionist interests. In order to balance the need to allow the catch and sale of tuna while reducing the dolphin bycatch rate, the US linked the dolphin take to that of the tuna catch. The methodology to determine the permissible ratio for a particular year was, however, based on the number of dolphins the US fishermen caught. This meant Mexico and exporters to the US only knew at the end of a year whether their catch ratio fell within the permissible range. The unpredictable nature of the US requirements meant that the Panel did not consider that the US measures could be ‘necessary’ to protect the health or life of dolphins. An alternative methodology, reasonably available, for reducing the incidental take rate of dolphins was not, however, suggested by the Panel. Dunoff notes that ‘predictability’ is not one of the requirements of Article XX(b), and he is correct. Yet had the measures gone past the subparagraph (b) stage of Article XX(b), they would likely have failed the chapeau. That is because the unpredictable nature of the measures would have resulted in discrimination difficult to justify.

The Panel’s concern regarding the destabilising influence of measures taken ‘extrajurisdictionally’ pursuant to Article XX(b) to protect the environment also influenced its reasoning on Article XX(g).

Applying the ‘primarily aimed at’ test established in the Herring and Salmon report to the interpretation of Article XX(g), the Panel noted that the US’s measures had to be employed in conjunction with restrictions on domestic production or consumption. This is a legitimate aspect of the Article XX(g) test. However the Panel also added the jurisdiction test as an extra layer. Again using purposive reasoning, it stated:

A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its

...
jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.  

The Panel reasoned that “Article XX(g) allows each contracting party to adopt its own conservation policies”, but that if the US measures were allowed to stand, Article XX(g) would effectively be interpreted to allow measures to be applied extrajurisdictionally. This would allow states to “unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.” Accordingly, it concluded that measures primarily aimed at rendering effective restrictions on production or consumption outside the Member’s jurisdiction were not within the scope of Article XX(g).

Further problems with the measures harked back to the Panel’s concerns regarding the measures’ unpredictable nature. The Panel recalled that the “Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the US conservation standards”, so would not know whether Mexican products could be imported. It found “a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins.”

Environmental lobby groups following the case were outraged by the Panel’s decision in this case, but moderate commentators (including environmentalists) also noted the US’s motives for imposing the ban were questionable. For example, there was no evidence to show that the dolphins in the affected area were threatened with extinction. Thus, while the US’s actions appealed to environmentalists maintaining ‘preservationist’ and ‘animal liberationist’ positions, and as cruel, unpalatable, and wasteful as the method of fishing seemed, the targeted behaviour was unlikely to wreak

---

81 Ibid, at para 5.31.
82 Ibid, at para 5.32.
83 Ibid, at para 5.33. As noted above in relation to Article XX(b), while ‘predictability’ is not a requirement of subparagraph (g), had the measure satisfied subparagraph (g), it would likely have failed the chapeau on the grounds on ‘arbitrary or unjustifiable discrimination’.
long term or lasting damage on the environment. Moreover, Mexican fishermen were placed in a much more uncertain position vis-à-vis the US fishermen, and bore a proportionally higher burden of the trade impact of the measures, because the methodology to determine the annual permissible dolphin bycatch ratio was based on the number of dolphins US fishermen caught and was applied retrospectively. Had the measures been compared against the chapeau of Article XX, it is likely that this latter feature would have been sufficient grounds to consider the measures a disguised restriction on international trade.

_Tuna-Dolphin I_ was never adopted by the GATT Council. The US administration was at that time seeking to secure ratification of NAFTA which had been concluded between the US, Mexico and Canada. Outrage over the Panel's decision threatened to upset the ratification process, as well as the Uruguay Round negotiations. So as not jeopardise those agreements, Mexico was persuaded not to seek adoption of the report. Instead, an agreement was signed in May 1992, between Mexico, the US, and eight other nations, to phase out by 1994 the setting of purse seine nets around shoals of tuna which included dolphins. Moreover, the US enacted the International Dolphin Conservation Act in 1992, authorising the US Secretary of State to negotiate similar international agreements, and the European Economic Community (the EEC) banned ships owned by its own Members from setting purse seine nets around shoals of tuna which included dolphins. Vogel notes that "[a]s a result of all these initiatives, less

---

84 I note, however, that neither Article XX(b) or XX(g) require environmental attributes to be facing extinction before measures may be taken to protect or conserve them – and indeed if states were to wait so long before taking action, it would probably be too late. In fact, neither Article XX(b) or XX(g) require states to justify the propriety of the policy at stake, merely the propriety of using the particular measure. Nevertheless, in the spirit of using trade measures as a last recourse, and to ensure that suspicions that measures are not being used as a disguised restriction on international trade, it is appropriate that trade measures be reserved for serious environmental problems. See Chapter 2, text accompanying nn 155, 167-169.
85 See Charnovitz, 1994, above at n 14; Johnson, 1996, above at n 11; Vogel, 1995, above at n 3.
87 16 U.S.C. §§ 1411-1418.
88 Vogel, 1995, above at n 3, at 116-117.
than 5,000 dolphin deaths were associated with tuna fishing in the ETP in 1993 – a hundredfold decline in the space of two decades.”

_Tuna-Dolphin II_

The EEC was strongly critical of Mexico’s refusal to submit the _Tuna-Dolphin I_ report to the GATT Council and so initiated a similar complaint. The Marine Mammal Protection Act 1972 (US) established both a ‘primary nation embargo’ on tuna products imported directly from nations which did not comply with the requirements of that Act, and a ‘intermediary nation embargo’ on tuna products imported from a country which had imported tuna from nations subject to the primary nation embargo and which could not “certify and provide reasonable proof that it ha[d] not imported products subject to the direct prohibition within the preceding six months”. This ‘intermediary nation embargo’ was imposed to prevent ‘tuna laundering’.

The EEC and the Netherlands complained against both embargos on the basis that they violated Article XI of the _General Agreement_, could not be considered to be a border adjustment pursuant to Article III and its relevant Note, and did not fall within Article XX. The Panel allowed the challenge, finding the measures inconsistent with Article XI of the _General Agreement_. It decided that Article III was not applicable.

The Panel examined the application of Article XX(g) to the measures, deciding that:

- dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, [so] accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.

Thus, it considered that the measures passed the first limb of the Article XX(g) test. The Panel in _Tuna-Dolphin I_ had not even gone this far.

---

89 Ibid. Vogel notes that the European Parliament also called for a ban on the import of tuna caught using the purse seine nets around dolphin technique, but, wanting to ensure no complaint was filed against the EEC, no measure was adopted by the Council of Ministers.

90 Vogel, 1995, above at n 3. They were joined in their action by The Kingdom of Netherlands (the Netherlands). The resulting report, _Tuna-Dolphin II_, was also not adopted.

91 _Tuna-Dolphin II_, at para 2.12.
Further, contradicting the view of the Panel in *Tuna-Dolphin I*, the *Tuna-Dolphin II* Panel rejected the view that Article XX(g) would not allow measures applied extrajurisdictionally. It noted:

5.15 ... the text of Article XX(g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved. ... the conditions set out in the text of Article XX(g) and the preamble qualify only the trade measure requiring justification ("related to") or to the manner in which the trade measure is applied ("in conjunction with", "arbitrary or unjustifiable discrimination", "disguised restriction on international trade"). The nature and precise scope of the policy area named in the Article, the conservation of exhaustible natural resources, is not spelled out or specifically conditioned by the text of the Article, in particular with respect to the location of the exhaustible natural resource to be conserved. ... two previous panels have considered Article XX(g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision. (footnote omitted)

5.16 ... measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX(e) relating to products of prison labour. It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.

5.17 ... under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory. Nor are states barred, in principle, from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory. A state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fishermen on these vessels, with respect to fish located in the high seas.

Further, it found no other evidence limiting the interpretation of Article XX(g) to only covering measures applying to natural resources found within the territory of a contracting party.\(^93\) Thus, the Panel decided that measures taken to "conserve dolphins in the eastern tropical Pacific Ocean, which the US pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g)."\(^94\)

---

\(^92\) Ibid, at para 5.13.
\(^93\) Ibid, at para 5.20.
\(^94\) Ibid.
The Panel then went on to consider whether the US measures were ‘related to’ the conservation of an exhaustible natural resource and made effective ‘in conjunction’ with restrictions on domestic production or consumption. In doing so, it applied the ‘primarily aimed at’ test formulated in the *Herring and Salmon* report.

The Panel highlighted the problems associated with using a country-based measure to address the environmental harm. It noted that the intermediate nation embargo would not only affect tuna harvested in a manner harmful to dolphins, but would also affect tuna which was not so caught, as well as countries which did not have harvesting practices harmful to dolphins if the tuna “was from a country that imported tuna from countries maintaining tuna harvesting practices and policies not comparable to those of the US.”95 Similarly, it noted that the primary nation embargo could be taken against any tuna imported from a country subject to the embargo, irrespective of whether that “particular tuna was harvested in a way that harmed or could harm dolphins”.96 It therefore considered that the embargoes “could not, by [themselves], further the US conservation objectives”97 as they could have effect only if the exporting country, and in the case of the secondary nation embargo, a third country, changed their policies and practices in relation to the harvesting of tuna. In the Panel’s view:

both the primary and intermediary nation embargoes on tuna implemented by the US were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins.98

The Panel looked to see whether Article XX(g) supported the making of measures ‘primarily aimed at’ forcing other nations to change their policies, but found no clear answer in the text. It then considered Article XX(g) “in the light of the object and purpose of the General Agreement.” Noting that it had been a “long-standing practice of panels ... to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement”99 it found that:

---

95 Ibid, at para 5.23.
97 Ibid, at para 5.23 and 5.24.
98 Ibid, at para 5.24 (emphasis added).
If ... Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.  

Further, because the Panel considered that the US measures had been taken to force other contracting parties to change their policies within their jurisdiction, they could not be considered to be ‘primarily aimed’ at either the conservation of an exhaustible natural resource or at rendering effective restrictions on domestic production or consumption, as required by Article XX(g). Accordingly, the Panel decided that the measures were not consistent with Article XX(g).

The Panel used much the same grounds to dismiss the US measures under Article XX(b). Just as it had stated in relation to Article XX(g), the Panel considered that Article XX(b) was not restricted to measures taken within the jurisdiction of a contracting party, and that the policy at issue “fell within the range of policies covered by Article XX (b).”

The Panel considered that ‘necessary’ in Article XX(b) meant that that ‘no alternative existed’ and approved of the ‘least GATT-inconsistent’ test. It reiterated that the measures were taken “so as to force other countries to change their policies with respect to persons and things within their own jurisdiction” and:

concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered “necessary” for the protection of animal life or health in the sense of Article XX (b).

provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation.” See Palmeter, 1998, above at 67.

---

100 Tuna-Dolphin II, at para 5.26.
101 Ibid, at paras 5.31-5.33.
102 Ibid, at para 5.33.
It stated that the General Agreement would become ‘seriously impaired’ if such an interpretation was allowed.\textsuperscript{106}

Snape and Lefkovitz consider that in making this ruling, the Panel introduced a “causation test” into Article XX, not found or supported within its text.\textsuperscript{107} As a matter of public policy, it is important that measures appear, on their face, to be able to be effective (ie, can cause) the conservation objectives of the Member imposing the measure to be attained – even if no ‘effects test’ is imposed by Article XX.\textsuperscript{108} Snape and Lefkovitz suggest that the causation aspect arose differently however, for example from a finding that ‘if a measure will only be effective if it causes another nation to change its conservation policies, then the measure cannot be necessary/primarily aimed at conservation’. This is one reading of the Panel’s ruling, but it is more likely that the outcome of ‘whether the measures were taken so as to force other countries to change their policies’ was only part of the equation.

The better view is that the Panel obliquely reintroduced the issue of ‘extrajurisdiction’ into its report, rather than a ‘causation test’, as its objection to the US’s measures was that they ‘forced’ “other countries to change their policies with respect to persons and things within their own jurisdiction”.\textsuperscript{109}

\textsuperscript{106} Ibid, at para 5.38.
\textsuperscript{107} Snape, 1994, above at n 51, at 788.
\textsuperscript{108} The Appellate Body made this clear in \textit{United States – Gasoline} at 22. Rejecting Venezuela’s submission on point it stated “We do not believe, finally, that the clause ‘if made effective in conjunction with restrictions on domestic production or consumption’ was intended to establish an empirical ‘effects test’ for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been ‘primarily aimed at’ conservation of natural resources at all.”
Alternatively, the ruling could be to read as distinguishing between country-based measures and origin-neutral measures, prohibiting the first and making no ruling on the second.\textsuperscript{110} That is, while the Panel’s ruling prohibited measures predicated on forcing “other countries to change their policies with respect to persons and things within their own jurisdiction”\textsuperscript{111} (emphasis added) it was silent in respect of measures which influence the practices of individuals within other country, or elsewhere. Article XX does not, however, make such a distinction at law.

The \textit{Tuna-Dolphin} reports were widely criticised by commentators on both environmental policy and legal grounds. Moreover, since they remained unadopted, they had no legal status other than to provide some guidance as to how future similar cases might be interpreted.\textsuperscript{112} GATT contracting parties were, however, generally supportive of the rulings made, in particular that in \textit{Tuna-Dolphin I}.\textsuperscript{113} Their support was also reflected in other fora such as the United Nations General Assembly, and in the text of Agenda 21.

\textit{Summary}

The grounds upon which the US’s measures were found not to be justifiable under Article XX in the two \textit{Tuna-Dolphin} reports were quite distinct. In \textit{Tuna-Dolphin I}, the Panel denied relief on the grounds that unilateral measures could not be applied ‘extrajurisdictionally’. In fact, as pointed out by Demaret, the measures did not qualify as either “an exercise in extraterritorial legislative jurisdiction or in extra jurisdictional activity”\textsuperscript{114} since the measures “did not actually regulate the conduct of foreign subjects

\begin{footnotesize}
\textsuperscript{110} Hudec, 1996, above at 2; Wynter, 1998, above at n 109.
\textsuperscript{111} \textit{Tuna-Dolphin II}, at paras 5.24, 5.37.
\textsuperscript{112} Report of the Appellate Body in \textit{Japan – Alcoholic Beverages}, at 14-15. They stated that while “unadopted panel reports ‘have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members’, that “a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.” See Chapter 2, n 175, above, and Chapter 5, n 234, below.
\textsuperscript{113} See the comments of Hudec, above at Chapter 2, n 176.
\textsuperscript{114} Demaret, P., ‘TREMs, multilateralism, unilateralism and the GATT’ in J Cameron, P Demaret and D Geradin (eds), \textit{Trade & the Environment: The Search for Balance} (1996) 52-68, at 61-62.
\end{footnotesize}
Rather, they regulated imports into the US – a proper subject of territorial jurisdiction. Sands notes that a similar result to the *Tuna-Dolphin I* decision was reached one hundred years earlier in the 1893 Behring Sea Arbitration, where US intervention to prevent British registered fishing vessels hunting Behring Sea fur seals to extinction was found to be an extraterritorial application of its laws. Be that as it may, the *Tuna-Dolphin I* ruling was reliant on the culture of diplomacy prevalent within the GATT. It introduced a new jurisdictional test not found in the text of the *General Agreement*, and failed to observe the customary international law rules of interpretation. The ruling advanced a strong-trade position, but because it did not allow measures to encourage products on the basis of their environmental comparative advantage, left little opportunity for states to encourage sustainability through trade.

In *Tuna-Dolphin II*, the Panel did not agree that measures could not be applied extrajurisdictionally. Rather, it objected to the measures being predicated on forcing the change of other nations’ internal and sovereign policies on the harvesting of tuna. As noted by McDonald and Charnovitz however, the measures actually used did leave nations free to choose their internal and sovereign policies – as they were free to change their policies to allow producers to continue to sell into the market, or maintain their policies and develop markets elsewhere.

In effect, the *Tuna-Dolphin* rulings led equally to a strong-trade-weak-environment interpretation of the *General Agreement*, it was just the means to the end which differed.

---

115 Ibid, at 62.
119 See also the comments by the Appellate Body in their report in *United States – Shrimp*, at para 124, see below, text accompanying Chapter 5, n 255.
In fact, in neither decision did the Panels rule against the measures under Article XX specifically because they were process based rather than a product-based. The closest a panel came was in Tuna-Dolphin II, when the Panel ruled against the coercive nature of the measures designed to force the change in another nations’ policies and practices. What it failed to consider, however, was that even product-based trade measures will have a coercive effect if product standards are introduced and producers wish to maintain their markets.

United States – Automobiles

The final case to raise trade and environment issues under the GATT regime was United States – Automobiles. Article XX was only raised in relation to the CAFE requirement, found to be maintained in violation of Article III:4.

Article XX(g) was the only ‘environmental’ exception raised in the case and the Panel examined only the GATT-inconsistent aspect of the measure – the less favourable treatment accorded to large imported cars stemming from separate foreign fleet accounting. The Panel found that the policy objective of the CAFE requirement was to conserve gasoline, and fell within the scope of Article XX(g). It then applied the Herring and Salmon report formulation of Article XX(g) to determine whether the measure was ‘primarily aimed at’ the conservation of gasoline “and at rendering effective domestic production restrictions”. In doing so, it rejected the EC’s argument that the measure must be necessary, making the point that:

Subject to the requirements of the introductory clause of Article XX, the fact that other less trade restrictive measures, such as a fuel tax, could be used equally and more

---

120 See also Chamovitz, 1994, above at n 14.

121 It will be recalled that the CAFE requirement fined manufacturers and importers of automobiles if the average fuel efficiency of their automobile fleet fell below a certain level. The Panel considered that this requirement meant the imported product received less favourable treatment than that accorded to a like domestic product “based on factors not directly relating to the product as such” and ruled that this was inconsistent with Article III:4, United States – Automobiles, at para 5.54. See further in Chapter 3, text accompanying nn 167-183.

122 Compare the approach in United States – Gasoline where the Appellate Body emphasised that it is the measure, rather than the legal finding of inconsistency, which must be assessed vis-à-vis Article XX.

123 United States – Automobiles, at para 5.59.
effectively to encourage fuel efficiency did not imply that the measure could not be justified under Article XX(g).\textsuperscript{124}

Had the EC’s interpretation of Article XX(g) been accepted, that test would have become even more strict. In rejecting the test, the Panel rejected an approach inviting further strengthening of trade disciplines at the expense of domestic regulatory control.\textsuperscript{125}

The Panel noted that the practice of separate foreign fleet accounting meant that products were treated differently based on non-product-related PPM aspects of the product. The differential treatment stemmed from categorising the fleets according to the “ownership or control relationships of the producer or importer” and assessing their fuel efficiency accordingly.\textsuperscript{126} The Panel did not approve of using the ownership or control relationships as a basis for categorisation.\textsuperscript{127} It considered that the separate foreign fleet accounting aspect of the measure tended to inhibit rather than encourage the importation of small cars and so “did not contribute directly to fuel conservation in the US.”\textsuperscript{128} Since the measure could not further its conservation goal, it could not be considered to be one ‘primarily aimed at’ the conservation of natural resources. Accordingly, the Panel found that the GATT-inconsistent aspect of the measure could not be justified by Article XX(g).\textsuperscript{129} The Panel did note, however, that it was reasonable to take into account the fuel efficiency of imported cars, and that not to do so would prejudice the operation of the CAFE programme. Furthermore, it noted that it would be “possible to include in a revised CAFE regulation an averaging method that would render the CAFE regulation consistent with the General Agreement” but made no ruling on how such a method would look.\textsuperscript{130}

\textsuperscript{124} Ibid, at para 5.63.
\textsuperscript{125} Haag has criticised this aspect of the decision, stating that it allows legislators to include “protective inefficiencies” into domestic regulatory measures. Haag, C.T., ‘Legitimizing “environmental” legislation under the GATT in light of the CAFE panel report: more fuel for protectionists?’ (1995) 57 University of Pittsburgh Law Review 79, at 100.
\textsuperscript{126} United States – Automobiles, at paras 5.62, and 5.50.
\textsuperscript{127} Ibid, at paras 5.60-5.61.
\textsuperscript{128} Ibid, at para 5.60. Indeed, it noted that the measure “was likely to make it more costly, and therefore more difficult, for domestic manufacturers to meet the CAFE standard and the overall goal of conserving fuel.” at para 5.60.
\textsuperscript{129} Ibid, at paras 5.60-5.61.
\textsuperscript{130} Ibid, at para 5.66.
Unlike the *Tuna-Dolphin* disputes, this case was not about protecting the global environment, but about protection of the domestic environment of the state imposing the measure. Accordingly, the difficult issue of jurisdiction was not raised.

*United States – Automobiles* was similar to the *Tuna-Dolphin* reports, in that the Panel did not object to the measure purely because it was process based. Rather, it examined the effect of the distinction (it tended to inhibit rather than encourage the importation of small cars) and ruled against it on this basis. Moreover, the approach in *United States – Automobiles* allowed greater scope for non-product-related PPM-based trade measures to be used as the Panel did not object that the measure would have a coercive effect on the manufacturers and importers of automobiles to maintain the fuel efficiency of their fleet above a certain level. Indeed, the US argued that the measure was “designed to be ‘technology-forcing’, or to compel manufacturers to increase the fuel efficiency of automobiles marketed in the United States”.  

131 The Panel did not use this as a reason to strike down the measure.  

132 As noted above, all environmental standards, whether product or process based, will influence production decisions of producers if producers which to maintain their markets. The fact that the measure relied on ‘factors not directly relating to the product as such’ (the product’s non-product-related PPMs) was important to the outcome of the case, but was reserved only as a reason for why the measure could not be consistent with Article III:4. Ultimately however, *United States – Automobiles*’ impact on GATT jurisprudence was minimal as the decision remained unadopted.

**Conclusion**

This chapter has traced the interpretation of Article XX through the GATT years. It has shown that it was restrictively interpreted in all cases, and only in rare cases was it successfully relied upon in defence of a breach of the *General Agreement*. Most of the

---

cases contained factual circumstances which counteracted their environmental merit, that is, protectionist elements were often apparent from the facts and the outcome of the cases were largely warranted. Nevertheless, panels also tended to restrictively interpret Article XX so that national discretion to implement domestic measures to protect the environment was significantly curtailed, and they relied on the GATT culture of diplomacy rather than observance of law to do so. Moreover, no PPM-based trade measure was found to fall within the Article XX exceptions. While panels did not use the fact that such measures were directed at the process of production rather than at the product to rule against them, they interpreted the Article XX disciplines to impose further substantive hurdles for the measures to meet.

This approach maintained the power of the General Agreement and served the agenda of strong markets free of government intervention, but its lack of fairness sowed the seeds of deep and widespread community dissatisfaction with the idea of the liberalisation of trade and the liberal economic paradigm.

Confronted with the restrictive interpretations emanating from the GATT, but also convinced of the social and economic benefits capable of being delivered by the liberalisation of international trade, a number of commentators proposed modifications to the General Agreement, or to its interpretation, to enable trade and environmental interests to be more sensitively balanced.

Esty made one of the most considered proposals. He suggested that Article XX be replaced by a three pronged test to balance more adequately trade and environmental concerns. The test would comprise of a review of:

1. the intent or effect of the challenged policy or regulations [an aims or effect test];
2. the legitimacy of the underlying environmental policy or claim of environmental injury [an environmental legitimacy or an environmental injury test];
3. the justification for the disruption to trade [a 'not clearly disproportionate' test].

He explained:

By focusing on the environmental injury in question and substituting the more deferential “clear disproportionality” review standard for the current “necessary” test,
which results in excessive second-guessing of national environmental policy approaches, the proposed rules put GATT on a greener tack.\textsuperscript{134}

He proposed that it recognise “two fundamental bases for establishing the legitimacy of environmental policies with trade effects”:

\begin{itemize}
  \item[a)] multilateral agreement; or
  \item[b)] environmental injury to the country imposing trade measures (to ensure the “presence of a bona fide environmental issue or injury and the nexus of the party using the trade measures to the environmental harm they wish to stop”).\textsuperscript{135}
\end{itemize}

Moreover, he suggested “five possible ‘locations’ of environmental harms” (domestic; transboundary; global; foreign resulting in a loss of global “positive externalities”; and foreign),\textsuperscript{136} considering that the severity of the trade impact should be softened as the likelihood of the harm actually being experienced in the country using the trade restriction diminished. In addition, he suggested that “the bar on ‘extrajurisdictional’ trade measures … be softened” and that “a more refined analysis of unilateral trade action” be put into place.\textsuperscript{137} In particular, unilateral measures taken “to reinforce multilaterally agreed standards” or to “respond to significant global or transboundary pollution spillovers” be provided with more tolerance.\textsuperscript{138}

Caldwell and Wirth make the point, however, that Esty’s balancing test is “similar to the ‘proportionality’ standard found in EU law”,\textsuperscript{139} which commentators have pointed out “can be quite subjective in practical application”\textsuperscript{140} and “may also elude attempts at

\textsuperscript{134} Ibid, at 137. See further at Chapter 5, text accompanying nn 191-197.
\textsuperscript{135} Esty, 1994, above at n 4, at 234.
\textsuperscript{136} Ibid, at 235.
\textsuperscript{138} Esty, 1994, above at n 4, at 236. See further in Esty at 283 and his appendix E for a “Matrix of appropriate unilateral trade measures by locus and significance of environmental harm”.
\textsuperscript{140} Caldwell, 1996, above at n 139 at 569, referring to Geradin, D., ‘Balancing free trade and environmental protection - the interplay between the European Court of Justice and the Community Legislator’ in J Cameron, P Demaret and D Geradin (eds), Trade & the Environment: The Search for Balance (1996) 204-241, at 213; and Petersmann, E-U., ‘Trade and environmental protection: the
clarification to a high level of predictability and analytical rigor." 141 Moreover, they note the views of Petersmann that "the EU principle of proportionality places far more rigorous constraints on national environmental regulatory powers than the GATT/WTO regime does." 142 Given the negative redistributive side effects of using trade measures, and in particular the impact that they can have on developing countries, 143 it is, however, appropriate that measures be adapted to suit the impact of the environmental harm on the country imposing the measure, as well as reflecting the urgency and magnitude of the environmental harm at stake.

Other commentators have also agreed that amendment to Article XX would be beneficial. A number of commentators have advocated the amendment of Article XX to allow measures taken pursuant to an MEA. 144 In the case of measures taken unilaterally, Arden-Clarke of WWF has suggested that Article XX be amended to also allow measures "designed ... to encourage or ensure protection of [the] environment

---

141 See in particular Brack, 1997, above at n 2; Ward, H., Trade Measures and Multilateral Environmental Agreements: Backwards or Forwards in the WTO? (1996); Hudec, 1996, above at 2, at 120-142; Schoenbaum, T.J., 'International trade and protection of the environment: the continuing search for reconciliation' (1997) 91 The American Journal of International Law 268, at 283. See also Reiterer, 1996, above at n 2. The EC has been a strong proponent of modifying Article XX, or developing an understanding pursuant to Article XX to clarify the relationship with MEAs, see n 2, above. Note that at one stage in the negotiations of Article 32 of the draft ITO Charter, the proposed Article 32(j) read "relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption, in U.N. Doc. E/PC/T/C.11/54 at 34. Article 32 of the draft Charter was the precursor to Article XX(g) of the General Agreement. The reference to international agreements was, however, removed.
and promote sustainable development.”

This test would presumably remove the offending ‘necessary’ aspect of the Article XX(b) test and would require the intention of the measure (rather than its effect) to be assessed. Accordingly, it would place only a very weak discipline on domestic regulatory measures where some positive environmental intention could be shown. Christensen and Geffin have suggested that “a new provision be added to permit trade measures ‘imposed for the protection of the environment, ecological or biological resources, ... whether within or outside the jurisdiction of the Contracting Party enacting the measure.”

This would also be an ‘intent’ test and would leave effectiveness untested. The proposal would, however, address the jurisdictional issue raised in Tuna-Dolphin I and the coercion issue raised in Tuna-Dolphin II. Alternatively, some commentators have suggested the negotiation of a separate environmental code.

Not all commentators have, however, agreed that amendment to Article XX is necessary or feasible. Dunoff has noted, for example, that “in 1991, the Negotiating Group on GATT Articles rejected a suggestion that would have added the phrase ‘the

---


environment’ to Article XX(b).” Further, he has pointed out that “the reaction of GATT contracting parties to the U.S. embargo of Mexican tuna may be a rough indication of the enthusiasm that would meet any effort to amend the GATT to permit environmental trade measures.”

Likewise, Charnovitz, has argued that the unduly restrictive interpretation of Article XX is inappropriate, but that:

There is no need to amend the GATT (which would be difficult in view of the voting requirements) to deal with environmental concerns. Instead, the CONTRACTING PARTIES should utilize the least GATT-inconsistent way to permit legitimate ETMs [environmental trade measures] – that is, a return to the original intent of Article XX.

In the next chapter we shall see that the Appellate Body of the WTO has been taking a much more balanced approach to the interpretation of Article XX, and increased the scope for Members to implement domestic regulatory measures consistent with a strong-trade-strong-environment position to protect the global environment. Article XX(g) has been interpreted so that the potential exists for a range of environmental policies to fall within its scope, and many of the restrictive devices introduced by panels to limit its application have been rejected. An effectiveness test appears to have been reintroduced into Article XX(b). Moreover, an environmental measure and a human health measure have been justified under Article XX, and a more defined picture of the necessary ingredients for a successful measure is beginning to emerge. This has made the need for modification of Article XX largely redundant.

---

149 Dunoff, 1994, above at n 11, at 1067. Dunoff considers a better approach to addressing trade and environment concerns in a more balanced manner is to create a new environmental institution. See Chapter 1, n 25, above.
Sustainability through Trade and the Rule of Law: Article XX jurisprudence under Appellate Body guidance

Introduction

The focus of Chapters 3 and 4 was on the interpretation of the term ‘like product’ in Articles I and III, the use of the ‘aim and effect’ approach to the interpretation of Article III, and GATT panels’ Interpretation of the ‘environmental’ exceptions in Article XX. The particular interest was the consistency or otherwise of domestic regulatory measures which differentiated between products on the basis of non-product-related PPM factors. Overall, a move to a rules-based approach in the GATT system was apparent, yet also noticeable was a restrictive interpretation of the General Agreement in support of a strong-trade-weak-environment position, sustained more by the culture of diplomacy than observance of the rules of international law.

Chapter 3 observed that Members have a broad regulatory discretion to implement measures to protect their domestic environment where those measures are not discriminatory and do not afford protection to domestic production. Most environmental laws a state might wish to implement would not raise any incompatibility with the WTO Agreement or the covered agreements, as the laws would generally be domestic in scope. Instead, the ‘trade and environment’ conflict arises when Members wish to implement domestic regulatory measures to protect the environment beyond their national borders, or when they use measures which are explicitly discriminatory (imposing a higher environmental standard on the imported product than the domestic product), or origin-neutral but result in more burdensome

requirements being placed on imported products.\textsuperscript{152} As we saw in Chapter 3, non-product-related PPM-based criteria have not been embraced as an acceptable means of distinguishing between products under Articles I or III of the \textit{General Agreement}. Therefore, origin-neutral measures which employ such criteria and result in more burdensome requirements being placed on imported products are regarded as violations. For Members to retain such measures without fear of retaliation,\textsuperscript{153} the measures must be justifiable under Article XX of the \textit{General Agreement}.

The analysis in Chapter 4 showed that GATT panels limited the scope for Members to justify environmentally based measures by introducing considerable restraints in their interpretation of Article XX. One of the outcomes of this restrictive interpretation was that some believed that Article XX could not justify PPM-based trade measures.\textsuperscript{154} For example, in \textit{Tuna-Dolphin II}, the Panel ruled against measures which forced other contracting parties to change their policies within their jurisdiction. It was unclear,


\textsuperscript{152} This is for Article III violations. Esty and Geradin provide as an example of this \textit{de facto} discrimination “a regulation prohibiting the sale of a toxic substance that is largely imported while allowing the sale of a competing domestically produced substance of similar toxicity”. Esty, D. and D. Geradin, ‘Market access, competitiveness, and harmonization: environmental protection in regional trade agreements’ (1997) 21 \textit{Harvard Environmental Law Review} 265, at 270-271. For Article I violations, an explicitly discriminatory measure is one which imposes a higher environmental standard on the ‘like’ imported product of one Member and not another; an origin-neutral measure is one which makes no such explicit distinction but the measure results in more burdensome requirements being placed on the imported products from one Member versus another country.

\textsuperscript{153} Article 22.6 of the DSU allows the DSB to authorise a Member, which has invoked the dispute settlement procedures against another Member, to suspend its concessions and other obligations against that Member if it has not brought its inconsistent measures into compliance with the \textit{WTO Agreement} or otherwise fails to comply with the recommendations and rulings of the DSB within a reasonable period of time (determined pursuant to Article 21.3 of the DSU). See \textit{European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to arbitration by the European Communities under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes}, Award of the Arbitrator, WT/DS26/15, WT/DS48/13, 29 May 1998; \textit{European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 of the DSU}, Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999. See Pauwelyn, J., ‘Enforcement and countermeasures in the WTO: rules are rules – toward a more collective approach’ (2000) 94 \textit{The American Journal of International Law} 335.

\textsuperscript{154} For example, Cheyne, I., ‘Environmental unilateralism and the WTO/GATT system’ (1995) 24(3) \textit{Georgia Journal of International and Comparative Law} 433. Compare Chamovitz, however, who has argued that this was incorrect. Chamovitz, S., ‘Green roots, bad pruning: GATT rules and their application to environmental trade measures’ (1994) 7 \textit{Tulane Environmental Law Journal} 299. Others were even more pessimistic, believing that panels would always strike down environmental and health measures. But see \textit{European Communities – Asbestos} where a measure taken to protect human life and health in the country imposing the measure has been justified under Article XX(b), and \textit{United States –
however, whether exception was taken to the measure because it forced another country to change its policies within its jurisdiction (a country-based trade measure), or forced a foreign entity, outside the territorial jurisdiction of the US, to change its action. Alternatively, exception may have been taken to the use of a process standard which forced either another country and/or foreign entity to change its policies. Yet whether a standard is a process standard or a product standard, manufacturers, if they wish to keep trading, will normally be forced to make adjustments to the production process to meet the standard unless they are already in compliance; albeit manufacturers will generally have more flexibility to choose how the standard is to be met if the standard is a product standard.

This Chapter continues the examination of the interpretation of Article XX. It shows that the cases decided under the WTO regime have significantly changed the landscape of understanding Article XX and the potential to use non-product PPM-based trade measures. The cases are significant for a number of reasons. This Chapter focuses on how they indicate that non-product PPM-based measures can in some circumstances be justified, and provide insight into the minimum requirements Members must meet when introducing domestic regulatory measures designed to “pull up” environmental standards and encourage a ‘California effect’. This is so whether such standards are designed to improve a Member’s domestic environment or an aspect of the global commons. Although not a focus of this thesis, yet relevant to the wider trade and environment debate, the cases provide some insight as to the role civil society can play in the peaceful resolution of environmental disputes, as well as some insight into the role of science in the dispute settlement process, and the manner in which scientific

Shrimp (Recourse to Article 21.5), where an impact-based PPM measure taken to protect sea turtles has been justified under Article XX(g). These cases are discussed in this chapter, below.

155 It is unlikely that the Tuna-Dolphin II Panel intended to prevent Article XX from applying to any measure which forced an entity outside the territorial jurisdiction of the US to change its action, as this could conceivably cover all measures and render Article XX inoperative. The ruling in United States – Gasoline arguably confirms this. In that case, the Panel did not rule against the use of baseline gasoline standards per se, notwithstanding the influence such standards would have on the production of gasoline if producers (including foreign entities) were compelled to comply with them over an annual period.

156 As noted in Chapter 2, democratic participation in environmental problem solving (including dispute resolution) is a central element of the sustainability discourse applicable to the WTO and more generally. See further below at n 283.
information can be integrated into the settlement of disputes.\textsuperscript{157} Overall, these cases indicate that the existing rules in the \textit{General Agreement} can accommodate an international regime which is both strong on trade and environmental protection, but that Members must implement their domestic regulatory measures in a manner which is sensitive to the impact on trade.

\textbf{Towards acceptance of PPM-based measures under Article XX: United States – Gasoline}

For those interested in the linkage between international trade and environmental law issues, it was perhaps portentous that the first case to be considered by a WTO panel and subsequently by the Appellate Body was one which centred around environmental issues and raised important questions as to the interpretation of Articles III and XX. This was the case of \textit{United States – Standards for Reformulated and Conventional Gasoline},\textsuperscript{158} its reasoning with respect to both Articles III and XX can be seen as laying the foundation for the treatment of the PPM issue by the Appellate Body in \textit{United States – Shrimp}, considered below.

The facts of \textit{United States – Gasoline} were considered briefly in Chapter 3. It will be recalled that the baseline establishment method (BEM) of the Gasoline Rule was inconsistent with Article III:4 of the \textit{General Agreement}. The BEM was further assessed in relation to Article XX of the \textit{General Agreement}. While the Panel ultimately found that Article XX did not justify the method, it appeared to accept that Article XX(b) of the \textit{General Agreement} permitted either statutory or individual

\textsuperscript{157} Panellists' use of science in the dispute settlement process in relation to Article XX has been curious. While panels have called for extensive expert evidence in the more recent disputes raising environmental issues (\textit{United States – Shrimp}; \textit{European Communities – Asbestos}; \textit{Compare United States – Gasoline} where no expert evidence was called) their decisions have been made almost as if in spite of that evidence. A strong criticism of GATT panels was their lack of familiarity or expertise with environmental matters when making decisions on complex scientific issues. It leads one to query whether panels' current use of experts is more a matter of form than substance. If nothing else, expert evidence can act as a safeguard, for if panels make a substantial error of fact in the consideration of a dispute, the Appellate Body will have grounds to overturn it as a matter of law.


208
baseline standards to be maintained.\textsuperscript{159} That is, it appeared to accept that such standards could be ‘necessary’ where they were ‘consistent’ or ‘less inconsistent’ with the \textit{General Agreement}.\textsuperscript{160} The Panel made no specific finding as to whether the standards were ‘consistent’ or ‘less inconsistent’ with the agreement.\textsuperscript{161}

In fact, individual baseline standards are unlikely to be consistent with Article III:4. If a domestic producer established a baseline standard lower than that of an importer, it would allow domestic gasoline which is dirtier than foreign gasoline to be sold, thus affording it more favourable treatment. Moreover, the more favourable treatment would stem from the characteristics of the producer as the ‘like product’ (chemically identical gasoline) would be treated differently according to the characteristics of the producer assessed in 1990.\textsuperscript{162}

\textsuperscript{159} In relation to Article XX(g), the Panel examined only the less favourable application of the BEM and whether it was primarily aimed at the conservation of exhaustible natural resources. (Report of the Panel in \textit{United States – Gasoline}, at para 6.40, following the ‘primarily aimed at’ test established in the \textit{Herring and Salmon} panel, discussed in Chapter 4, above. Note that it was the Panel’s examination of the less favourable application of the BEM which was overturned on appeal.) The Panel could see “no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the United States objective of improving air quality in the United States.” (at para 6.40). Moreover, it emphasised that “being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule.” (at paras 6.11-6.13.) The Appellate Body considered this section of the Panel’s report and further comments made by the Panel ‘opaque’ (Report of the Appellate Body in \textit{United States – Gasoline}, at 15), but did not elucidate whether it considered that only the statutory BEM to be consistent with Article III:4 nor whether using the individual baseline method for all was acceptable for the purposes of Article XX(g).

\textsuperscript{160} This follows the ‘least GATT-inconsistent’ approach, outlined in Chapter 4 in \textit{United States – Section 337} and in the \textit{Thai – Cigarette} case, later approved by the Appellate Body in \textit{Korea – Beef} at para 166 and \textit{European Communities – Asbestos}, at para 170ff.

\textsuperscript{161} It merely mentioned that “a regulatory scheme using foreign refiner baselines, to the extent that it did not distinguish between imported gasoline on the basis of its country of origin, would not necessarily contravene Article I or other provisions of the \textit{General Agreement}”. (at para 6.25).

\textsuperscript{162} Statutory baseline standards are also problematic. If a single statutory baseline is the regulatory means chosen to implement the environmental policy, all refiners, blenders and importers must, over an annual period, supply gasoline of the same chemical composition. While the gasoline from such entities would be accorded the same treatment over an \textit{annual period} (providing some basis for arguing consistency with Article III:4), the treatment accorded to the gasoline might not be the same if compared on a batch-by-batch basis. That is, if an importer of gasoline was not, in an annual period, in compliance with the Gasoline Rule, then the gasoline from that importer could not be freely sold on the US market, even if that particular batch of gasoline was chemically identical to a batch of gasoline which could be freely sold by a domestic entity in compliance with the rule. (See Appleton, A., ‘GATT Article XX’s chapeau: a disguised ‘necessary’ test?: The WTO Appellate Body’s ruling in \textit{United States - Standards for Reformulated and Conventional Gasoline}’ (1997) 6(2) Review of European Community Law and International Environmental Law 131). The individual baseline method is even more problematic however. If it is applied, not only can the ‘like product’ (chemically identical gasoline) be treated differently according to the characteristics of the producer assessed in 1990, refiners, blenders and
The Panel’s acceptance of the use of either statutory or individual baselines could arguably be seen to suggest that the use of a process standard (in this case a producer-based PPM standard) which ‘forces’ a foreign entity to change its policies is not, prima facie, contrary to Article XX of the General Agreement. Given the strong views the Panel expressed in relation to Article III:4 against differentiating between products on the basis of criteria with no objective basis (such as the characteristics of the producer) the seeming tolerance of such measures in relation to Article XX(b) is noteworthy.

The Appellate Body’s approach to measures with extrajurisdictional effect

Like the Panel, the Appellate Body did not use the fact that the measure was a non-product-related PPM-based trade measure to find against it. The problem with the measure was the manner in which it was applied. There was a lack of consultation or concern as to the differential trade impact of the measure. That the measure was ultimately based on the characteristics of the producer rather than the characteristics of the product presented at the border at a particular moment was not at issue. Indeed, the Appellate Body noted that statutory baselines and individual baselines were among the regulatory options available to the US to implement the Clean Air Act 1990 (US). It therefore seemed to authorise an approach reliant on the use of non-product-related PPM-based criteria. Moreover, notwithstanding that the difficulty in verifying compliance with PPM-based trade measures is commonly listed as a reason against

---

164 Report of the Appellate Body in United States - Gasoline, at 25. The Appellate Body also noted that statutory baselines could be used for all, and while it noted that this approach “if properly implemented, could have avoided any discrimination at all”, it was silent as to the discriminatory effect of using individual baselines. Note however that Article XX does not strike down measures merely if they are discriminatory – its concern is to prevent measures which are arbitrarily or unjustifiably discriminatory. See Appleton, 1997, above at 162 at 136, who agrees that “the Appellate Body appears to authorize the use of environmental baselines, predicated on non-product-related attributes, to conserve natural resources”. 

210
their use, it agreed with the Panel that it would be possible to adequately scrutinise the implementation of such measures. The Appellate Body quoted with approval the Panel’s finding that:

It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.165

In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve U.S. purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel’s view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data.166

The Appellate Body itself stated:

We agree with the finding above made in the Panel Report. There are, as the Panel Report found, established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade – trade between territorial sovereigns – to go on and grow. The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate.167

The Appellate Body’s decision in United States – Gasoline was significant. It seemed to confirm that, while certain non-product-related PPM-based trade measures might be

found inconsistent with certain Articles of the *General Agreement*, they could fall within the Article XX exceptions to that agreement if they were properly implemented.\(^\text{168}\) In summary, it seemed to suggest that Article XX could authorise:

- *product* standards having extrajurisdictional effect; and
- ‘characteristics of the producer’ or non-product-related PPM standards which implicitly require the modification of production methods.

As seen in Chapter 4, the *Tuna-Dolphin I* Panel found that Article XX could not be used to excuse unilateral measures applied extrajurisdictionally, while *Tuna-Dolphin II* found it could not excuse measures predicated on forcing the change of other nations’ internal and sovereign policies. However, in *United States – Gasoline*, the baseline standards set by the Gasoline Rule – whether statutory or individual – implicitly affected the process of how the gasoline was made, and clearly were intended to influence the manner in which the gasoline was prepared. Since the statutory baselines affected foreign refiners and blenders, they had an ‘extrajurisdictional’ effect. Moreover, the statutory baseline requirements placed on importers ‘forced’ foreign operations to change their practices with regards to the production of gasoline. Indeed, the Panel reported that “Venezuela noted that ‘Petroleos de Venezuela, S.A.’ ... had already made costly adjustments to its production in order to meet the statutory baseline requirements and had accelerated its programme of investments with a view to complying with” the US measures.\(^\text{169}\) The Appellate Body did not take issue with either of these factors, but nor were they directly asked to by any of the participants to the dispute.

The measure in *United States – Gasoline* could, however, be distinguished from the type of non-product-related PPM-based trade measures ‘overruled’ in the *Tuna-Dolphin I* and *Tuna-Dolphin II* disputes by a number of factors. Firstly, the effect of the modified process was measurable in the final product, albeit over a period of time. Secondly, the measures were not aimed at the practices of nations exporting to the US, but at individual operators. While the Appellate Body’s ruling in relation to the

---

\(^{168}\) Wynter, 1999, above at n 151; Wynter, 1998, above at n 151.

acceptability of the US measures vis-à-vis Article XX(g) provided some evidence that measures based on criteria other than the characteristics of a product presented at the border could be allowable under that Article, it provided no clear indication that non-product-related PPM-based trade measures would be excused, nor that the approach taken in the Tuna-Dolphin disputes on Article XX was incorrect. The beginnings of an argument could, however, be made.

Converging trade and environment positions: the new interpretation of Article XX(g)

The Appellate Body’s decision in United States – Gasoline had implications beyond the PPMs debate. Its commitment to the interpretative tradition of customary international law\(^{170}\) and its more balanced approach to the interpretation of Article XX(g) suggested that Article XX might sustain environmental measures otherwise inconsistent with the General Agreement. The Appellate Body’s approach therefore provided an important step in interpreting Article XX, and the WTO Agreement as a whole, in a way which allows strong trade disciplines to be balanced with stronger environment disciplines. It also provided an important lesson on the role law can play in attaining sustainable development. For these reasons, this section traces the Appellate Body’s ruling in relation to the Panel’s decision in United States – Gasoline to show the evolution of the interpretation of Article XX(g) and the chapeau of Article XX.

Subparagraph (g) of Article XX

The Panel and the Appellate Body applied a traditional analysis to determine the consistency of the US’s measures with Article XX. Firstly, the Panel found that the policy goal of the measures was to conserve an exhaustible natural resource.\(^{171}\) It considered that clean air could be considered to be an ‘exhaustible natural resource’

\(^{170}\) That is, that the terms of treaties must be read in good faith in accordance with their ordinary meaning in their context and in the light of the treaty’s object and purpose. As set out in the previous chapters,
since clean air had value, was natural, and was depletable. It found that “a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)” \(^ {172}\) This finding was not appealed.\(^ {173}\)

Secondly, the Panel considered whether the measures, in particular the GATT-inconsistent aspect of the measures (the less favourable treatment), were ‘related to’ the conservation of exhaustible natural resources. It found that they were not and that, accordingly, the measures failed to meet the requirements of Article XX(g).\(^ {174}\) The US appealed this finding.

The Panel applied the traditional interpretation of the test to determine whether a measure was ‘related to’ the conservation of exhaustible natural resources, examining whether it was ‘primarily aimed at’ the conservation of such resources.\(^ {175}\) While the use of the ‘primarily aimed at’ test was not appealed by the US, and all participants and third parties to the appeal accepted the application of that test, the Appellate Body noted that the phrase ‘primarily aimed at’ “is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)” \(^ {176}\) This comment invited a reinterpretation of the test in *United States – Shrimp*, the next case to raise the Article XX(g) exception.

The Panel found at first instance that the US’s measures did not fall within Article XX(g) because the “less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline” could not be considered to be primarily aimed at the conservation of exhaustible natural resources. It “saw no direct connection between less favourable treatment of imported gasoline that was

---


\(^{172}\) Ibid.

\(^{173}\) Venezuela and Brazil did raise the issue at the oral hearing of the Appeal, however did not raise it as an issue to be appealed per the *Working Procedures* of the Appellate Body. See Report of the Appellate Body in *United States – Gasoline*, at 11-12.


\(^{175}\) Ibid, at paras 6.38-6.40, applying the test established in the *Herring and Salmon* case.

chemically identical to domestic gasoline, and the US’s objective of improving air quality in the US.\textsuperscript{177}

On this point, the Appellate Body first queried whether the Panel had substituted a ‘direct connection’ test for the ‘primarily aimed at’ test, or whether it introduced this test as a “new and additional element”\textsuperscript{178} in its application of that test. It also noted that the Panel erred in its finding because it based its analysis on whether the legal finding that imported gasoline was treated less favourably was ‘primarily aimed at’ the conservation of exhaustible natural resources, not whether the measure, the BEM, was ‘primarily aimed at’ the conservation of clean air.\textsuperscript{179} Obviously, Article XX will only be relevant if inconsistency with some part of the General Agreement has been established. According to the Appellate Body, the Panel’s approach turned Article XX “on its head”,\textsuperscript{180} incidentally making it more difficult for a measure to find shelter within Article XX(g).\textsuperscript{181}

Further, the Appellate Body pointed out that the Panel appeared to have applied a ‘necessary’ test to Article XX(g), importing the disciplines of Article XX(b).

Hudec notes that:

the general understanding of article XX was that governments were entitled to an excuse for a measure in violation only in those cases where the violative aspects of the measure were necessary to the attainment of one of the important social policy objectives listed there. This condition was easy enough to enforce if the words of provision said that the violative measure had to be “necessary” to the attainment of one of those policy objectives. The trouble was that article XX(g) merely required that the measure “relate” to the conservation objectives listed. To keep article XX(g) from becoming a wholesale license for excusing GATT violations, panels had worked out an ingenious (and arguably disingenuous) way of interpreting “related” so that it meant the same thing, more or less, as “necessary”.\textsuperscript{182}

\textsuperscript{179} Ibid, at 16.
\textsuperscript{180} Ibid.
\textsuperscript{181} Hudec argues that the effect of the Appellate Body’s ruling “would appear to [be] … that virtually every challenged ruling would [be] … prima facie excused under Article XX.” Hudec, R.E., ‘GATT/WTO constraints on national regulation: requiem for an “aim and effect” test’ (1998) 32(3) The International Lawyer 619, at 637. See also Appleton, 1997, above at 162, who agrees that the Panel’s formulation was much narrower.
The Appellate Body rejected the use of the necessary test in relation to Article XX(g), pointing out that such an approach meant interpreting Article XX(g) contrary to the manner required by the Vienna Convention and customary international law. It stated:

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category [of Article XX], the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.

Instead, it found subparagraph (g) required that a substantial relationship exist between the means and the ends of the measure, and found that the baseline establishment rules achieved this. It found:

The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the “non-degradation” requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule’s objective of stabilising and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. ... We consider that given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).

The effect of this finding was that the Appellate Body watered down the “degree of connection or relationship” required by Article XX(g) from one which required conservation to be the uppermost or only goal of the measure – as the Tuna-Dolphin disputes appeared to require – to one where the aim of the measure and the manner used to attain that Goal must be “substantial” and not “merely incidentally or inadvertently aimed at the conservation”. Note that although this language is a significant improvement on requiring a measure to be ‘primarily aimed at’ conservation, as Appleton has commented, “it still can not be said that that the Appellate Body has given the phrase ‘relating to’ its ordinary meaning”. It is, however, a pragmatic result which ensures that subparagraph (g) will only apply to measures with a genuine

---

182 Hudec, 1998, above at n 181, at 637.
184 Ibid, at 18.
187 Ibid, at 19.
environmental purpose. As noted by Hudec, Article XX’s place is central in finding an “acceptable balance between the trade objectives of the [GATT/WTO] regime [to liberalize trade between WTO member states] and the legitimate regulatory claims of member states”. The policing of this is a ‘delicate’ task.

Two years prior to the Appellate Body’s ruling, Esty suggested that Article XX be modified to introduce a requirement that measures authorised by the Article XX exception be tested for their effectiveness. He sought a weakening of the rigour of that article which, as then interpreted, gave “too little deference to national decisions about how to pursue environmental goals”, and the introduction of a safeguard to ensure that only measures genuinely designed to achieve environmental protection be allowed. In United States – Gasoline, Venezuela argued that an effectiveness requirement was already present in Article XX(g). It argued that to be primarily aimed at conservation, the baseline establishment rules “must not only ‘reflect a conservation purpose’ but also show “some positive conservation effect”. The Appellate Body rejected this approach, stating that the application of Article XX(g) was not contingent on an ‘empirical effects test’. Its ruling suggests that Article XX(g) is capable of supporting action on a precautionary basis, as action can be taken in the absence of full scientific certainty, including certainty as to the effects of the action. The Appellate Body did note, however, that it was:

not ... suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation

---

188 Appleton, 1997, above at 162, at 132.
189 Hudec, 1998, above at 181, at 620 and 619 (bracketed text in original).
190 Ibid, at 620.
191 Esty, D., Greening the GATT: Trade, Environment and the Future (1994), at 234-5. See above at Chapter 4, nn 133-138 and accompanying text. Note too that in CTE discussions, New Zealand has proposed an ‘Understanding’ be made to provide for an ‘accommodation’ of trade measures taken pursuant to an MEA” which includes an ‘environmental effectiveness’ test, a ‘least trade-restrictiveness’ test, and a ‘proportionality’ test to ensure that GATT/WTO inconsistent measures “do not go beyond what is necessary to achieve the environmental objectives of the MEA.” Brack, D., ‘Reconciling the GATT and multilateral environmental agreements with trade provisions: the latest debate’ (1997) 6(2) Review of European Community Law and International Environmental Law 112, at 116.
192 Esty, 1994, above at n 191, at 233.
193 Others suggested an ‘intent’ test to achieve this. See above at Chapter 4, nn 145-146 and accompanying text.
The Appellate Body completed the analysis of Article XX(g), and found that the US’s measures were “made effective in conjunction with restrictions on domestic production and consumption”. It clarified that this limb of Article XX(g) places a “requirement of even-handedness [rather than identity of treatment] in the imposition of restrictions” affecting imported and domestic products.

The US’s measures were the first to have been found to be provisionally justified by one of the ‘environmental exceptions’ of Article XX, and thus United States – Gasoline raised the issue of how the chapeau was to be interpreted. By rejecting an effects test, and watering down the ‘primarily aimed at’ test, the Appellate Body made it comparatively easy for a measure to satisfy the requirements of Article XX(g), easier in fact than Esty’s test.

*The chapeau of Article XX*

The US’s measures nevertheless failed the test of the chapeau of Article XX. The Appellate Body was concerned that in choosing to apply the BEM of the Gasoline Rule in the manner in which it did, the US:

[failed] to explore adequately means, including in particular co-operation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners.

Furthermore, it found that the US had neglected “to count the costs for foreign refiners that would result from the imposition of statutory baselines” while forbearing to apply a statutory baseline to the majority of their domestic producers. This was a task, the US had argued, which would have been “physically and financially impossible [to

---

196 Ibid, at 21, 22.
197 Ibid, at 21.
198 Ibid, at 28.
199 Ibid.
do] because of the magnitude of the changes required in almost all of the US refineries''.

The Appellate Body found that the failure to adequately assess, and attempt to ameliorate, the impact of the measure constituted ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade’. Charnovitz has argued that the Appellate Body’s apparent requirement that Members engage in consultations with those affected, and take into account the impact the measures will have on others “erects even higher hurdles for environmental policy makers”. Yet these requirements seem to reflect basic tenets of fairness and good faith, a requirement which the Appellate Body sees embedded in Article XX. Indeed, the ‘hurdles’, which take only time and some consideration to meet, seem more likely to ensure the implementation of more efficient measures, and, because of the deliberative process preceding their implementation, measures which are more democratic. This is eminently compatible with the teachings of the sustainability discourse.

Waincymer has argued that the Appellate Body’s interpretation of the chapeau, that a measure may not be applied so as to constitute ‘arbitrary discrimination’, ‘unjustifiable discrimination’ or a ‘disguised restriction’ on international trade, “[i]n effect, … adopts … a foreseeability [avoidability] and a reasonableness test”. He argues that such a test tends “to equate to the ‘necessity’ test as employed under Article XX(b), given that a reasonably available, GATT-legal alternative will show avoidability.”

202 Waincymer, J., ‘Reformulated gasoline under reformulated WTO dispute settlement procedures: pulling pandora out of a chapeau?’ (1996) 18 Michigan Journal of International Law 141, at 175. This is because the Appellate Body stated that if the Article XX “exceptions are not to be abused or misused, … the measures falling within the particular exceptions must be applied reasonably, …” at 22. It found that the US must have foreseen that the implementation of its measures was discriminatory, because while the US did not require domestic refiners to immediately comply with a statutory baseline because of ensuing physical and financial costs and burdens, there was no evidence that it had considered the costs and burdens which would fall on foreign refiners. Report of the Appellate Body in United States – Gasoline, at 29.
203 Waincymer, 1996, above at n 202, at 175.
Accordingly, he argues that “the effect of the chapeau is to indirectly superimpose a necessity test on Article XX(g), notwithstanding the Appellate Body’s conclusion that the words ‘relating to’ suggested a different intent.” This view is also supported by Hudec, who comments:

Having interpreted the main body of article XX so that most challenged regulations would have been prima facie excused under that provision, the Reformulated Gasoline opinion then went on to recapture the traditional understanding of article XX – the understanding that the violative measure itself had to be necessary to attaining the claimed regulatory purpose. The Appellate Body found the basis for such a rule in the preambulatory conditions stated in article XX, known as the chapeau. ... The Appellate Body provided a rather broad and impressionistic definition of the words of the chapeau, saying that the text involved several overlapping concepts that were not easy to separate. The one concrete conclusion it reached was that these words did cover the traditional kind of article XX conclusion the Panel and the Appellate Body had reached about the U.S. gasoline regulation that was before them – that when the discriminatory element of a regulation is found not necessary to the policy objective it is claimed to serve, that measure can be classified as either “arbitrary or unjustified discrimination” or “a disguised restriction on international trade.” The Appellate Body may have used different words, but they achieved the same result.

Appleton considers that while such an interpretation is possible, “it is not the most probable”. He argues first that the tests in Article XX(b) and in the chapeau are different. While Article XX(b) requires Members to use a GATT-consistent measure or, failing that, the least GATT-inconsistent measure reasonably available, the Appellate Body’s interpretation of the chapeau “acknowledges that Article XX encompasses measures that are not GATT-consistent, and focuses on alternatives that avoid or reduce discrimination.” Appleton notes that the Appellate Body did not express a preference between the use of two measures which it suggested were possible – one which would have avoided all discrimination, and one which “might result in discrimination in favour of certain refiners, albeit less than that arising pursuant to the US baseline establishment rules.” Secondly, to interpret the term ‘necessary’ into the chapeau, it would, in effect, mean that “the same kind or degree of connection or relationship” would be given to “the measure under appraisal, and the state interest or

---

204 Ibid.
206 Appleton, 1997, above at 162, at 134.
207 Ibid, referring to p.25 of the Appellate Body report.
208 Appleton, 1997, above at 162, at 134.
policy sought to be promoted or realized”. This was an effect the Appellate Body expressly stated “did not seem reasonable to suppose ... the WTO Members intended to require, in respect of each and every category” of Article XX. In effect, such an approach would ignore the ordinary meaning of the words of Article XX. Thirdly, although the Appellate Body relied on excerpts of the Panel’s reasoning in respect of Article XX(b) to justify its conclusions in relation to the chapeau, the Appellate Body used these passages as evidence of factual findings made by the Panel, not the legal conclusion of necessary.

Appleton’s reasoning is persuasive. Given the strong emphasis the Appellate Body placed on the rule of law in its judgment, as well as the importance it placed on giving effect to all of the terms of the treaty, it is unlikely that the Appellate Body intended to reintroduce the necessary test into the chapeau of Article XX. At the same time, there is force in Hudec’s argument that “when the discriminatory element of a regulation is found not necessary to the policy objective it is claimed to serve, that measure can be classified as either ‘arbitrary or unjustified discrimination’ or ‘a disguised restriction on international trade’.” Certainly, as Appleton points out, the more discriminatory a measure is, the harder it will be to justify. I would argue that the difference between the Article XX(b) necessary test and the requirement of the chapeau is that whereas the necessary test provides little scope for a party to justify why a particular measure was chosen, the chapeau allows Members rather more scope to choose a measure which is GATT-inconsistent if they can provide adequate justification. Moreover, the test in the chapeau is more procedural, focussing more on the manner of application of a measure, rather than the substance of the measure itself.

---

210 Appleton, 1997, above at 162, at 134, referring to p.18 of the Appellate Body report.
211 Appleton, 1997, above at 162, at 134 and 135.
The interaction of the chapeau with Articles I, III and XI of the General Agreement

The final point to note about the Appellate Body’s report in United States – Gasoline is that while it did not discuss the validity of measures directed specifically at process standards, it gave crucial insight into how Article XX should be read with the rest of the Agreement. It stated:

The context of Article XX(g) [and Article XX as a whole] includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, [the language of Article XX] may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies.\(^{213}\)

Furthermore, quoting from the Herring and Salmon case, it emphasised:

as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.\(^{214}\) (emphasis in Appellate Body Report)

In Chapter 3 we saw that the physical characteristics of a product are an important feature in determining the ‘likeness’ of products under Articles I and III, and that these Articles have generally been interpreted to prevent states from using non-product-related PPM-based trade measures. Taking into account the Appellate Body’s views of the interrelationship of Articles XX, I and III, it can be noted that the language of Article XX does not attempt to distinguish between product or process based measures. Even if Articles I and III could be said to make such a comparison,\(^{215}\) this should not be leaked into Article XX. To do so would emasculate Article XX by excluding from its consideration the regulatory purpose and legitimacy of a measure, and would effectively disallow all environmental trade measures (whether taken unilaterally or multilaterally) not capable of being phrased as product standards. The chapeau of


Article XX expressly prevents such emasculation where it states that aside from the exclusion of protectionist measures, “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures” (emphasis added).

Article XX exists as a means of sorting protectionist from legitimate environmental policy formulations, moderating the effect of those Articles of the General Agreement which do not examine the regulatory purpose of a measure. Properly interpreted, it relies on the rule of law to allow trade and environment positions to be balanced. Its substantive hurdles remain significant, and so support strong markets. Yet they are not so high that markets will rule at the expense of domestic regulatory measures introduced to maintain a strong environment. To maintain a strong environment, measures must sometimes be framed as product standards. In other cases, for example when product standards are inappropriate, process standards must be used. In all cases the standards will cause (or, to use more emotive language, force, induce or coerce) producers to adapt their practices to suit the new standards. Product standards will, however, often allow greater scope for those countries to choose how this is to be done.

United States – Shrimp: the acceptance of process standards, and the development of a ‘good faith’ obligation in Article XX

In United States – Shrimp, the Appellate Body clarified that non-product-related PPM-based trade measures may be excused by Article XX(g), provided such measures are applied appropriately. The case entrenched the role law plays in balancing strong markets and the environment, with the Appellate Body clarifying that Article XX is essentially a ‘good faith’ obligation to which all Members using trade measures inconsistent with the General Agreement must submit. Given the importance of the dispute to the treatment of non-product-related PPM-based trade measures under the General Agreement, and the scope provided for the ‘California effect’ to operate, the facts of the case are set out in detail.
United States – Shrimp examined the legality of the US’s measure conditioning the market access of shrimp on national turtle conservation policies. The dispute was initiated by India, Malaysia, Pakistan and Thailand against the US, and a number of countries participated as third parties to the hearing. Their participation indicated the level of international interest in the dispute. The dispute concerned the legality of a non-product-related PPM-based trade measure aimed at shrimp imported into the US. The measure was applied as a country-based ban which not only excluded the importation of shrimp caught in a manner harmful to turtles, it also excluded shrimp which had not been caught in a manner harmful to turtles if any part of the country of export’s catch was harmful to turtles. This was so even if the harmful part of the country of export’s catch was not supplied to the US. Thus, it raised the issue considered in the Tuna-Dolphin disputes – to what extent can a country’s policies concerning the production of certain products be taken into account when invoking environmentally based trade bans.

As will be seen, both the Appellate Body’s report in United States – Shrimp, and the Panel’s report in United States – Shrimp (Recourse to Article 21.5), indicate that the method of production of a product, and a country’s environmental policies affecting that production, can be taken into account when using trade measures to achieve certain policy goals. Such measures must be applied, however, only in exceptional circumstances, in a reasonable manner and only as a last resort. This marks a significant departure from the ‘jurisprudence’ of the unadopted Tuna-Dolphin disputes, and accepted wisdom, that the effect of environmental policies and factors of production which are not physically detectable in the ‘final’ product may not be the subject of trade measures. As we have seen, it is difficult to encourage sustainable development on a consistent basis without taking into account the environmental history of internationally traded goods. The Appellate Body’s decision in United States

---

217 Third party participants were Australia, Ecuador, El Salvador, the EC, Guatemala, Hong Kong, Japan, Nigeria, the Philippines, Singapore and Venezuela.
218 Moreover, in United States – Shrimp (Recourse to Article 21.5), the Panel characterised the ability to use unilateral measures to address environmental problems under Article XX not “as a definitive ‘right’ to take a permanent measure”, but “as the possibility to adopt a provisional measure allowed for emergency reasons” (at para 5.88, emphasis added). For discussion of the use of unilateral measures as measure of last resort, see Chapter 2, text accompanying nn 155, 167-169.
Shrimp provides a framework within which measures which do take into account the environmental history of internationally traded goods can begin to be utilised by strong states desirous of stronger environmental disciplines.

The Facts of United States – Shrimp

Turtles and TEDs

Seven recognised species of sea turtles exist in the world and all are endangered. All species of sea turtles are listed in Appendix I of the Convention on International Trade of Endangered Species 1973 (CITES)219 and appear on the World Conservation Union ‘Red List’.220

One of the largest of the anthropogenic factors contributing to the demise of sea turtle populations is large-scale trawling for shrimp using commercial fishing technology and mechanised trawling systems;221 others are ocean pollution and the direct harvesting of the turtles and their eggs.222 While there is no real data on the total world-wide

219 The Loggerhead (Caretta caretta), the Green (Chelonia mydas), the Leatherback (Dermochelys coriacea), the Hawksbill (Eretmochelys imbricata), Kemp’s Ridley (Lepidochelys kempii), the Olive Ridley (Lepidochelys olivacea), and the Fl atback (Chelonia depressa).

220 Inclusion in the ‘Red List’ indicates that the species must be highly protected to prevent their extinction. Inclusion in Appendix I of CITES indicates that the signatories have agreed for the highest level of protection to be given to sea turtles which are directly the subject of international trade. At the time of the dispute, all of the primary parties to the dispute were signatories to CITES, and remain so.

221 Sea turtles which become entangled in shrimp trawl nets will become comatose or drown if the trawl does not finish in sufficient time for the turtles come to the surface to take air. If trawl times are less than 60 minutes, the turtle mortality rate is not high. Trawls longer than 60 minutes “have a proportionally greater influence on sea turtle mortality”. (Mr. M. Guinea, at 191, para 124 of the United States – Shrimp Panel report.) It is generally accepted that it is the large commercial vessels with mechanised trawling systems, and not small shrimping vessels with hand operated nets, which pose the greatest threat to sea turtles. Mechanised trawling systems allow large nets to be used and allow long trawl times as they are able to withstand the great weight of the net when it is hauled up. The trawlers in India, Malaysia and Thailand tend to use mechanised trawling operations. Pakistan trawling operations do not tend to be mechanised but as trawlers tend to employ large crews, they are able to pull up nets of sufficient size and weight that they pose a danger to sea turtles. Kaczka, D., ‘A primer on the shrimp-sea turtle controversy’ (1997) 6(2) Review of European Community Law and International Environmental Law 171.

222 The majority of data quantifying the rate of capture of sea turtles in shrimp trawling nets comes from US studies, largely driven by the requirements of the Endangered Species Act of 1973 (US). Data on sea turtle mortality has also been collected from Malaysia, Thailand, India and Pakistan, but is largely anecdotal. (Evidence of Dr S. Eckert, expert advising the WTO Panel at 181, para 91 of the United States – Shrimp Panel report. See also Kaczka, 1997, above at n 221.) The Panel report contains a wealth of evidence from international experts on sea turtle conservation. One of the primary US studies which it
mortality rate of sea turtles from trawling activities, extrapolations from US data estimate that the world take of sea turtles is 124 000 annually. 223

Sea turtle mortality caused by shrimp trawling can be significantly reduced by the installation and use of 'turtle excluder devices' (TEDs) in shrimp nets. 224 A TED is a filtering device which prevents large objects from entering the body of a trawl net, but which allows small objects to pass through into the body of the net. 225 These devices allow the retention of smaller items such as shrimp in the net, but exclude larger items such as sea turtles, fin-fish, logs and old tyres. This reduces by-catch, reduces the likelihood of net and shrimp damage caused by the by-catch and, since the net is less heavy, allows trawl times to be extended. Thus, TEDs add to the efficiency of the trawling operation and contribute to the sustainable management of contiguous commercial fisheries. 226 TEDs do not tend to be costly. The WTO Panel hearing the dispute heard from the US that TEDs cost between US$75 – 500 in the US. Although the technology was developed in the US, TEDs are now manufactured in many nations for significantly lower cost. 227

refers to is the National Research Council, The Decline of Sea Turtles (1990), hereinafter referred to as NRC Report. Note Mr M. Guinea reservations about the report. He described it as "a fine body of work by a highly respected group of scientists, but ... focused mainly on the United States of America ... [and] ethnocentric". He said he had "difficulties extrapolating its conclusions to the global scale" (para 5.18 of the Panel report). 223 Kaczka, 1997, above at n 221, at 173, referring to NRC Report, above at n 222 and Earth Island Institute v. Christopher, 19 C.I.T. 1461, 913 F. Supp. 559 (CIT 1995), at 568. This evidence was not considered by the experts advising the WTO Panel. 224 Evidence from experts advising the Panel in United States – Shrimp; answers to question 3(b) at 210–215, paras 210-222 of the Panel report. The US submitted that TEDs reduce sea-turtle mortality by about 97%. The experts did not conclusively agree to the US's submission, but agreed that TEDs tended to reduce their mortality by a very significant degree. 225 United States – Shrimp Panel report at 3, para 15; Kaczka, 1997, above at n 221, at 174. See http://www.e-c-i.com/saveaturtle/teds.html for an illustration of a TED and how it works. Dr Eckert advising the Panel cited Crouse et. al., (1992) as the most “thorough review of the efficacy of TEDs in the US” at para 5.210. Crouse, D.T., M. Donnelly, M.J. Bean, A. Clark, W.R. Irvin and C.E. Williams, The TED Experience: Claims and Reality (1992). 226 Kaczka, 1997, above at n 221, at 174. 227 Para 3.79 of the Panel report. The US submitted that Indian participants of TED workshops conducted in India indicated that TEDs cost around US$8-12 to make in India. India disputed this submission, and said that the average cost of a TED was about $200 with the average income of an Indian fisherman only $200-$300 per annum, see para 3.81. Profits made by the owners of the trawls were not mentioned.
The ‘Shrimp-Turtle’ Ban

The US enacted Section 609 of Public Law 101-162, which authorised it to restrict the importation of shrimp “harvested with commercial fishing technology which may adversely affect” sea turtles. Governments could be certified if they provided documentary evidence that they either had protections in place comparable to US programmes and their fleets had an average incidental take rate of turtles comparable to the US fleet average, or their fishing environment did not pose a threat to turtles. Certification allowed access to the US market. Prior to the use of trade measures on uncertified nations, s.609 required the US to engage in negotiations with countries whose fleets appeared to threaten sea turtle populations.

Since 1987, the US has required all of its shrimp trawlers to be fitted with TEDs or to use reduced trawl times to prevent drowning of sea turtles. Pursuant to s.609, the US applied from 1 January 1993 restrictions on the importation of shrimp from the Wider Caribbean Region caught with nets not fitted with TEDs. It also negotiated the Inter-American Convention on the Protection and Conservation of Sea Turtles applicable to that area. On 1 May 1996, the US restrictions were applied to the rest of the world. This followed an appeal to the US Court of International Trade (CIT) by a number of US environmental and animal-rights NGOs who argued successfully that the US Administration’s limited implementation of the legislation was in breach of s.609.

United States – Shrimp examined the legality of the prohibition imposed by s.609 and its associated regulations and judicial rulings. The Panel found that CITES did not authorise the ban because while that Convention allows measures to be taken to protect the trade in turtles, in this case it was not turtles, but shrimp which were being traded. Further, it was found that the measure contravened Article XI of the General Agreement And was not excused by Article XX.

The Consistency of the Ban with Article XX

The nub of the case before the Panel was the application of Article XX of the General Agreement. The ‘like products’ argument was not raised by the US, and it is quite possible that it abandoned arguing this approach in light of the decision in Japan – Alcoholic Beverages. The US relied primarily on Article XX(g) to justify its measure, arguing the application of Article XX(b) in the alternative. The Panel found, however, that the US’s measure did not comply with the chapeau of Article XX and did not examine Article XX(b) or Article XX(g) in any detail. On appeal, the Appellate Body considered the application of Article XX(g) and found that while the US’s measure was consistent with subparagraph (g) of Article XX, it was applied in a manner inconsistent

---


231 Other international agreements and documents which encouraged the parties to protect endangered species included the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 ILM 818), requiring the Parties to identify and take measures to avoid processes likely to significantly impact upon threatened species such as sea turtles (India and Malaysia were Parties, Thailand was in the process of ratification); the Bonn Convention on the Protection of Migratory Species of Wild Animals (Bonn, 23 June 1979, [1991] ATS 32, 19 ILM 11), hereinafter the Bonn Convention, requiring Parties to prohibit the taking of listed species such as sea turtles, except in limited circumstances (India and Pakistan were Parties); and the 1982 United Nations Convention on the Law of the Sea, Montego Bay, 19 December 1982, UN Doc. A/CONF.62/122; 21 ILM 1261 (hereinafter UNCLOS), and the non-binding FAO Code of Conduct of Responsible Fisheries, adopted 31 October 1985 by the 28th Session of the FAO Conference, establishing guidelines to reduce the impact on threatened species. The non-binding ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 1989, reprinted (1985) 15 Environmental Policy and Law 64, also required Parties to take measures to protect and prevent the extinction of endangered species; Malaysia and Thailand were Parties. Cameron, J. and F. Darroch, WWF Amicus Brief to WTO Shrimp-Turtle Dispute (1997), and Kaczka, 1997, above at n 221 have argued that the US’s actions may have been authorised by these conventions, however the Panel and Appellate Body did not consider these arguments. Instead, the
with the requirements of the chapeau. The US subsequently amended the measure to take into account the Appellate Body’s criticism, and the present implementation of the measure has been authorised.\textsuperscript{232}

It is the usual practice of panels to find whether a measure falls within a particular subparagraph of Article XX before considering whether it complies with the chapeau.\textsuperscript{233} The Panel deviated from this standard procedure, choosing to see whether the measure complied with the chapeau first. Had such a finding stood, it would have potentially broadened the application of the chapeau to cover measures not within its ambit, significantly limiting national regulatory authority.

The Appellate Body reversed this “chapeau-down” approach. It found that Article XX must be read so that a measure is assessed to see whether it can be provisionally justified under one of the subparagraphs of Article XX, and only once this has been found, whether the measure complies with the chapeau. Their approach was originally articulated by the Appellate Body in \textit{United States – Gasoline} and was re-emphasised by the present decision. The WTO system does not have a system of \textit{stare decisis}, yet it is clear that the Appellate Body’s previous decisions are of persuasive authority and that it consistently applies its interpretative approach.\textsuperscript{234} This strengthens the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{232} Report of the Panel in \textit{United States – Shrimp (Recourse to Article 21.5)}, at para 6.1.
\item \textsuperscript{233} This approach was observed all of the GATT cases, except, possibly \textit{United States – Prohibition of Imports of Tuna and Tuna Products from Canada}. See Chapter 4, text accompanying nn 24ff.
\item \textsuperscript{234} See, for example, the discussion between Roessler and Jackson as to the precedential value of Appellate Body decisions. Both agreed that Appellate Body decisions are not strictly binding, however Jackson considered the Appellate Body said in \textit{Japan – Alcoholic Beverages} that: “over time, decisions of the Appellate Body may become ‘practice,’ as that term is used in the Vienna Convention.” Roessler, R., A. Ellard and R. Elliott, ‘Performance of the system IV: implementation’ (1998) 32(3) \textit{The International Lawyer} 789 (question and answer summary), at 792. See also Jackson, J.H., ‘The WTO Dispute Settlement Understanding - misunderstandings on the nature of legal obligation’ (1997) 91 \textit{The American Journal of International Law} 60, and Bhala who argues that the doctrine of \textit{stare decisis} currently operates in practice in the WTO, and ought to be formalised \textit{de jure}. Bhala, R., ‘The myth about \textit{stare decisis} and international trade law (part one of a trilogy)’ (1999) 14 American University \textit{International Law Review} 845; Bhala, R., ‘The precedent setters: \textit{de facto stare decisis} in WTO adjudication (part two of a trilogy)’ (1999) 9(1-151) \textit{Journal of Transnational Law & Policy}. See Chapter 2, n 175, and Chapter 4, n 112, above.
\end{enumerate}
\end{footnotesize}
confidence of the parties and onlookers in the predictability and security of the system.\textsuperscript{235}

The Appellate Body reversed the Panel’s finding that the US’s measure did not fall within the scope of Article XX. Instead, it found that the measure could be provisionally justified under Article XX(g) but was applied in a manner contrary to the chapeau. It did not consider the consistency with Article XX(b) as this was unnecessary.

\textit{Subparagraph (g) of Article XX}

The complainants argued that Article XX(g) was restricted to non-living natural resources and therefore could not apply to protect sea-turtles. Article XX(g) had never been interpreted so narrowly, the ordinary meaning of the words would not support such an interpretation, and evidence in the negotiating history for that Article provided no indication that the framers of the Article intended to ‘exclude’ ‘living resources’ from the meaning of that Article. Indeed, the drafting history pointed to the contrary.\textsuperscript{236}

While the Panel’s use of the “chapeau-down” approach meant it avoided making a finding on this issue,\textsuperscript{237} the Appellate Body noted these points, and further noted that

\textsuperscript{235} The consistency of the Appellate Body’s interpretative approach is assisted by their ‘collegiate’ approach, being the practice of all Appellate Body members meeting in Geneva when considering an Appellate Body report, not just those Appellate Body members who have been assigned to the case. See Article 17.1 of the DSU and the Appellate Body Working Procedures, as amended in WT/AB/WP/3, Rule 4 (Feb 28, 1997).

\textsuperscript{236} Although the negotiation history forms, at most, a supplementary means of interpretation, the US referred to an episode during the negotiation of the ITO Charter where “the delegate from Australia questioned whether Article 25 (prohibiting quantitative restrictions) would prevent Australia from limiting exports of merino sheep. (U.N. Doc. E/PC/T/A/SR/401, 15 August 1947 and E/PC/T/A/PV/40(1), 15 August 1947). The delegate explained that due to dire drought conditions, Australia had lost 20 million merino sheep, and was thus prohibiting exports. The Belgian delegate responded that regardless of the scope of Article 25, Australia’s prohibition was allowed by the exception for exhaustible natural resources.” This exception was in Article 37(j) which was the precursor of GATT Article XX(g). The US argued that the article’s negotiation history “[refutes] the complainants’ argument that Article XX(g) was intended to be limited so as to exclude biological resources.” US Submission to the WTO panel, at 114, para 269, of the report of the Panel in United States – Shrimp. Compare Charnovitz, S., ‘Exploring the environmental exceptions in GATT Article XX’ (1991) Journal of World Trade 37, at 45-47.

\textsuperscript{237} In doing so it missed an opportunity to confirm that Article XX is not hollow but can encompass a range of environmental measures with its ambit, if the measures are properly applied. Indeed, their
the General Agreement “crafted more than 50 years ago” could not be read as a “static” document “in its content and reference but [was] rather ‘by definition, evolutionary’.”

In particular, it noted that in “modern international conventions and declarations … [there appear] frequent references to natural resources as embracing both living and non-living resources”.

Accordingly, the Appellate Body found it was “too late in the day to suppose that Article XX(g) of the GATT 1944 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources”, noting that this was not the course taken in United States – Tuna from Canada or the Herring and Salmon report.

Thus, the Appellate Body found that a policy designed to protect sea-turtles could fall within the scope of Article XX(g); that given their endangered status, turtles were indeed ‘exhaustible’; and that because “[t]he sea turtle species here at stake … are all known to occur in waters over which the US exercises jurisdiction” that “in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the US for purposes of Article XX(g).”

Notwithstanding its reference to jurisdiction in its finding, the Appellate Body also stated “[w]e do not pass upon the question of whether there is an implied jurisdictional approach left them open to the criticism that they intended to give no concessions to the US’s measure at all.

The Appellate Body here referred to Namibia (Legal Consequences) Advisory Opinion (1971) ICJ Reports 31 where the ICJ found that ‘concepts embodied in a treaty are ‘by definition, evolutionary’, their ‘interpretation cannot remain unaffected by the subsequent development of law …. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’”


Report of the Appellate Body in United States – Shrimp, at para 134. The Appellate Body referred at note 110 to UNCLOS, noting that Article 56 expressly refers to living and non-living natural resources, and Articles 61 and 62 to living natural resources; to the Convention on Biological Diversity which refers to “biological resources”; Agenda 21, which the Appellate Body noted “speaks most broadly of ‘natural resources’ and goes into detailed statements about ‘marine living resources’ (in particular at para 17.70ff); and the Resolution on Assistance to Developing Countries, adopted in conjunction with the Bonn Convention, which also refers to living natural resources”. (19 ILM 11, at 15).

Report of the Appellate Body in United States – Shrimp, at para 134. For discussion of United States – Tuna from Canada and the Herring and Salmon report, see Chapter 4, above.

limitation in Article XX(g), and if so, the nature or extent of that limitation".\textsuperscript{242} This has raised some confusion as to the application of Article XX(g). Ahn considers that:

many Article XX jurisdictional issues can be avoided by finding a “sufficient Nexus” between the concerned states and the contested environmental resources” but that “[i]t is unclear what factors constitute a “sufficient nexus” or what is the minimum requirement for “sufficient nexus.”\textsuperscript{243}

Bree argues that the Appellate Body’s words must be interpreted to mean that the Appellate Body found that the US measure did not have an extrajurisdictional effect.\textsuperscript{244} He posits that:

The general rule that might be derived from the Appellate Body report is that a sufficient nexus between the protected subject and a country exists when the natural resource is at least temporarily within the jurisdiction of the country that invokes the Article XX exception even though the damaging activity takes place outside its territory.\textsuperscript{245}

It could be argued, however, that a ‘sufficient nexus’ between a particular species and an importing nation is created by allowing the importation of products affecting that species – that is, by allowing consumers to participate in the trade of products affecting that species. This is particularly so since, as noted by Howse and Regan, the demand of the consumer tends to reinforce the particular action of the supplier.\textsuperscript{246} I consider that no firm conclusion as to the jurisdictional scope of Article XX can be drawn as the Appellate Body left open the question as to whether or not the measure was extrajurisdictional, merely finding that on the particular facts of the case the measure evidenced the appropriate qualities to fall within Article XX(g).

The Appellate Body noted, however, that not all populations of sea turtles “migrate to, or traverse, at one time or another, waters subject to US jurisdiction” and that neither “appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitats – the

\textsuperscript{242} Ibid, at para 133.
\textsuperscript{245} Ibid, at 112.
\textsuperscript{246} Howse and Regan, 2000, above at n 215, at 262.
This comment might foreshadow jurisdiction as a component of a ‘sufficient nexus’, and if so, these words indicate that only some, not all, populations need to enter the jurisdiction of the Member invoking the exceptions. Alternatively, the comment may provide a platform upon which a future ruling might be based where, if urgent action is needed or the environmental harm is significant, action, even if it is ‘extrajurisdictional’, will be regarded. If a jurisdictional component is required, then non-product-related PPM-based trade measures in situations where no populations of an endangered species occur within the jurisdiction of the Member invoking the Article XX exception may not be available. This would tie the hands of states wishing to limit the impact of the consumption patterns of their consumers on species wholly outside their jurisdictional boundaries.

To the extent that they have left some uncertainty, the Appellate Body’s words were unhelpful, notwithstanding they were carefully limited to the specific facts of the case. While the ordinary meaning of the words of Article XX(g) in their context and in the light of the object and purpose of the treaty do not exhibit any jurisdictional requirement per se, the Appellate Body’s comment is likely to encourage the jurisdictional argument to be perpetuated for a time. It will also probably reinforce the chilling effect on Members seeking to enact regulations to protect endangered species where a similar jurisdictional nexus could not exist, for example for species which are not migratory, or whose migratory pattern does not happen to coincide with the territorial boundaries of the Member wishing to take action, even if to do so would not affect the jurisdiction of another.

The second limb of the Article XX(g) test was whether the US’s measure was ‘related to’ the conservation of exhaustible natural resources. The Appellate Body re-emphasised its finding in United States – Gasoline that the ‘relating to’ test requires a ‘substantial relationship’ between the means and the ends of the measure, not a relationship “merely incidentally or inadvertently aimed at the conservation”. It therefore confirmed the greater scope for national regulatory discretion to which it had

---

hinted in *United States – Gasoline*. It found that s.609 could be considered to be “relating to” the conservation of sea turtles.\(^{249}\)

The Appellate Body also found that the measure complied with the third limb of Article XX(g), as it was “made effective in conjunction with restrictions on domestic production or consumption”. Moreover, it re-emphasised the requirement of ‘even-handedness’ imposed by this part of Article XX(g).\(^{250}\)

The Appellate Body found that the US’s measure was, in principle, applied in an even-handed manner and could be provisionally justified under Article XX(g). It nevertheless found that the measure was not in compliance with the chapeau of Article XX. For the turtles then, the result remained the same. The approaches of both the Panel and the Appellate Body confirmed that the real test of Article XX lies in the chapeau, but the Appellate Body’s approach was welcome as it again reiterated that Article XX is not the hollow provision some critics have argued it to be, but can allow national regulatory action to improve global environmental conservation if that action is properly applied and implemented. Accordingly, Article XX provides some leeway for leader environmental states to implement domestic regulatory measures which may lead to a ‘California effect’.


\(^{249}\) The Appellate Body found at para 145 “In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States – Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.” (footnote omitted).

The chapeau of Article XX

Although subparagraph (g) of Article XX received important coverage in the *United States – Shrimp* dispute, the Appellate Body’s treatment of the chapeau was particularly noteworthy. In addition to its more clear articulation of the sequence according to which Article XX is to be read, the Appellate Body’s reasoning on the chapeau is important as it:

- rejected the notion that Members cannot use measures which ‘force’ other nations to change their policies;
- identified the chapeau as a ‘good faith’ obligation similar to that found in international law; and
- emphasised that measures must be applied in an even-handed manner and the process must be procedurally fair.

*Measures designed to force a change in an exporting Members’ conservation policies*

In developing its reasoning in *United States – Shrimp*, the Panel appeared to establish a new test to determine whether a measure fell within Article XX, namely whether it was likely to “undermine the WTO multilateral trading system”. The Panel was of the view that the US’s non-product-related PPM-based trade measure did not fall within Article XX because it could be seen to force exporters to adopt conservation policies in order to gain access to the US market. According to the Panel, if Article XX allowed such behaviour, it would undermine the multilateral trading system. Its security and predictability would be further threatened if other Members were then encouraged to adopt similar or conflicting policies. Moreover, such behaviour would upset the balance of the negotiated concessions for market access which the multilateral trade system has been designed to protect. The Panel relied upon the much criticised point made in the *Tuna-Dolphin II* dispute to support its reasoning on this point.

---

251 Report of the Panel in *United States – Shrimp*, at 291, para 44.
252 Ibid, at 291-2, paras 44 and 45.
The Appellate Body found that the Panel’s reasoning rested on a standard and test which found no basis in the text of Article XX and correctly overturned its approach. As the Appellate Body stated:

Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; But it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX. 254

Furthermore, the Appellate Body comprehensively rejected the Panel’s reasoning that Article XX would not allow any measure which had the effect of forcing other Members to change their policies. It stated:

... conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply. 255

The implication of this ruling was quite considerable. It clarified that Article XX can, *prima facie*, allow measures such as country-based non-product-related PPM-based trade measures within its scope. As the Appellate Body went on to point out, however, the measures must be properly applied. Taking the results of *United States – Shrimp* and *United States – Gasoline* together, it appears that the following types of non-product-related PPM-based trade measures, if properly applied, fall within the scope of Article XX:

- country-based non-product-related PPM-based trade measures; and

253 Ibid, at 292, para 46, referring to paras 5.27 and 5.39 of *Tuna-Dolphin II*, discussed in Chapter 4, above.


255 Ibid, at para 124 (emphasis in original). Indeed, we saw in *United States – Gasoline* an example of a measure capable of provisional justification under Article XX(g) which forced exporting Members to modify their internal policies to comply with those unilaterally proscribed by the importing Member. There, baseline standards, which implicitly required foreign refiners and blenders of gasoline and
• origin-neutral non-product-related PPM-based trade measures based on the characteristics of the producer (producer-based PPMs).

In fact, the measures implementing s.609 have been revised by the US so that they are now aimed solely at the non-product-related PPM characteristics of the particular product. That is, they are now an impact-based PPM as they allow shrimp in 'shipment-by-shipment'. Even if a harvesting nation is not certified as requiring the use of TED technology comparable in effectiveness to that used in the US on all commercial shrimp trawlers harvesting in areas likely to intercept sea turtles, the Revised Guidelines allow the entry of shipments of shrimp which have been harvested by trawlers using TEDs comparable in effectiveness. In United States – Shrimp (Recourse to Article 21.5), these measures were found to be consistent with Article XX. Moreover, the argument that impact-based PPM-based trade measures should not be allowed as they can ‘force’ a change in the environmental policies and practices of exporting Members seems to have lost much of its strength. Although Malaysia argued that the measures, unilaterally applied, violated its sovereign right to determine its own environmental policies and practices, the Panel in United States – Shrimp (Recourse to Article 21.5) noted that the Appellate Body had found that:

while a WTO Member may not impose on exporting members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that

importers of gasoline to modify the manner in which the gasoline was produced, were found by the Appellate Body to be capable of provisional justification. See in Chapter 4, at text accompanying n 168.


The shipment is also allowed entry if it is otherwise found to have been harvested in a manner which does not adversely affect sea turtles, being:

• Shrimp harvested in aquaculture;
• shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices, or by vessels using specified gear, in accordance with the US programme; or
• shrimp harvested in any other manner or under any other circumstances that the Department of State may determine, following consultation with the NMFS, does not pose a threat of the incidental taking of sea turtles.

Para 2.24 of United States – Shrimp (Recourse to Article 21.5); para 5 of the Revised Guidelines.


Ibid, at para 5.103.
exporting countries commit themselves to a regulatory programme deemed comparable to its own.\textsuperscript{260}

Depending, however, on how the issue of jurisdiction is handled in future cases, we may see a differentiation between measures which are and are not allowed. This would apply to all types of non-product-related PPM-based trade measures, not just impact-based PPMs.

Putting the jurisdictional issue to one side however, the focus of future disputes is more likely to be concerned with whether a measure has been properly applied rather than the stage of production which a measure targets. The Appellate Body’s report in United States – Shrimp provides important insight into the factors to be taken into account when determining this issue, relevant to the design of measures which may facilitate a ‘California effect’. This aspect of their decision is accordingly considered below.

\textit{The chapeau’s obligation of ‘good faith’, even-handedness and procedural fairness}

The Appellate Body’s assessment of whether the US’s measure had been properly applied is significant, and demonstrates the role law plays in the balancing of strong markets with a strong environment.

In United States – Gasoline, the Appellate Body stated:

The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.\textsuperscript{261}

Charnovitz has criticised this finding, stating that the Appellate Body offered “no analysis or evidence in support of” this interpretation, “[f]or example, it … [did] not

\textsuperscript{260} Ibid.

\textsuperscript{261} Report of the Appellate Body in United States – Gasoline, at 22.
explain how a legal right for exporters to export can exist without regard to the legal right of importers not to import." He explained:

In other words, the Appellate Body’s reasoning is circular in suggesting that article XX must be interpreted to preserve legal rights (or maintain legal obligations) which themselves can only be determined by article XX.

The Appellate Body seemed to clarify its ruling in United States – Shrimp, stating that the “chapeau of Article XX is, in fact, but one expression of the principle of good faith”.

It elaborated that:

162. ... This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of "Abus de droit, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.” An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.

163. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

Article XI of the General Agreement, the rule against quantitative restrictions, qualifies “legal right of importers not to import”. It is one mechanism used by exporters who wish to export gain market access. Articles I and III of the General Agreement Also qualify the “legal right of importers not to import” by restricting the use of various types of discriminatory measures. The Appellate Body’s comments in United States – Shrimp clarify that while Article XX allows the General Agreement’s qualifications on the “legal right of importers not to import” to themselves be qualified, this may only occur if a bona fide reason to do so exists. That is, the conduct is reasonable. I would suggest that the Appellate Body’s reasoning on this point is only circular to the extent

262 Chamovitz, 1998, above at 201, in Chapter 2 at text accompanying n 72, lexis database.
263 Ibid.
that what is seen as ‘reasonable’ will vary depend on the circumstances of each case.266 I would also suggest that an assessment of the ‘reasonableness’ of the measure would include both an assessment of whether the magnitude of the environmental harm and its urgency made the use of a trade measure appropriate, and whether the measure was appropriately tailored to respond to that magnitude and urgency.

The Appellate Body applied the doctrine of *abus de droit* in *United States – Shrimp* to determine whether the US had properly applied its measure, finding that it had failed to do so on a number of counts. As we have seen, the chapeau of Article XX allows Members to restrict market access and accord discriminatory treatment only if the measure is “not applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. These words provide the framework for determining whether a measure has been applied reasonably or in good faith.

In considering whether the US measure amounted to ‘unjustifiable discrimination’, the Appellate Body found:

- The measure was rigidly and inflexibly applied – unless an exporting Member adopted a regulatory program and enforcement practice essentially identical to that applied by the US to its own trawlers, that Member would not be certified and their shrimp would be banned from entering the US market.267 This was so even if the shrimp intended for export had been caught with nets installed with TEDs.
- The US had failed to negotiate seriously with all Members exporting shrimp to the US. While it had only recently negotiated with the nations of the wider Caribbean/western Atlantic region the *Inter-American Convention for the Conservation of Turtles*, there was no indication that it had attempted to negotiate a similar agreement with other nations, including the appellees. Failure to attempt negotiations was in contravention of the terms of s.609.
- The phase-in period for the TEDs was considerably longer for nations in the wider Caribbean/western Atlantic region than for the rest of the world. Whereas nations in the...
former region had a phase-in period of three years, the rest of the world had only four months.
• The US had made far more effort to transfer TED technology to nations of the wider Caribbean/western Atlantic region than to the rest of the world.

The reason why the US had spent so much effort negotiating with the wider Caribbean/western Atlantic region and assisting them with technology transfer and long phase-in periods was because its Administration only ever intended applying s.609 to that region and not to the rest of the world.268 The Department of State was forced into applying the measure on a world-wide basis by rulings of the US CIT when a coalition of environmental groups and the Georgia Fishermen’s Association brought actions against it for failing to properly implement s.609. The aspects of United States – Shrimp which took place at the domestic level tell an interesting story of the many agendas which government departments must respond to and control in order to see through the difficult task of achieving a trade liberalisation agenda while trying to ensure the appropriate conditions for sustainable development and international competitiveness.269 It is also one of the reasons environmentalists have argued for greater national discretion in the implementation of trade measures for environmental purposes. The Appellate Body did recognise the role of the CIT in bringing the situation to bear, yet indicated that the US must, like the general community of states, bear “responsibility for acts of all its departments of government, including its judiciary.”270

268 The US Administration was reluctant to extend the ban beyond the Wider Caribbean Region because of the major disruptions to its trade foreign policy interests. The November 1990 Report of the Secretary of State to The Congress of The United States on the Status of Efforts for the Conservation and Protection of Sea Turtles Pursuant to Section 609 of P.L. 101-162 stated “... Because four of the five species protected under the U.S. regulations are known to occur worldwide, this law, if given the broadest possible interpretation, could affect shrimp imports from more than 80 countries totalling as much as $1.8 billion – more than 75 percent (by value) of all shrimp consumed in this country. The impact of the resulting embargoes would be unprecedented both internationally and domestically. ... In implementing the law, the Administration has proceeded on the assumption that Congress intended to take reasonable steps internationally to protect sea turtles but did not intend to force a situation that would create enormous market disruptions in the US and create major foreign policy problems with many countries.” In Earth Island Institute v. Christopher, 19 C.I.T. 1461, 913 F. Supp. 559 (CIT 1995), Lexis Database, at 54-57.

269 It is worth noting that although the Georgia Fishing Association was motivated by competitiveness concerns to join with the environmental community, it was denied standing by the CIT as it failed to show that the domestic requirement to use TEDs put it at a competitive disadvantage. See Earth Island Institute v. Christopher, 19 C.I.T. 1461, 913 F. Supp. 559 (CIT 1995); Lexis Database.

The Appellate Body findings made it clear that while measures will be examined within the context of how they are currently applied, their historical application will also be taken into account. In doing so, it demonstrated a much greater willingness to consider issues of domestic implementation than previous panels. Just as the Appellate Body emphasised in United States – Gasoline, Article XX will only allow the imposition of trade measures as a last resort, and proper consultation and negotiation must be carried out to find an alternative means of achieving environmental policy objectives. Examination of how genuine the attempts at negotiation made by parties would appear to be a beneficial step for advancing sustainable development, as it would encourage greater participation of those affected by the measure and improve the chances of a fair solution being reached. It appears from its ruling however, that care must be taken when developing a regional approach to conservation where subsequent extension to other regions might be appropriate. While the US was essentially ‘caught out’ by the conjunction of activist environmental NGOs and the bad design of its own legislation and guidelines, one may wonder whether this will this produce more of a shift away from regional conservation approaches to avoid future problems with co-ordination.

Given that regional approaches are an effective means of building consensus, and are encouraged under international environmental instruments such as the Convention on Biological Diversity, the Bonn Convention and UNCLOS, this situation would be undesirable and, pragmatically, is unlikely.

The Appellate Body also found the US measure to be arbitrary. It concluded that the law contained three flaws:

- The measure was rigidly and inflexibly applied.\(^{272}\)
- The conditions for the grant, denial or withdrawal of certification to allow the export of shrimp to the US were entirely determined by the US Department of State, without any chance for input or appeal by the nations applying for certification.\(^{273}\)
- The process for certification under s.609 was neither transparent nor predictable. Indeed, the Appellate Body considered it to be “singularly informal and casual”, there “appear[ed] to be no way that exporting Members ... [could] be certain whether the terms of Section 609, in particular, the 1996 Guidelines [implementing Section 609], ... [were] being applied in a fair and just manner by the appropriate governmental agencies of the US.” Therefore, the Appellate Body considered that “exporting Members applying for

---

\(^{271}\) For example, while phrased as applying primarily at the national level, Chapter 8.3 of Agenda 21 advocates the importance of broader participation in decision-making.


\(^{273}\) Ibid, at para 180.
certification whose applications ... [were] rejected ... [were] denied basic fairness and due process, and ... [were] discriminated against vis-à-vis those Members which ... [were] granted certification.”

Finally, the Appellate Body drew upon Article X of the GATT which it found “established certain minimum standards for transparency and procedural fairness” not evident in the US measure.

*United States – Gasoline* made it clear that measures must be applied in an even-handed manner. *United States – Shrimp* went further, entrenching the notion that if Members are to rely on Article XX, they themselves must act in a scrupulously fair and transparent manner. It is likely that the result of this decision will be that far more attention will be paid to the administration of trade measures, possibly impacting upon many existing measures taken to protect domestic environmental and other concerns.

**The role of Sustainable Development in the multilateral trading system**

The Panel’s decision in *United States – Shrimp* gave real cause for concern to those among the environmental and trade community looking to see the objective of sustainable development more fully reflected in the interpretation of WTO rules. One of the achievements for the environment of the Uruguay Round was the recognition in the preamble of the *WTO Agreement* that environmental protection and preservation is an important and legitimate goal of international law and policy. The first paragraph of the preamble states:

> RECOGNIZING that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. (emphasis added)

---

275 Ibid, at para 183.
276 Note that in *United States – Shrimp* (Recourse to Article 21.5), the US measure has now been provisionally authorised pursuant to Article XX of the *General Agreement*. See text accompanying nn 256 - 260, above.
The Panel downplayed the importance of the objective of sustainable development, stating:

While the WTO preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.\(^{277}\)

In coming to this conclusion, the Panel placed insufficient weight on why the central focus of the WTO Agreement might be the promotion of economic development through trade, and too much emphasis on how. It appeared to ignore that one of the purposes of the new WTO Agreement was to “develop an integrated, more viable and durable multilateral trading system”, and that trade should be conducted “with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand”.\(^{278}\)

The mechanism to achieve this objective is the agreement by Members to reduce tariff and non-tariff barriers to trade and eliminate discriminatory treatment. This is however only a means to an end, and as Article XX explicitly recognises, there may be exceptional circumstances when discriminatory treatment is warranted.

The Appellate Body’s decision did much to allay the concerns of more moderate environmentalists. Throughout its judgment it emphasised that “the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy”\(^{279}\) and that the words of the preamble “add colour, texture and shading to [the] interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994.”\(^{280}\) This is significant because the Appellate Body did not limit the application of the words of the Preamble merely to Article XX of the 1994 General Agreement, or the expressly ‘environmental’ provisions of covered

---


\(^{278}\) Preamble to the WTO Agreement.


\(^{280}\) Ibid, at para 153.
agreements, but to the *WTO Agreement* and the covered agreements in their entirety. Its approach built upon that evident in *European Communities – Hormones*, where the Appellate Body indicated that the expression of the precautionary principle was not necessarily limited solely to Article 5.7 of the SPS Agreement.\(^{281}\) Given that the general rule of interpretation states that the text, annexes *and* the preamble of a treaty form part of the context in which the specific words of an Article is to be interpreted, we can expect to see much greater weight given to the objective of sustainable development as the *WTO Agreement* and its annexes receive further interpretation. This will assist in balancing strong markets with a strong environment, as well as furthering the convergence of trade and environmental concerns.

Fairness considerations in the balancing of strong markets with a strong environment

The Appellate Body report in *United States – Shrimp* sent a very clear message that Members must strictly observe the fundamentals of procedural fairness if they wish to rely on Article XX. They must act reasonably and in good faith. Furthermore, it opened the WTO dispute settlement system to wider participation by civil society. These developments should bring greater confidence in the system and in its ability to guide parties to a peaceful and fair resolution of disputes, again assisting in the balancing of strong markets with a strong environment, and encouraging a greater convergence of trade and environmental concerns.

One ingredient important to finding such a balance is the concept of environmental and social equity or fairness. This concept is increasingly relevant in the international setting, where developed and developing nations struggle to balance the demands and aspirations of resource use and conservation in both an economically and environmentally sustainable fashion. We noted in Chapter 2 that the Rio Declaration emphasises that states should internalise the environmental costs of their activities and not cause transboundary environmental harm, but recognises that states have different roles to play in the protection of the environment and that environmental standards should be tailored to the developmental context in which they should apply. Chapter 2 accordingly noted that developed countries must shoulder much of the burden of modifying their environmentally harmful patterns of production and consumption, and should provide assistance for developing countries to do the same. It noted that

282 The requirement to act in good faith was further emphasised by the Panel in *United States – Shrimp (Recourse to Article 21.5)*, where the Panel linked the seriousness and the continuity of efforts, assessed of a period of time, to negotiate a multilateral agreement to address sea turtle conservation with that good faith. See at paras 5.60 and 5.69ff.

283 In summary, the Appellate Body reversed the Panel’s ruling that while parties to a dispute could attach all or part of an *amicus* brief to their own submissions, and thereby put it on the record, that the Panel itself could not take any such briefs submitted by NGOs directly to it into account unless it had sought the information itself (Article 13 of the DSU). The Appellate Body found that NGO submissions could be taken into account by panellists where they had been submitted directly to the panel or included as part of a parties’ submissions. In *United States – Hot-Rolled Lead*, the Appellate Body further found that it could take into account *amicus* briefs submitted directly to it in an appeal (at para 42). Note,
positive measures such as technology transfer, capacity building and funding to modify unsustainable production practices provide a less confrontational and often more equitable solution means of doing so.\textsuperscript{284}

In United States – Shrimp, the US attempted to employ positive measures in conjunction with trade bans in order to achieve sea turtle conservation, holding workshops in over 30 countries to explain and show the rationale, use, design, construction and effectiveness of TEDs. Most workshops were given to countries in the wider Caribbean/western Atlantic region as it was not intended that the measure would be applied world-wide. The Appellate Body saw this concentration of efforts at technology transfer as evidence of discrimination.

Article XX does not explicitly require technology transfer or other assistance to be offered to compensate for, or offset, the costs of measures authorised by that Article. It is, for example, distinct from Article XIX of the General Agreement, the ‘escape clause’, which allows WTO Members to temporarily withdraw concessions if “unforeseen developments” and obligations under the General Agreement lead to increased imports which “cause or threaten serious injury to domestic producers” of competing products, and authorises retaliatory action to compensate for the withdrawal of concessions.\textsuperscript{285}

\begin{flushright}
\textsuperscript{284} Positive measures do not replace the utility of trade measures. As emphasised by Dr Marauhn at the UNCTAD meeting on Positive Measures to Promote Sustainable Development (see in Chapter 2 at n 92, above), trade measures are not ‘negative’ measures but combine with positive measures as an important tool at the international level to encourage more environmentally sustainable behaviour. These comments were made with respect to multilaterally agreed measures, however the principle can be applied in the unilateral context if positive measures are incorporated and designed to mitigate the negative social effects of trade measures.
\textsuperscript{285} Withdrawal may only be “to the extent and for such time as may be necessary to prevent or remedy such injury” and must be on a non-discriminatory of MFN basis (Article XIX: 1(a)). Other clauses which allow an ‘escape’ from certain obligations of the General Agreement are Articles XII used in balance of payment difficulties, XVIII for developing countries to be used for economic development reasons, and XXIII which allows concessions to be withdraw in the event of nullification and impairment of benefits. Also, Article XXVIII allows renegotiation of benefits. Jackson, J.H., World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade (1969), at 556.
\end{flushright}
Article XX itself operates as something of an 'escape clause', but rather than allowing concessions to be withdrawn to prevent serious injury to domestic producers, Article XX allows the prevention of serious injury to the environment. Requiring Members which rely on Article XX to protect the environment to pay for the incremental cost of achieving that protection does not, at first glance, appear to sit comfortably with the polluter pays principle, where those responsible for environmental harm should bear the cost. However, it is often not merely the producers of environmentally harmful goods who bear the responsibility for environmental degradation, but also the consumers of those products. Although an import ban may remove the incentives provided by consumers to continue a particular type of environmentally harmful activity, it might also result in the transfer of activity to another environmentally harmful activity not apparent to consumers. This does not achieve environmental or social equity, for either the environment or for the people affected and who have the least power to change their circumstances.

The existing jurisprudence shows that, at the minimum, Members invoking Article XX to justify a measure must count the costs that its imposition would have on exporters. As we saw in United States – Gasoline, a failure to do so was one of two factors providing a foundation “well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred”. The resulting discrimination, which the Appellate Body viewed as foreseeable, was both ‘unjustifiable’ and a ‘disguised restriction on international trade’. The provision of technology transfer or some other form of assistance – whether monetary or otherwise – would further strengthen a Member’s position when relying on Article XX as it would so go some way to demonstrate good faith. The teaching of United States – Shrimp is, however, that if a party relies on such a provision as evidence of its good faith, it must do so in an even-handed manner.

We have seen above a more balanced approach to the interpretation of Article XX(g) evolving under the WTO dispute settlement system; one, we have argued, is capable of allowing strong trade disciplines to be balanced with stronger environment disciplines. But what of Article XX(b)? The flexibility available under Article XX(b) to balance trade and environmental concerns is narrower given the wording of that provision. As noted in Chapter 4, the ‘necessary’ test in Article XX(b) has been interpreted under the GATT regime as a ‘least GATT-inconsistent’ test. This interpretation has been upheld in recent WTO cases: in Korea – Beef in relation to Article XX(d) and European Communities – Asbestos in relation to Article XX(b). While the Appellate Body in those cases has interpreted the term ‘necessary’ fairly narrowly, it certainly has not adopted the most narrow of interpretations.

In Chapter 4 we noted that Charnovitz argued that the term ‘necessary’ in Article XX(b) should not be interpreted to mean ‘absolutely necessary’. The Appellate Body addressed this issue in Korea – Beef. It noted that according to its dictionary meaning:

The word “necessary” normally denotes something “that cannot be dispensed with or done without, requisite, essential, needful”,

but that “a standard law dictionary cautions that:”

[t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.

In the Appellate Body’s view:

Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term “necessary” refers ... to a range of degrees of necessity. At one end of this continuum

---

lies “necessary” understood as “indispensable”; at the other end, is “necessary” taken to mean as “making a contribution to.” We consider that a “necessary” measure is, in this continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to.”

In both *Korea – Beef* and *European Communities – Asbestos*, the Appellate Body found that:

> the “weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure” is reasonably available is the extent to which the alternative measure “contributes to the realization of the end pursued”. ... “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to accept as “necessary” measures designed to achieve those ends.

An alternative measure will not be considered to be ‘reasonably available’ if a Member cannot reasonably be expected to employ it. A measure will not be disqualified merely on the grounds that it is administratively difficult to implement. Yet if the alternative measure fails to achieve the Member’s chosen level of protection, that is, it is not effective, it will not be considered to be a measure reasonably available for the purposes of Article XX(b). As made clear in *European Communities – Asbestos*, a Member’s chosen level of protection in relation to a particular risk may be zero tolerance. Accordingly, Article XX(b) would appear to justify precautionary action, particularly when the matter was urgent or the magnitude of harm likely to be great.

Compared to the disciplines of Article XX(g), states may have less latitude to use Article XX(b) to protect human health or the environment. Yet Article XX(b) is certainly not insignificant. Indeed *European Communities – Asbestos* represented the first time a measure taken to protect human health was found to satisfy the conditions of Article XX.

---

290 Report of the Appellate Body in *European Communities – Asbestos*, at para 172, quoting its report in *Korea – Beef*, at paras 166, 163.
Conclusion

In Chapter 3 we saw the core obligations of the *General Agreement*, the principles of ‘most-favoured-nation’ and ‘national treatment’, as well as the rule against quantitative restrictions, working to buttress strong markets in the international sphere by constraining national discretion to implement domestic regulatory measures affecting the flow of international trade and interfering with countries capitalising on their comparative advantage. Chapter 3 showed that these obligations have been consistently interpreted in a way which limits Members from choosing domestic regulatory measures designed to implement environmental policy, influence sustainable consumption habits among their consumers, and to reinforce the use of environmental comparative and competitive advantage.

In Chapter 4 we saw that the *General Agreement* contains provisions in Article XX which give space to states to maintain domestic regulatory measures to implement environmental policy. In examining a series of Article XX disputes however, we saw that during the GATT regime, panels consistently interpreted this Article narrowly in order to ensure that strong markets would be maintained. That is, while some lip service was paid to the importance of environmental protection, generally that Article was interpreted so that states had little space to maintain domestic regulatory measures to either encourage their consumers to adopt sustainable consumption habits or to implement policies to reinforce the use of environmental comparative and competitive advantage. Moreover, while Article XX was never interpreted so that the use of non-product-related PPM-based trade measures was expressly excluded, unadopted jurisprudence substantially limited the use of measures applied ‘extrajurisdictionally’ or in a manner which had the effect of forcing another nation to change its policies and practices in relation to the production of products. Most types of non-product-related PPM-based trade measures were covered by these categories. Accordingly, while Article XX may theoretically have been capable of supporting a strong-trade-strong-environment regime, during the GATT regime it was interpreted in a manner which buttressed strong markets at the expense of a strong environment.
This Chapter has demonstrated that the WTO’s approach has altered. In *United States – Gasoline* and subsequent cases, greater attention was paid to the words of the *General Agreement* and hence more reliance was placed on law rather than diplomacy to resolve trade disputes. This closer reading has meant the ‘environmental exceptions’ of Article XX are now effectively broader and offer more stability, thus affording national democracies greater space and a stronger platform upon which to implement environmental policy in support of stronger environmental disciplines. Moreover, in *European Communities – Asbestos*, a measure taken to protect human health has for the first time been found to satisfy the conditions of Article XX. This will allow for a path of development which is more sustainable.

We have also seen that Article XX can sustain the use of non-product-related PPM-based trade measures if they are properly applied. We saw the first sign of this in *United States – Gasoline* where origin-neutral producer-based PPM measures were at issue. Importantly, a key policy reason for preventing the use of such measures was rejected when both the Panel and the Appellate Body found that adequate procedures for verifying compliance with such measures do exist and allow trade to “go on and grow.” In *United States – Shrimp* we saw these signs confirmed, where a country-based non-product-related PPM-based trade measure was at issue, and an impact-based PPM measure was eventually, and provisionally, authorised.

*United States – Shrimp* was concerned with the plight of the sea turtle. It highlighted deficiencies in the international legal system to protect endangered wildlife, yet showed a practical example of the use of non-product-related PPM-based trade measures to address these deficiencies. It is a sad indictment of the present state of affairs however,

---

295 Report of the Panel in *United States – Shrimp (Recourse to Article 21.5)*, at para 5.87. The Panel stated at 5.88 “Finally, the Panel would like to clarify that, in a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the United States in this case may only be accepted under Article XX if they were allowed under an international agreement, or if they were taken further to the completion of serious good faith efforts to reach a multilateral agreement, the possibility to impose a unilateral measure to protect sea turtles under Section 609 is more to be seen, for the purposes of Article XX, as the possibility to adopt a provisional measure allowed for emergency reasons than as a definitive ‘right’ to take a permanent measure. The extent to which serious good faith efforts continue to be made may be reassessed at any time. For instance, steps
that while the international community has recognised that sea turtles are endangered, the action of one nation attempting to ‘remove itself from the loop’ of their further decline was enough to provoke an international trade dispute. That dispute demonstrated that neither international environmental law, nor international trade law on the issue was definitive, nor, until very recently, adequate to halt their decline.\textsuperscript{296} Nor indeed was the interrelation of international trade law and international environmental law adequate. The dispute also highlighted currents of distrust among those participating in the discourse on trade and environment, with many sceptical as to the institutional ability of the WTO to handle the dispute in a balanced fashion, and others sceptical of motives to protect the turtles. Even the mechanisms used to address the plight of the turtle were shown to be unsatisfactory. While technology transfer and trade measures solved some problems, the latter created others.

Trade measures are not the only means for promoting sustainable trade. The market can provide powerful incentives to change behaviour, as can publicity generated by a case.\textsuperscript{297} The effectiveness of the response is, however, more left to chance.\textsuperscript{298} The ability for Members to use domestic regulatory measures to influence their consumers’ behaviour becomes most important when it is not a ‘cute’ species such as sea turtles at issue, but a species less beloved by consumers (such as sharks), more ‘humdrum’ (such as certain non-commercial fish stocks), or the environmental issue more technical.

\begin{flushleft}
which constituted good faith efforts at the beginning of a negotiation may fail to meet that test at a later stage.” (emphasis added)
\end{flushleft}

\textsuperscript{296} This is not to say that CITES, which combines trade principles with environmental law, is, in and of itself, inadequate. Rather, CITES only addresses one aspect of the problem – the trade in turtles, not the impact humans have on turtles generally.

\textsuperscript{297} For example, in respect of the protection of sea-turtles, a large eco-labelling campaign was launched in the US to educate consumers about the link between wild-shrimp and sea turtles. Had the US not maintained its measures, and if the campaign was as successful as the tuna-dolphin campaign, it would have gone some way to helping the sea turtles. The publicity brought by the WTO case will probably help the cause of sea turtles. For example, Australia is now moving towards requiring trawlers to use TEDs to reduce the taking of turtles. Shaming brought on by the public airing of environmental harms can act as a powerful behaviour modifier, and the dispute could catalyse governments resistant to TEDs to reconsider their use.

\textsuperscript{298} See Stevens, C., ‘Synthesis report: trade and environment: PPM issues’ in OECD (ed), OECD, \textit{Trade and Environment: Processes and Production Methods} (1994) 7-9, at 21-22, indicating that while eco-labels are the least trade-invasive method of modifying consumer behaviour, there is also evidence that they are not particularly effective in preventing environmental degradation when the methods of harvesting or production cause either immediate or irreversible damage. Furthermore, because the costs of developing comprehensive and adequate eco-labelling programmes can be very high, the likelihood of
Government intervention is sometimes necessary to ensure that consumer action does not reinforce unsustainable environmental activities. Correspondingly however, measures must be designed more specifically to target the source of the harm to ensure the side-effects of such government intervention is minimised. Accordingly, it is important that the General Agreement can authorise not just product-based trade measures and product-related PPM-based trade measures, but non-product-related PPM-based trade measures also. The Appellate Body’s ruling in United States – Shrimp was not a victory for sea turtles, but was welcome as it brought home that Article XX is capable of justifying non-product-related PPM-based trade measures if they are implemented in a manner which is fair. This was confirmed in United States – Shrimp (Recourse to Article 21.5), when the US’s revised measures to protect the sea turtles were authorised.

This Chapter has shown us that the Appellate Body has provided the keys to making significant progress in breaching the trade and environment ‘divide’. It has identified that Article XX places an obligation on Members to take into account the costs of measures, and to act reasonably and in good faith when using trade measures to achieve environmental policy goals. It has confirmed the reintroduction of the principle of effectiveness for measures proposed as less trade restrictive alternatives; and it has firmly emphasised that the WTO Agreement and the covered agreements must be interpreted in a manner which allows for the objectives of sustainable development to be met.

States which wish to use national regulations to raise environmental standards to initiate a ‘California effect’ must do so through careful consultation and negotiation. While this may be viewed by some as being an incursion into national democratic processes, the environmental discourses explored in Chapter 2 teach us that participatory democracy is a means of strengthening the legitimacy of decision-making systems and sustainability encourages strong democracy at all levels including the global and transnational level. Accordingly, an international deliberative process will most likely be applied on an international basis is low unless there is evidence of international consensus that the environmental problem is serious.
assist in addressing concerns which other nations have regarding the legitimacy of the use of unilateral trade measures to address environmental concerns. It will probably also assist in developing creative and cooperative solutions for solving environmental problems. Moreover, notwithstanding the need for Members to engage with others and negotiate the use of unilateral trade measures to solve environmental problems, a line has been drawn in the sand. The rest of the world is now on notice that they too must act in good faith and make a reasonable attempt to negotiate when approached.
The SPS Agreement: balancing trade, health and environmental concerns

Introduction

So far, we have focused on the General Agreement. We have explored the extent to which that agreement constrains the ability of Members to implement and maintain domestic regulatory measures to foster sustainable consumption habits among their consumers. We have also considered the extent to which the General Agreement impacts upon the ability of strong or leader states to raise domestic environmental regulatory standards which may encourage a ‘California effect’. Our particular focus has been the extent to which Members may make regulatory distinctions based on non-product-related PPM attributes to differentiate between physically similar products. We have seen that Articles I and III of the General Agreement support the maintenance of strong markets by exerting considerable control on the types of regulatory distinctions Members may make, and that on current interpretations, do not support regulatory distinctions made on the basis of non-product-related PPM attributes. Yet we have also seen a softening of the jurisprudence in relation to Article XX of the General Agreement, whereby such regulatory distinctions are able to be maintained if there is the requisite connection between the measure and the particular environmental policy, and the measure is implemented in a fair manner.

The *General Agreement* is not, however, the only covered agreement to constrain Members’ use of domestic regulatory measures to implement environmental policy. A number of the other agreements have the potential to do so. The remainder of this thesis looks at two of these agreements in detail. The *SPS Agreement*, which is dealt with in this Chapter, has been chosen because, amongst other purposes, of the role it shares with Article XX(b) of the *General Agreement* in disciplining measures necessary to protect human, animal or plant life or health. It shows that the *SPS Agreement* considerably strengthens the disciplines of Article XX(b), and imposes regulatory constraints far greater than that required by Article XX(g). However, unlike Article XX, there are clear substantive and jurisdictional limitations on the application of the *SPS Agreement*. It only applies to measures applied to protect human, animal or plant life or health, or to prevent or limit other damage within the territory of the Member imposing the measure. Moreover, if the requirements of the agreement are met, the measure is presumed to be consistent with the *General Agreement*, in particular Article XX(b).\(^2\) Chapter 7 examines the *TBT Agreement*, which covers all technical regulations and standards except sanitary and phytosanitary measures (SPS measures).

This chapter examines the interpretation of the *SPS Agreement* by the dispute settlement arm of the WTO in light of the three cases which have been heard to date. These are *European Communities – Hormones, Australia – Salmon* and *Japan – Measures Affecting Agricultural Products*.\(^3\) In doing so, it sets out the basic requirements of the *SPS Agreement*, analyses the relationship which the *SPS Agreement* has with the *General Agreement*, explores the discretion afforded to Members to implement domestic regulatory measures, and explores the extent to which the *SPS Agreement* accommodates an international regime which is both strong on trade as well as allowing for strong environmental protection.

*European Communities – Hormones* raised primarily consumer, rather than environmental, health and safety issues. Nevertheless, it is given primary consideration in this Chapter because of its role in establishing the interpretation of the *SPS Agreement*.\(^2\)

---

\(^2\) Article 2.4 of the *SPS Agreement*.  

---

258
Agreement, the insight it gives into the use of the precautionary principle in interpreting the SPS Agreement, and because it demonstrates the growing importance of international standardisation bodies which draft international environmental and consumer standards, guidelines and recommendations and the effect these standards have on domestic regulatory freedom. Moreover, the case gave the dispute settlement arm of the WTO its first opportunity to consider and clarify the application of the SPS Agreement within the context of the WTO Agreement as a whole. It established how the SPS Agreement interrelates with the other covered agreements, the burden of proof necessary to bring a case and defend an SPS measure, the extent to which measures will be scrutinised and how experts may contribute to that process, and what is expected of a Member in terms of justifying a measure.

The cases of Australia – Salmon and Japan – Agricultural Products both raised quarantine concerns. Australia – Salmon provides important guidance as to what evidence a Member must provide when seeking to use SPS measures to protect its domestic environment, and Japan – Agricultural Products further explores what is meant by ‘sufficient scientific evidence’ and elucidates the law relating to the transparency requirements found in Article 7 of the SPS Agreement. These cases do not raise PPM type issues, although arguably the Panel appeared to treat the Australia – Salmon case as if it did. They shall be considered only to the extent they add to the jurisprudence of the SPS Agreement established in European Communities – Hormones.

The SPS Agreement is concerned with issues of quarantine and food health safety. Therefore, of the covered agreements, the SPS Agreement is less likely to discipline measures introduced to encourage sustainable consumption habits of consumers. The latitude it does leave states to introduce unilateral SPS measures may allow a ‘California effect’ to be triggered. Although the agreement only applies to measures introduced to protect human, animal or plant life or health from quarantine and food health risks within the territory of the Member, exporters to that Member are likely to

---

demand that high quarantine and food health safety standards be maintained, or even implemented, in their home jurisdiction to ensure that the Member will accept their products. Few non-product-related PPM-based trade measures are likely to be tested in relation to the SPS Agreement, however. Even though the text of the SPS Agreement makes no distinction between product-related and non-product-related PPM-based trade measures, such a measure would not be tested against the SPS Agreement unless it was applied to protect human, animal or plant life or health from quarantine and food health risks within the territory of the Member applying the measure. Few non-product-related PPM-based trade measures are likely to fall into this category. One example might be a product made from a genetically modified organism (GMO), where the effect of that modification is not detectable in the final product.  

Notwithstanding that the SPS Agreement may therefore be of less relevance to the application of non-product-related PPM-based trade measures to improve global environmental standards over time, it contains strong provisions encouraging the harmonisation of international standards (likely to affect both products as well as production processes) and exerts considerable discipline over the ability of Members to improve their own environmental standards over time. Accordingly, it is evidence of the discipline that the new generation of covered agreements exerts over the domestic regulatory capacity of Members and gives important insight as to how existing disciplines might be modified if renegotiated, or how an agreement to regulate the use of PPM-based trade measures, proposed in Chapter 8, might be constructed. Therefore, it is central to this analysis on the balancing of trade and environment positions to allow stronger environmental regulations to be maintained, and useful to consider if giving thought to the negotiation of a PPMs Agreement.

---

4 If the modification is detectable in the final product, the measure would more properly be characterised as a product-related PPM-based trade measure or even a product-based measure. Note that if the GMO modification is not detectable in the final product, a Member would probably find it difficult to establish that the product represented a threat to human, animal or plant life or health within the terms of the SPS Agreement.
The Rationale for the SPS Agreement

The *SPS Agreement* arose out of negotiations during the Uruguay Round. It was created to codify the manner in which Members could impose environmental standards and consumer health and safety standards where they affected international trade.\(^5\) This was done in an attempt to halt their burgeoning use as protectionist non-tariff barriers.\(^6\) The *SPS Agreement* was intended to strengthen trade, yet, within certain limitations, it allows laws promoting consumer health and the environment to be strong where such measures are based on sound science.

Few panel complaints were formally made in relation to the trade effects of health regulations and standards during the GATT regime,\(^7\) but there were “numerous counter-notifications (notifications by an affected exporting country about an importing country’s regulations) and frequent expressions of concern about the trade-inhibiting potential of health regulations.”\(^8\) Patterson attributed the difference in the number of formal and informal complaints to a lack of enforceable rules in the area and inadequacies in those rules, in particular Article XX(b) of the *General Agreement*.\(^9\) Moreover, Patterson noted that for those panels which did consider health regulations,

---

\(^5\) Wirth notes that much of the text of the *SPS Agreement* was motivated by the hormones dispute between the US and the European Community, discussed further below. Wirth, D.A., ‘The role of science in the Uruguay Round and NAFTA trade disciplines’ (1994) 27 *Cornell International Law Journal* 817, at 824.

Note that in this Chapter, the term ‘standard’ refers to both mandatory and non-mandatory standards, guidelines and recommendations. This is to be distinguished from the use of the term in relation to the *TBT Agreement* (discussed in Chapter 7) where a ‘standard’ is non-mandatory only.

\(^6\) From a position where the GATT was traditionally very reluctant to limit national sovereignty regarding standards for sanitary and phytosanitary protection, the Uruguay Round saw as one of its major objectives the “minimization of the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture”. Ministerial Declaration launching the Uruguay Round MTN.1.GNG/NG5/W/41, in Patterson, E., ‘International efforts to minimize the adverse trade effects of national sanitary and phytosanitary regulations’ (1990) 24 *Journal of World Trade* 91, at 94.

\(^7\) In 1990, when negotiations were only partly underway, the *GATT Analytical Index* only reported “a statement regarding Australia’s agricultural policies (L/1055); a recourse to Article XXIII:2 by Uruguay against 15 Contracting Parties relating to sanitary regulations on meat which ended without a legal ruling by the Panel (L/1923, Annex 1); a discussion held in the Group on Meat in 1962 on the question of discriminatory effects of restrictions for phytosanitary reasons (CG/3); and a notification by France in 1969 indicating that the residual restrictions it applied on animal semen and certain live plants were consistent with Article XX(b) (L/3212/Add.12).” Patterson, 1990, above at n 6, at 93.

\(^8\) Patterson, 1990, above at n 6, at 93-94 (footnote omitted).

\(^9\) Ibid, at 94.
their recommendations “studiously avoided limiting in any way the complete discretion of sovereign governments in the area of health and safety” And that:

not only [was] no ruling ever ... made on the GATT-consistency of a health regulation, but no specific action on the part of the implementing party ... [was] ever ... recommended. The furthest dispute settlement panels [had] gone [was] to recommend that the implementing country “examine the possibility” of administering the regulations so as to permit increased imports.\textsuperscript{10}

Speaking in 1990, the then-US Trade Representative Carla Hills voiced fears that “without additional guidelines, health and safety standards could become ‘the trade barrier of choice of the 1990s’”.\textsuperscript{11} Even when the Uruguay Round was launched in 1986, trade ministers had agreed that health standards had the potential to be a major disrupter of international trade. An important goal for the Round was the elimination of the unjustified use of health-related trade measures.\textsuperscript{12}

The negotiation of the \textit{SPS Agreement} originally began in the Negotiating Group on Agriculture. According to Patterson, the negotiations initially lacked “a persuasive economic analysis of the costs of differing health regulations” to provide momentum.\textsuperscript{13} Moreover, they were hampered by the inability to negotiate a single level of risk acceptable for all Members, as each Member was concerned to be able to exercise a level of caution against the risk adapted to their own “geographic, climactic, production and ... cultural situation to reflect their own ‘concerns and priorities’”.\textsuperscript{14} Sovereignty concerns therefore lay at the heart of the negotiations.

\textsuperscript{10} Ibid, at 94, referring to the conclusions of Report of the Panel on \textit{Uruguayan Recourse to Article XXIII} (L/1923) BISD 11S/95 (15 November 1962). But note that this was to change when the decision of \textit{Thailand – Cigarettes} was issued. See at Chapter 4, above.


\textsuperscript{12} As Wirth notes, sanitary and phytosanitary standards formerly fell within the ambit of the \textit{TBT Agreement}, but were “split off” during the Uruguay Round negotiations to be dealt with in a separate agreement which “emphasizes scientific validity to a considerably greater extent than the broader new Agreement on Technical Barriers to Trade”, Wirth, 1994, above at n 5, at 325.

\textsuperscript{13} Patterson, E., ‘International efforts to minimize the adverse trade effects of national sanitary and phytosanitary regulations’ (1990) \textit{24 Journal of World Trade} 91, at 95.

\textsuperscript{14} Ibid.
Throughout the negotiations, environmental and consumer groups, particularly in the US, expressed their concern that food safety standards would be watered down. They were particularly concerned about standards made in relation to pesticides and chemical residues in food, and feared that the SPS Agreement:

would force a downward harmonisation of the food safety standards and would impose an impossible procedural and substantive burden on nations wishing to exercise their sovereign right to secure for their citizens a higher level of protection.  

These groups therefore mounted a substantial opposition to the agreement being concluded.

---

The Requirements of the SPS Agreement

We saw previously that the disciplines of the General Agreement are strict. Members may not discriminate against imported products, or apply quantitative restrictions, except in exceptional circumstances, for example as set out in Article XX. The SPS Agreement further constrains domestic regulatory flexibility by placing additional requirements on Members in relation to the SPS measures they may apply. Measures which are neither facially nor patently discriminatory may otherwise fail to meet the disciplines of the SPS Agreement. Measures must be based on a risk assessment (Article 5.1), they must not be more trade-restrictive than required to achieve a Member's appropriate level of SPS protection (Article 5.6), and Members must apply measures which reflect a consistent level of protection in comparable situations if, to do otherwise, would result in discrimination or a disguised restriction on international trade (Article 5.5). The agreement also strongly encourages Members to harmonise their SPS standards by basing their SPS measures on international standards, guidelines, or recommendations, where they exist.16

---

16 The primary requirements of the SPS Agreement may be summarised as follows:

- Members may apply SPS measures only to the extent necessary to protect human, animal or plant life or health (Article 2.2);
- Members must ensure that SPS measures are based on scientific principles (Article 2.2);
- SPS measures must not be maintained without sufficient scientific evidence, except as provided in Article 5.7 (Article 2.2);
- SPS measures must not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail (Article 2.3); and
- SPS measures must not be applied in a manner which would constitute a disguised restriction on international trade (Article 2.3).
- Members must base their SPS measures on international standards, guidelines, or recommendations, where they exist, except as otherwise provided for in the agreement and in particular Article 3.3 (Article 3);
- Members must ensure that SPS measures are based on an assessment of the risks to human, animal or plant life or health taking into account risk assessment techniques developed by the relevant international organisations (Article 5.1);
- To achieve the goal of consistency in SPS protection, Members must avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate levels of protection in different situations, if such distinctions result in discrimination or a disguised restriction on international trade (Article 5.5); and
- Members must ensure that SPS measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection (Article 5.6).
- Members may provisionally adopt SPS measures on the basis of available pertinent information, however they must seek to obtain the additional information necessary for a more objective assessment of risk and review the measure within a reasonable period of time (Article 5.7).

The SPS Agreement also establishes certain other requirements, such as transparency requirements (Article 7); requirements for the operation of control, inspection and approval procedures (Article 8 and
The scope of coverage of the *SPS Agreement* is, however, more limited than that of the *General Agreement*. The *SPS Agreement* only applies to measures which are mandatory in character and fall within the definition of an SPS measure. That is, a measure applied to protect human, animal or plant life or health, or prevent or limit other damage, *"within the territory of the Member"* imposing the measure. Measures applied to protect human, animal or plant life or health, or prevent or limit other damage only *outside* the territory of the Member appear to fall outside the scope of the *SPS Agreement*. They may, however, be covered by the *General Agreement* and/or another agreement such as the *TBT Agreement*. Accordingly, the flexibility of Members to implement domestic regulatory measures to encourage a ‘California effect’ for the protection of the global environment is not limited by the *SPS Agreement* unless those measures are also applied to protect human, animal or plant life or health, or prevent or limit other damage, *within* the territory of the Member.

At the same time, the *SPS Agreement* expressly covers PPM-based trade measures applied to protect human, animal or plant life or health, or prevent or limit other damage, within the territory of the Member. There is no differentiation in the text between product-related and non-product-related PPM-based trade measures. Thus, if a particular method of processing or producing a product is not detectable in the final product, but nevertheless gives rise to a risk of damage of the type covered by the *SPS Agreement* within the territory of a Member, a measure applied by that Member to protect against that risk would appear to fall within the scope of the *SPS Agreement*. Accordingly, it could be tested against that agreement to determine its consistency with its terms. It is more likely, however, that SPS measures will address methods of processing or producing which are detectable in, or affect the quality of, the final product. To the extent that such measures are applied to limit the applicable damage within the territory of the Member, they are covered by the *SPS Agreement*.

---

17 See at Appendix A.
As noted, the *SPS Agreement* strongly encourages Members to base their SPS measures on international standards, guidelines, or recommendations where they exist. Article 3 of the *SPS Agreement* allows three possible ways for Members to frame their measures:

- Members may implement a measure which conforms to international standard, guideline, or recommendation (Article 3.2). Such a measure “would embody the international standard completely and, for practical purposes, converts it to a … [domestic] … standard”.18
- Members may implement a measure which is ‘based on’ an international standard, guideline, or recommendation (Article 3.1). In this case such a measure “may adopt some, not necessarily all, of the elements of the international standard”.19
- Members may also implement a measure which provides a level of protection different from that implicit in the international standard, guideline, or recommendation where the measure is not ‘based on’ an international standard, guideline or recommendation (Article 3.3). The appropriate level of protection implemented by such a measure may be higher than that implied by the international standard.

If the SPS measure conforms to an international standard, guideline, or recommendation, it is presumed to be consistent with the relevant provisions of the *SPS Agreement* and the *General Agreement* (Article 3.2). In all other cases the measure must be based on a risk assessment and meet the other requirements of the *SPS Agreement*.

*European Communities – Hormones* was the first case in which a WTO panel Considered the *SPS Agreement*. The case was brought as two separate actions against the EC, the first by the US and the second by Canada.20

The central issue in *European Communities – Hormones* was the ability of the EC to ban the importation of beef and beef cattle to which either natural or synthetic hormones had been administered for growth promotion purposes. The case raised mixed PPM issues. The meat of beef cattle to which hormones have been administered remains physically indistinguishable from that of cattle to which no hormones have been administered, although hormone-treated beef tends to be more lean. While it is

---

19 Ibid, at para 171.
20 The dispute is not yet settled. At the time of writing, the recommendations on the matter adopted by the DSB have yet to be implemented by the EC, and the DSB has authorised the US and Canada to suspend concessions in relation to the EC. See *EC Measures Concerning Meat And Meat Products (Hormones), Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS26/15, WT/DS48/13, 29 May 1998.
possible to use sensitive analytical techniques to detect synthetic hormonal residues, it is almost impossible to distinguish natural hormonal residues from exogenous residues.\textsuperscript{21} The case raised fundamental questions about the ability of Members to implement standards higher than the relevant international standards to address the concerns of their citizens, and which have their popular support. Sensitive consumer safety and sovereignty concerns were at stake in the case. In the wake of 'mad cow' and 'foot and mouth' disease scares, these concerns are further heightened. They continue to make implementation politically difficult. Yet some argue that it is protectionism and not science, or fears as to the fallibility of science, which helps to fan the flames of consumer concern.

Matters involved in Bringing an Action and Defending a Measure

The Burden of Proof under the SPS Agreement

The \textit{SPS Agreement} is a free-standing agreement. No violation of the \textit{General Agreement} or another agreement need be shown for the \textit{SPS Agreement} to be raised. Furthermore, no discrimination or differential treatment need be shown for a violation to be found. Indeed, all a complainant needs to show to bring an action is that, \textit{prima facie}, the Member has chosen an SPS standard which is not based on sufficient scientific evidence, is more trade restrictive than required to achieve a Member's appropriate level of sanitary or phytosanitary protection, or is higher than the relevant international standard and is not 'based on' or justified by an assessment of the particular risks at issue. Once a complainant has shown, \textit{prima facie}, that the relevant standard has been applied in a manner inconsistent with the \textit{SPS Agreement}, the burden

\textsuperscript{21} Advice given by experts advising the Panel in \textit{European Communities – Hormones}, in particular answers to question 2. Hence while the measure applied to the use of synthetic hormones for growth promotion could be characterised as a product-related PPM-based trade measure, the measure applied to the use of natural hormones for growth promotion is better characterised as a non-product-related PPM-based trade measure.
shifts to the defendant to rebut the case. This distribution of the burden of proof is consistent with the manner in which proof is treated in the other covered agreements.

The SPS Agreement evolved from the disciplines of Article XX(b) of the General Agreement. Waincymer has suggested that by modifying and expanding the words of the chapeau of Article XX of the General Agreement into the SPS Agreement, it has made the chapeau obligations of the General Agreement “a positive obligation under Article 2.3 of the SPS Agreement”. He states that “[t]he irony from a legal perspective is that changing it from an exception to an obligation will change the burden of proof and in that sense make it harder for a complainant to succeed.”

Waincymer overlooks that for Article XX of the General Agreement to be raised, the complainant must have already proven a violation of the General Agreement. He also does not mention that no discrimination or disguised restriction on trade needs to be shown by the complainant to prove a violation under the SPS Agreement. Rather, there are a number of avenues for a complainant to proceed under, such as Article 5.6, which requires that SPS measures be not more trade-restrictive than required to achieve a Member’s appropriate level of SPS protection. So far, the cases have not demonstrated that it is harder for a complainant to succeed under the SPS Agreement than under the General Agreement.

The first time a panel allocated the burden of proof under the SPS Agreement, it did so in a manner which would have severely limited the regulatory choices open to

---

22 See the Report of the Appellate Body in European Communities – Hormones, and the Panel and Appellate Body reports in Japan – Agriculture and Australia – Salmon.
24 See Appendix A.
26 Discrimination is not a necessary ingredient to prove a violation of the General Agreement, for example a quantitative restriction violates Article XI, whether or not it is applied in a manner which is discriminatory. Yet discrimination is a common source of violation. Note that if a discriminatory measure otherwise satisfies one of the subparagraphs of Article XX, it will be authorised by that Article unless the discrimination is shown to be arbitrary or unjustifiable, or the measure amounts to a disguised restriction on international trade.
Members when implementing measures to protect health or the environment within their territory. Article 2.1 of the *SPS Agreement* establishes that Members have a right to maintain SPS measures necessary for the protection of human, animal or plant life or health. Article 3 encourages Members to base their SPS standards on international standards, guidelines or recommendations, while Article 3.3 establishes that Members may determine their own appropriate level of SPS protection which may be higher than the international standard, and maintain measures to achieve this. In *European Communities – Hormones*, the Panel characterised the right of a Member to choose an appropriate level of protection not based on international standards as an ‘exception’ to the general rule that Members must base their SPS measures on international standards.\(^{27}\) The Appellate Body criticised this restrictive approach.\(^{28}\) It pointed out that defendants would be penalised for exercising their right of choice by requiring them to justify their choice before a complainant had shown, *prima facie*, that the defendant acted contrary to the *SPS Agreement*. In this context the Appellate Body said:

> The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an “exception”. In much the same way, merely characterising a treaty provision as an “exception” does not by itself justify a “stricter” or “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose, or in other words, by applying the normal rules of treaty interpretation.\(^{29}\)

A *prima facie* case is not a difficult burden for a complainant to bear. It requires merely that:

> [a] party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.\(^{30}\)

---

29 Ibid.
According to Kazazi, a *prima facie* case will be established by evidence "which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed"32 and "evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive."33

Were the burden to fall entirely on the defendant to justify any SPS measure that was queried, it is quite possible that so many actions would be brought that the quarantine and other resources of importing countries would be crippled. As it is, the *SPS Agreement* requires that all SPS measures be justified by a risk assessment, unless the measure is capable of being justified under Article 5.7 or conforms to an international standard, guideline or recommendation. In practice, Members need only have in place risk assessments for those measures potentially the subject of dispute, and, as pointed out by Lennard, "preparing a risk assessment is a costly and time consuming task, even for sophisticated and resource rich administrations".34 If the complainant had not even the burden of a *prima facie* case to bear, the potential for measures to be challenged

---

31 Ibid.
32 Kazazi, M., Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (1996), at 328, referring to Lillie S. King (USA) v United Mexican States, 4 RIAA, at 585, Mexican-USA General Claim Commission. Similarly, the Panel in European Communities – Hormones stated a *prima facie* case was satisfied by "factual and legal arguments that, if unrebutted, would demonstrate a violation of the SPS Agreement", at para 8.54 Canadian Report; para 8.51 United States Report. The Appellate Body in European Communities – Hormones stated "that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case." At para 104, referring to the Report of the Appellate Body in United States – Shirts and Blouses, at 14.
33 Kazazi, 1996, above at n 32, at 329, referring to Walker, D.M., The Oxford Companion to Law (1980), at 987. See also V. Walker, who states that "A WTO panel should ... assess all the evidence for and against any factual proposition and should adopt the proposition as a finding if, but only if, the greater weight of evidence supports the proposition. A panel need not be certain that the proposition is true, nor does the proposition need to be scientifically proven. What should be required is a determination by a panel that the proposition at issue is more likely to be true than false." Walker, V.R., 'Keeping the WTO from becoming the "World Trans-science Organization": scientific uncertainty, science policy and factfinding in the Growth Hormones Dispute' (1998) 31 Cornell International Law Journal 251, at 290-291.
34 Lennard, M., ‘The fish that Australia rejects: WTO rules on Salmon’ (1998) 72 The Australian Law Journal 758, at 760. In the context of discussing Australia – Salmon and European Communities – Hormones, Lennard commented that both Australia and the EC would be amongst the ‘sophisticated and resource rich administrations’ to find burdensome the many risk assessments required by the *SPS Agreement*. 
would be increased and the costs of ensuring compliance with the \textit{SPS Agreement} compounded.

The Appellate Body's discussion in \textit{European Communities – Hormones} on the allocation of the burden proof, including its extensive criticisms of the Panel's approach, served as a timely reminder of the importance of the rule of law in the new WTO dispute settlement system, and in particular how both the structure and words of the agreement must be carefully observed so as to preserve the rights of the parties and the essence of the agreement as a whole. While primarily interested in ensuring that Members do not rely on quasi-scientific rationales to justify environmental and health related trade restrictions,\textsuperscript{35} the negotiators of the \textit{SPS Agreement} have designed a text which balances the democratic right of nations to choose their own level of protection against a means of ensuring that the chosen protection reflects genuine health and environmental concerns and not protectionist concerns. To ensure predictability in the WTO system and regulatory balance, the words of the agreement must be faithfully observed.

\textbf{The Standard of Review}

Setting the appropriate level of review to apply to a dispute is a vital part of maintaining the balance between allowing sufficient regulatory discretion to Members to implement measures to protect the environment and health of their citizens while ensuring that such measures do not unfairly impinge on international trade. In an investigation carried out under the \textit{SPS Agreement}, panels must apply a standard of review to scrutinise the scientific validity of risk assessments done by the Members and the conclusions they draw from those risk assessments. One possible standard is a \textit{de novo} standard of review, where an independent factual investigation is carried out by the panel. At the opposite end of the spectrum is a deferential standard, where the panel defers to the findings of the Member and assesses only whether the Member followed

correct procedures to arrive at its conclusion. Reviews of varying degrees of intrusiveness fall between these two ends.\textsuperscript{36}

Wirth points out that there are significant risks inherent in courts conducting science-based reviews which are overly intrusive. This is so given the difficulty which laypersons can have in reconciling divergent scientific opinion; the propensity of scientists to disagree among themselves, even within the mainstream of scientific thought; and the influence which social values have on interpreting and evaluating scientific data.\textsuperscript{37} He worries that:

deploying science-based tests in the international equivalent of a proceeding for judicial review may be so fraught with peril that the potential chilling effect on legitimate domestic regulation will likely outweigh the benefits of increased market access.\textsuperscript{38}

Wirth was critical of the Panel’s review in \textit{European Communities – Hormones}, stating that it was “a highly intrusive review of the merits of the EU’s scientific evidence [done] in a manner that would be well nigh unthinkable at the domestic level” which “appreciated none of these critical issues”.\textsuperscript{39}

On appeal, the Appellate Body noted that the \textit{SPS Agreement} did not itself clarify the standard of review but found the appropriate standard was reflected in Article 11 of the DSU, being “an objective assessment of the facts”.\textsuperscript{40} The Panel in \textit{United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear} considered what this entails:

7.13 ... In our view, an objective assessment would entail an examination of whether the CIT A had examined all relevant facts before it (including facts which might detract from an affirmative determination ...), whether adequate explanation had been

\textsuperscript{36} Jackson, J.H. and S.P. Crole, ‘WTO dispute procedures, standard of review, and deference to national governments’ (1996) 90 American Journal of International Law 193; Wirth, 1994, above at n 5.

\textsuperscript{37} Wirth, 1994, above at n 5, at 841-843, 844, discussing the view that ‘science courts’, once mooted in the US, are “now generally regarded as impracticable precisely because many scientific issues are not inherently ‘justiciable’ in such an adjudicatory, adversarial setting”. See also Wirth, 1997, above at n 35, at 343.

\textsuperscript{38} Wirth, 1997, above at n 35, at 343.

\textsuperscript{39} Ibid. See also Walker, who considers that the Panel “(1) pretend[ed] not to pass judgment on the merits of past scientific reports while implicitly agree[ed] with their conclusions, and (2) formally preclude[d] rebuttal explanation in the WTO proceeding by members who disagree[d] with those scientific reports, saying that WTO panels do not themselves conduct risk assessments.” Walker, 1998, above at n 33, at 302.

\textsuperscript{40} At paras 116-117 of the Report of the Appellate Body in \textit{European Communities – Hormones}.
provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States.  

‘An objective assessment of the facts’ is much closer to a *de novo* standard of review than one of total deference, or even ‘deferential reasonableness’ which, on appeal, the EC submitted should apply. Yet, as pointed out by the Appellate Body in *European Communities – Hormones*, “total deference to the findings of the national authorities ... could not ensure an ‘objective assessment’ as foreseen by Article 11 of the DSU”.  

The Panel’s assessment in *European Communities – Hormones, Australia – Salmon and Japan – Agricultural Products* was not a *de novo* assessment, although in all cases it was fairly intrusive and thus potentially. In all cases the Appellate Body found that an objective assessment of the facts had been made.  

*The Use of Experts*  

Past criticisms of GATT/WTO panels have been that they have failed to consult scientific or technical experts when required to rule on measures of environmental and health related matters. WTO adjudicators’ expertise lies predominantly in trade and, in the case of the Appellate Body, international law and international trade. They are not required to have any scientific expertise, and critics have been sceptical of their competence to make decisions on complex technical matters as well as their familiarity with, and acceptance of, paradigmatic views in which trade is not central. While

---

41 This finding was not appealed.  
42 Report of the Appellate Body in *European Communities – Hormones*, at para 15. The EC pointed out this is the standard used in Article 17.6 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in Annex 1A to the WTO Agreement.  
44 For example, in *European Communities – Hormones*, the Appellate Body did find that although the Panel misrepresented the facts and evidence on one point before it, this did not amount to an “egregious disregarding or distorting of the evidence”. See Part VIII of the Appellate Body Report, in particular para 144. In *Australia – Salmon*, Report of the Appellate Body WT/DS18/AB/R, adopted 6 November 1998, the Appellate Body emphasised that panels are “not required to accord to factual evidence of the parties the same meaning and weight as do the parties” when making an objective assessment of the matter in accordance with Article 11 of the DSU, at 120, at para 6.
consultations with experts have allowed panels to take an intrusive approach when testing evidence put before them, it has also provided them with a more scientific appreciation of the matters under dispute and the evidence presented by the parties. Despite criticisms noted above, this has generally added credibility to their determinations.

In each of the SPS cases heard to date, panels have relied on expert evidence to assist in determining whether an assessment of the risk at issue exists, and whether the measures are based on such an assessment. They have been encouraged to do so by Article 11.2 of the SPS Agreement.46

In European Communities – Hormones, for example, the Panel consulted with a number of experts to seek their views on the physical and health effect of the hormones on humans and animals to which they have been administered; whether this differed according to whether the hormones were administered according to good veterinary practices; whether hormone residues could be detected; whether current international standards on hormone use were reflective of current scientific knowledge; the health effect of hormones compared to pesticides and other growth promoting substances; the difference between hormones administered for therapeutic or zootecchnical purposes as compared for growth promotion purposes; and whether labelling was a feasible means of identifying meat produced using growth promotion hormones.47

The review did not, on the whole, contradict the findings of the EC’s studies, nor show them to be scientifically flawed.48 Instead, the answers provided by the experts tended


46 See in Appendix A.

47 This evidence was extremely detailed. Six scientific and technical experts were asked to advise in written and oral form. The oral hearing was conducted as a two day meeting, at which the Panel and the parties were able to interview the experts. Similar procedures were used in Australia – Salmon and Japan – Agricultural Products.

48 In the case of the drug carbadox, for example, which has a growth promotion effect but is used in the EC as an anti-microbial agent in pig production, no Maximum Residue Limit (MRL) was set. The theoretical MRL for the drug in the EC was therefore unlimited residue. The EC claimed that because strict procedures for the administration and withdrawal of the drug had been delineated, that the MRL was, in practice, ‘no residue’. The Panel rejected this contention, relying on expert testimony that ‘a ‘no
to support the conclusions of the EC’s and other studies that showed that properly administered, growth promotion hormones do not present a risk to human health. The fact that the EC’s measures were found inconsistent with the SPS Agreement was not because the Panel dismissed their science, nor because of any attempt made by the Panel to interpret that science. As noted by both the Panel and the Appellate Body, while detailed studies had been presented to the Panel discussing the health effects of hormones applied according to good veterinary practice, the details of studies examining the risks associated with hormone abuse were not put before the Panel.\(^{49}\) The EC’s measures were, however, aimed at addressing the risk to human health when hormones were not properly administered. Since no such assessment was put before the Panel, an objective relationship between the risk assessment and the measure was not demonstrated.\(^{50}\) This conduct contravened Article 5.1 of the SPS Agreement.

In Australia – Salmon and Japan – Agricultural Products, the Panel used the experts to clarify statements made by the parties to the dispute and to clarify, not contradict, aspects of the science and methodology used in the evidence presented. In Australia – Salmon for example, the Panel used the experts to help it assess whether the document Australia submitted as a risk assessment met the requirements of a risk assessment, and understand the procedure according to which the Office International des Épizooties (OIE) establishes standards, guidelines and recommendations on the quarantine approaches to fish diseases.

In Japan – Agricultural Products, the Panel used the experts to help it compare the testing methodology and results provided by Japan with other practice in the area. It also relied on their evidence to make the case against Japan in relation to Article 5.6 of

---

residue’ level cannot be achieved in practice when use of the substance concerned is allowed (even under strict conditions) since there will always be some residue level of the substance or a metabolite, albeit a very small one, left in the meat, even after a long period of time”. Referring at note 342 to “the opinions of all experts advising the Panel in Transcripts of the joint meeting with experts of 17 February 1997, at paras 90, 91, 93 and 95 and answers to Panel Question 3, at paras 6.31-6.38.” Report of the Panel in European Communities – Hormones, Canada Panel report, at para 8.228, US Panel report, at para 8.225. The Panel therefore rejected the EC’s interpretation of the level of protection afforded by their conduct, not their science as to the effects of the residue.

the SPS Agreement.\textsuperscript{51} This latter approach was reversed on appeal, the Appellate Body pointing out that it is for the complainant to establish the burden of proof, not panellists. The Appellate Body emphasised that:

Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it understand and evaluate the evidence submitted and the arguments made by the parties, but not to made the case for a complaining party.\textsuperscript{52}

This finding has positive implications for Members wishing to maintain measures to support a strong environment, as it limits the scope of panels to find against such measures in the event of the complainant doing a poor job. That is, while the Appellate Body will sanction an intrusive review of scientific claims made by the complainant, it will not sanction a review so intrusive that the panel, rather than the complainant, is the one to run the case. Panels can, however, have a strong hand in directing the case. Panel hearings can take place over a number of weeks or months and panellists can hint to complainants arguments they wish them to consider which the complainants can then duly put. This procedure is not novel, even in domestic courts. Moreover, panels and the Appellate Body may act independently to gather information to assist them in resolving a dispute.\textsuperscript{53} As noted by the Appellate Body in Japan – Agricultural Products:


\textsuperscript{51} The Panel noted that the complainant, the US, had ‘suggested’ that an alternative quarantine approach to that in place would meet Japan’s appropriate level of protection, but did not specifically argue that a measure based on that approach met the requirements of Article 5.6. Report of the Appellate Body in Japan – Agricultural Products, at paras 121 and 127, quoting from the Panel report at paras 8.98 and footnotes 328, 332 and 333.

\textsuperscript{52} Report of the Appellate Body in Japan – Agricultural Products, at paras 131-132.

\textsuperscript{53} See United States – Shrimp, where the Appellate Body overturned the Panel’s ruling that it could not accept information which it had not actively sought, ruling instead that Article 13 of the DSU not only allows a panel to decide to seek or not to seek information, but also to “accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof.” (At para 104, emphasis in the original.) The Appellate Body also emphasised that Article 12 of the DSU allows panels to add to or depart from the Working Procedures of the DSU, and indeed directs that panel procedures must contain “sufficient flexibility so as to ensure high-quality Panel reports while not unduly delaying the Panel process.” (Article 12.2 of the DSU, at para 105, emphasis of the Appellate Body.) See also United States – Hot-Rolled Lead, at para 42 regarding the capacity of Appellate Body to
Article 13 of the DSU allows a panel to seek information from any relevant source and to consult individual experts or expert bodies to obtain their opinion on certain aspects of the matter before it.\textsuperscript{54}

Indeed, the Appellate Body stated that the opinion of experts and information from other relevant sources can be “indispensably necessary” in helping panels to weigh the application of the relevant covered agreements to the facts before them, including deciding the appropriate arguments to support.\textsuperscript{55}

The inclusion of Article 11.2 into the text of the \textit{SPS Agreement}, and the panels’ treatment of the science presented by the parties and experts in each of the SPS cases to date, tends to indicate a recognition by WTO negotiators and panels that panels which try to decide issues of complex scientific fact without the necessary scientific and technical competence merely reduce the community’s confidence in the decision-making process as a whole.\textsuperscript{56} Yet because of the nature of advice which the experts have been asked to provide, and the manner in which they do so, these concerns still remain relevant. Although experts have been consulted in each of the \textit{SPS Agreement} disputes, this has been on an individual basis. Panels have therefore been forced to weigh and reconcile disputed scientific evidence, lacking the scientific and methodological rigour which a panel of scientific experts, working together to provide a cohesive report, would have been able to contribute.

The approach of consulting experts on an individual basis was possibly chosen by the Panel in their first SPS case, \textit{European Communities – Hormones}, because it felt it would be too difficult for the experts to reach a consensus and make a single report.\textsuperscript{57} Asking the experts to make a single report may also have had the effect of unduly accept and take into account legal arguments as well as information where it finds “it pertinent and useful to do so”.


\textsuperscript{55} Ibid, at para 129.

\textsuperscript{56} See McDonald, 1997, above at n 45.

focussing on the scientific elements of the risk assessment, excluding the subjective considerations which the defendants were in the best position to assess. As it happens, the Panel in that case did give only secondary consideration to the subjective elements of risk assessment and their approach was rejected by the Appellate Body on appeal. The Appellate Body did, however, support the Panel's decision to consult experts on an individual basis, finding that Article 11.2 of the SPS Agreement and Article 13 of the DSU authorised this approach. That is, while Article 11.2 states that a panel should seek advice from experts where scientific and technical issues are involved, a panel need only establish an advisory group of experts when it deems it appropriate.

As the current SPS cases have shown, relying on expert evidence to reach legal conclusions can create tension. The procedure which panels have followed so far has provided instructive insight into the process of balancing the advice of neutral experts with the scientific determinations of domestic authorities, and the willingness of the WTO to add its own factual determinations to this process. Reference to expert opinion will assist panels to consider complex technical matters, and may assist in the balancing of trade and environment positions by increasing panellists' familiarity with, and acceptance of, paradigmatic views in which trade is not central. Care must be taken, however, that when experts are consulted, the burden of proof is borne by the correct party. Otherwise, the use of experts in the WTO system may turn out to be yet another avenue by which the domestic regulatory authority of Members is eroded.

---

58 Lennard, 1998, above at n 34.
59 For a thorough treatment of policy questions pertaining to the balancing of the advice of neutral experts with the scientific determinations of domestic authorities and the WTO panels' factual determinations, see Wirth, 1994, above at n 5. It is well to note the power experts can exercise within the judicial forum. New Scientist reports that in a study of 58 judicial cases where a scientific expert was appointed, 56 of the decisions conformed to the testimony of the expert "suggesting that courts may slavishly follow the opinion of a single independent expert." It noted that in adversarial proceedings, scientists are "frequently chosen because of their views are on the extreme ends of an issue. As a result, the judge and jury never get to hear what the consensus is." Kleiner, K., 'Experts' experts', New Scientist, 21 February 1998, at 11. Taking advice from a number or group of experts diminishes the chances that the consensus opinion is not represented. Allowing the parties to each choose representatives to advise the Panel ensures that a wider spectrum of views can be aired. This reduces some of the concerns expressed in Kleiner, but it is well for panels to remain vigilant that they are not being 'blinded by the science'.

278
Article 2 of the SPS Agreement And the requirement not to maintain measures without sufficient scientific evidence

As noted by Wirth,\(^{60}\) and as pointed out by the EC in their various submissions to panels and the Appellate Body on SPS Agreement matters, domestic regulatory authorities have some latitude of discretion under the SPS Agreement to implement measures to give effect to their environmental, health and safety concerns. One aspect of this is that a Member is free to choose their appropriate level of protection, which may be ‘zero risk’.\(^{61}\) Another aspect is, as noted by the EC in Japan – Agricultural Products:

A panel … [can] not conduct its own risk assessment. With respect to any of the many scientific issues involved in the risk assessment conducted by a WTO Member, a panel … [can] not substitute its own scientific judgment [nor that of an individual scientist or expert, or expert panel] for that of the WTO Member applying an SPS measure.\(^{62}\)

Their statement is correct in so far as a panel can not substitute its own scientific judgment, nor that of an individual scientist or expert, or expert panel, as to the acceptable level of risk a Member should adopt. As we have seen above, however, a panel is required to weigh and reconcile disputed scientific evidence, and can evaluate whether a scientific basis for an SPS measure exists. The regulatory discretion afforded to Members when implementing a measure based on science occurs because the SPS Agreement does not require Members to base their measures only on the “best science” or the “preponderance of science”, or indeed on a majority of scientific opinion.\(^{63}\) Instead, Members must base their measures on ‘sufficient’ scientific evidence (Article 2.2).\(^{64}\) It is the ambiguity of this phrase which provides scope to Members to exercise regulatory discretion to balance their trade and environmental concerns.

---

\(^{60}\) Wirth, 1997, above at n 35, at 341.

\(^{61}\) See below at n 88 and accompanying text.

\(^{62}\) Report of the Panel at paras 5.27-5.28.


\(^{64}\) Note that Article 5.7 allows Members to impose measures on a provisional basis even if there is insufficient scientific evidence to perform a risk analysis of an SPS threat. If a Member successfully relies on Article 5.7, no violation of Article 2.2 can be found.
The test used to determine whether ‘sufficient’ scientific evidence exists to support the measure is whether a *rational relationship* exists between the measure and the scientific evidence submitted to the panel in its support.\(^{65}\) As shall be seen, this test is similar in nature to that under Article 5.1: whether there is a rational relationship between the conclusions of a risk assessment and the measure it is claimed to support.\(^{66}\)

While Article 2 of the *SPS Agreement* has been raised in all three SPS cases to date, only in *Japan – Agricultural Products* has the panel proceeded to first examine a measure’s consistency with Article 2 prior to consideration of other Articles.\(^{67}\) In other cases, the relationship between Articles 2 and 5 have been explored by panels and commented upon by the Appellate Body, which has approved that “if a violation of the more specific Article 5.1 or 5.2” is found, “such finding can be presumed to imply ‘a violation of the more general provisions of Article 2.2’”.\(^{68}\)

**Article 3 of the SPS Agreement and the role of International Standards, Guidelines and Recommendations**

Notwithstanding the discretion the *SPS Agreement* affords to Members to choose measures based on sufficient scientific evidence, the *SPS Agreement* also provides a strong incentive for Members to progressively harmonise their measures to conform to international standards, guidelines or recommendations. Harmonisation is desirable as

---


\(^{67}\) The Appellate Body characterised this approach as “logically attractive”, and expressed surprise in *European Communities – Hormones* that this course was not initially followed by panels (at para 250). The change may have been made in *Japan – Agricultural Products* because of the clear-cut nature of the breach.

\(^{68}\) This is based on the view of the Appellate Body in *European Communities – Hormones*, at para 180 that “Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1”; and “When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3.” (at para 212). Note the comment of the Panel in *Australia – Salmon* however, that “given the more general character of Article 2.2 not all violations of Article 2.2 are covered by Articles 5.1 and 5.2.” (at para 8.52). This finding was approved by the Appellate Body on appeal.
not only does it reduce the complexity of legislation which importers have to deal with (in itself an impediment to trade), but minimises the use of such measures for protectionist purposes. As noted by the Appellate Body in *European Communities – Hormones*:

> The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both “necessary to protect” human life or health and “based on scientific principles”, and without requiring them to change their appropriate level of protection.69

The *SPS Agreement* establishes that domestic SPS standards may either be *based on* international standards, guidelines and recommendations; *conform to* international standards, or be *higher than* international standards, if there is scientific justification or a Member determines it to be appropriate.70 Where the chosen standard conforms to the international standard, it is presumed to be consistent with the *SPS Agreement* and the *General Agreement*.71 Yet Members have an autonomous right to choose a level of protection which is *higher* than that afforded by international standards, and may either base their chosen level of protection on the international standards or disregard the international standards.72

A measure which reflects that chosen level of protection must only be applied to the extent necessary for the protection of human, animal or plant life or health, must be supported by sufficient scientific evidence, and must also be based on a risk assessment according to Article 5.1. Moreover, the level of protection must be determined in accordance with the procedures set out in Article 5 on the assessment of risk. Accordingly, while domestic regulatory authorities are free to choose a very high level of protection and thus maintain a strong environment, their discretion to implement measures to reflect that level is fettered so that a strong trade regime is also maintained. This mechanism has been introduced to ensure that while health and environmental

---

70 Articles 3.1, 3.2 and 3.3 of the *SPS Agreement* respectively.
71 Article 3.2 of the *SPS Agreement*.
72 Report of the Appellate Body in *European Communities – Hormones*, at para 104. But note that this rights is not absolute or unqualified, and is subject to the disciplines of Article 3.3. Report of the Appellate Body in *European Communities – Hormones*, at para 173.
standards may be used, the scope to manipulate them for protectionist ends is limited. As expressed by the Appellate Body in *European Communities – Hormones*:

> The requirements of a risk assessment under Article 5.1, as well as of “sufficient scientific evidence” under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.\(^{73}\)

**The reification of international standards, guidelines and recommendations**

Because of the central role which international standards, guidelines and recommendations play in both the *SPS Agreement* and the *TBT Agreement*, it can be argued that they have, at least to some extent, been reified. In *European Communities – Hormones*, the Panel was severely criticised for interpreting Article 3, and in particular Article 3.1, as vesting international standards, guidelines and recommendations with “obligatory force and effect ... transform[ing them] into binding norms.”\(^{74}\) The Appellate Body in that case took pains to point out that Members do not have to unthinkingly implement relevant international standards, guidelines or recommendations to be in compliance with the *SPS Agreement*. They may adapt standards to their own domestic conditions, including the anxieties of their consumers, if those anxieties can be supported by a recognised body of evidence.

Nevertheless, the congruence between a Member’s standard and the relevant international standard acts as a trigger for whether an action taken under the *SPS Agreement* can be brought. This adds considerably to the weight of standards, guidelines and recommendations established by international standardising bodies. Such standards are not mandatory. Yet while they may still not be considered to be ‘binding norms’, they may no longer be considered as merely hortatory, but something which Members ignore at their peril. The negotiation of international standards is

\(^{73}\) Ibid, at para 177.

\(^{74}\) Ibid, at para 165, emphasis in original.
partly a political matter, yet the change in their level of effect will undoubtedly further politicise this process.\textsuperscript{75}

Whether strengthening the role of international standards, guidelines and recommendations will achieve the upward or downward harmonisation of international environmental, consumer health and safety standards will have to be assessed over time.\textsuperscript{76}

Braithwaite and Drahos note that maintaining vagueness as to the normative quality of international regulatory regimes can assist in the improvement of, for example, environmental regimes.\textsuperscript{77} Vogel reports that “the harmonization of environmental and

\textsuperscript{75} ICTSD notes that this is already beginning to occur. It writes “As a consequence of its heightened role in the international trade context, Codex decision-making has become more politicised. While a non-discriminatory and transparent trading system would require the most authoritative scientific advice possible, governments view to influence recommendations that could affect billions of dollars worth of trade.” International Centre for Trade and Sustainable Development, ‘Codex Alimentarius: setting food safety standards for global trade’ (1999) Year 2(4) Bridges between Trade and Sustainable Development 1, at 1. Stewart and Johanson also report that standard setting procedures within Codex has become increasingly politicised, as has the work of the International Plant Protection Convention (IPPC), and the OIE; Stewart and Johanson, 1998, above at n 57. The Codex, the IPPC and the OIE are identified in the SPS Agreement as the relevant international standardisation organisations for food and veterinary, plant health and animal health standards respectively. Furthermore, their work has been of relevance in each of the SPS Agreement cases considered to date (the Codex in European Communities – Hormones, the OIE in Australia – Salmon and the IPPC in Japan – Agricultural Products). Stewart and Johanson worry that “The establishment of standards by ... [these organisations] in the future might ... become more political, and possibly less scientific, as an indirect result of the SPS Agreement. Such a trend might ultimately damage the[ir] credibility”, as well as the harmonisation objective of the SPS Agreement. (Stewart and Johanson, at 52). Kennedy notes that “a strategy for any importing country to pursue [to obtain a trade advantage using the SPS Agreement] is to leverage international standards-setting bodies for the adoption of international standards that meet a country’s SPS standards.” He notes, however, that this strategy is “problematic for developing countries because they lack the scientific expertise and resources to influence the debate.” Kennedy, 2000, above at n 57, at 100. See Wynter, 1998, above at n 1, and McDonald, 1998, above at n 15, for a discussion of the politicisation of Codex standard-making in the context of the harmonies dispute.

\textsuperscript{76} Victor considers that the cases to date show that international standards have had little impact on the results of the cases, although he considers that this finding is biased by the nature of the cases brought so far, Victor, D.G., ‘The Sanitary and Phytosanitary Agreement of the World Trade Organization: an assessment after five years’ (2000) 32 New York University Journal of International Law and Politics 865, at 926-9. He argues that the cases indicate that there has been little evidence of a ‘race to the bottom’ for domestic standards (indeed in Australia – Salmon Australia’s standards on the whole were raised), and that while fears as to the downward harmonisation of standards could be justified, the cases so far show little evidence of that (at 919-923).

\textsuperscript{77} Braithwaite, J. and P Drahos, Global Business Regulation (2000). Rather than ‘symbolic’ regulatory regimes being of little use, as is generally considered to be the case, such regimes allow states to move towards higher environmental standards as their social, political and economic circumstances allow. Haas, P.M., R.O. Keohane and M.A. Levy, Institutions for the Earth: Sources of Effective International Environmental Protection (1993), at 399ff. This is of course unlikely to happen until the particular state
consumer regulations within the EU has significantly strengthened the regulatory standards in the majority of Member states”.

Discussing food safety and international trade, he predicts that in a similar fashion, the *SPS Agreement*:

is likely to lead to a steady improvement in the food safety standards and production practices in the majority of WTO signatories, though the precise extent of this dimension of the California effect remains to be determined.

A similar effect could occur in the case of environmental standards, but there is an important difference in institutional structure of the European Community and the international system for the harmonisation of environmental and consumer ‘regulations’. Whereas the Community has broad powers to force member states to raise their standards so as to ensure that the common market is not compromised, there is no such equivalent in the international arena. Standards, guidelines and recommendations established by international bodies are not binding, and the *SPS Agreement* has no ‘ratcheting-up’ clause. Accordingly, higher standards will be adopted by Members and producers only if they believe it is in their interests to do so.

If the international standard, guideline or recommendation is set at a high level, then states desirous of a strong environment are likely to adopt it. Yet there is likely to be a ‘chilling’ effect on the move to higher international standards if such standards are regarded as defining a ceiling above which a state must provide scientific justification to have a higher level of protection. At the moment we are seeing an increased politicisation of the international standard setting procedure, with more controversy **in question realises that it will benefit from taking such a step, but “concern, norms and capacity build faster when they are not induced by threat.” Braithwaite, 2000, above, at 63, quoting Brehm, S. and J. Brehm, *Psychological Reluctance: A Theory of Freedom and Control* (1981).


79 Ibid.


81 Indeed, Charnovitz believes that “WTO panels will tend to ratchet down food safety standards (or leave them unchanged)” and states “it is easy to see why advocates of safe: food are unenthusiastic about this dynamic.” Charnovitz, S., ‘The World Trade Organization, meat hormones and food safety’ (1997) 14(41) *BNA International Trade Reporter* 1781, at 1786. Compare Victor, D.G., ‘The Sanitary and Phytosanitary Agreement of the World Trade Organization: an assessment after five years’ (2000) 32 *New York University Journal of International Law and Politics* 865, above at n 76. Also note Wirth’s characterisation of *SPS Agreement* obligations as ‘negative’ obligations because the agreement does not “contain affirmative requirements directing national governments to achieve certain minimum criteria in these areas.” Wirth, 1994, above at n 83, at 818.
associated with the negotiations.\textsuperscript{82} Whereas states desirous of a strong environment will argue for high standards, others see that acquiescence will erode their markets and argue for lower standards accordingly. In \textit{European Communities – Hormones}, the Panel found that it did not need to consider “whether [the] standards [had] been adopted by consensus or by a wide or narrow majority”.\textsuperscript{83} In fact, the Codex approved the use of hormones for growth promotion purposes, later relied on by the US and Canada in their complaints, by only a small majority\textsuperscript{84} and, as pointed out by McDonald, the EC was “put through the demands of the SPS risk assessment process because it implemented a measure that was more rigorous than one agreed to by \textit{less than half} Of the Experts Committee.”\textsuperscript{85} In my view, the voting margin to adopt an international standard should be considered when assessing whether a defendant has justified the need for a level of protection higher than that achieved by the international standard, particularly if a substantial proportion of the minority has argued for higher standards than those actually set. It is hardly fair that a Member should find impediments blocking its adoption of a high SPS standard when the international community itself is in doubt as to whether the international standard is set at the right level.\textsuperscript{86} This is particularly so as the \textit{SPS Agreement} cannot itself encourage a move to higher standards.

Ultimately, however, while the ‘reification’ of international standards may play some part in the move to higher environmental standards, the operation of the ‘California effect’ is more likely to be dependent upon the trading partners of Members with strong WTO compliant domestic environmental measures supporting the adoption of similar standards at home. This will allow them to generate a competitive advantage for

\textsuperscript{82} Stewart and Johanson, 1998, above at n 57.
\textsuperscript{83} Para 8.69 US Panel Report.
\textsuperscript{84} 33 countries for, 29 against and 7 abstentions.
\textsuperscript{85} McDonald, 1998, above at n 15, at 123.
\textsuperscript{86} It is also worth considering, when weighing the importance to be placed on the Codex’s determination, that it is countries which ultimately make up the Codex, albeit with significant industry input. While they may act in the interests of sound science, they can also act in a manner which furthers their own economic interests – in this case easier access to a large market. This point was adduced by the then EC’s Commissioner for Agriculture, Franz Fischler, when expressing disappointment that the Codex had set MRLs for growth hormones, Agra Europe, ‘Consumer groups attacks Codex decision on hormones’, \textit{Agra Europe} (London)1995.
themselves in their home market and improve their economies of scale in the production of goods.

**Article 5: Assessing Risk to set the Appropriate Level of Sanitary and Phytosanitary Protection**

As noted, where a Member’s SPS measure does not conform to international standards, guidelines or recommendations, it must be ‘based on’ a risk assessment (Article 5.1). The risk assessment must be appropriate to the particular risk at issue, and may be performed by the Member or by others, including by an international organisation. Such an assessment is designed to help a Member establish and legitimise its appropriate level of protection which, we have noted, Members have an autonomous right to choose.

Risk assessment involves both a scientific determination of the uncertainty of an event and ensuing damage occurring, and a psychological evaluation of the attitudes people have towards that event. The process of risk assessment is inherently a subjective one and involves interconnecting issues including the concern which individuals, groups or cultures have towards an event; social issues of fairness and ethics such as whether the risk is voluntary, involuntary or unknown; and political and economic considerations such as whether the benefits outweigh the risk and whether it is cheaper to live with the risk than remove it.

Wirth notes that a bifurcation of the risk assessment process which isolates first the scientific aspects of the risk and then evaluates the subjective elements of the risk is a

---

87 See Annex A, para 4 for the two types of risk assessment defined in the *SPS Agreement*. The two types of risk assessment, and the elements which must be considered therein, have been set out respectively in *European Communities – Hormones* and *Australia – Salmon*.

88 Annex A, para 3.5 of the *SPS Agreement* defines the “Appropriate level of sanitary or phytosanitary protection”. See also Articles 5.4, 5.5 and 5.6 which condition Members’ choice and use of their appropriate level of protection. See in Appendix A.

commonly-used but not a universally-accepted approach. In *European Communities – Hormones*, the Panel went beyond such a bifurcation, appearing to remove the subjective determination of risk from the risk assessment process altogether. It stated:

> an assessment of risks is, at least for risks to human life or health, a *scientific* examination of data and factual studies; it is not a policy exercise involving social value judgments made by political bodies.

The Panel considered that the subjective elements integral to assessing risk were part of ‘risk management’, yet it found that ‘risk management’ determinations could not override the scientific conclusions drawn during the risk assessment phases. It considered that to do so would allow the object and purpose of the *SPS Agreement* – the harmonisation of standards – to be undermined.

When the risk assessment and risk management stages of a risk assessment process are separated, the scientific and the subjective elements of the process are arguably made more transparent. For this reason it is favoured by some nations. It is harder for Members to choose a level of protection markedly different to that suggested by the scientific evidence when that scientific evidence must be separately identified, thus the scope for protectionist behaviour is reduced.

Separating the risk assessment and the risk management stages can also, however, minimise any role which risk management plays in the process of determining a...
Member’s Appropriate level of protection. Therefore such a separation, if it is to be done, must be done with care. In *European Communities – Hormones*, the Panel appeared to find a risk management assessment relevant only to the process to be conducted under Articles 5.4 – 5.6 of the *SPS Agreement*; it was not considered in relation to Articles 5.1 – 5.3. Yet even in relation to the matters raised under Article 5.4 – 5.6, the Panel gave scant attention to risk management factors.

The Appellate Body was strongly critical of the Panel’s interpretation of Article 5.1, in particular its separation of the investigation into risk assessment and risk management. It found that the term ‘risk management’ had no basis in the text of either Article 5 or the *SPS Agreement* as a whole, and that such a separation led to an unduly restrictive approach to risk assessment.\(^95\)

As concerns about the impact of globalisation and environmental and consumer health deepen, it becomes more pressing for domestic regulatory authorities to address how factors other than science can be incorporated into the risk assessment process. The strains of this issue can be seen running through the debates such as the trade in GMOs, the use of bovine somatotrophin in milk production, and many others. Excluding subjective elements from the risk assessment process seriously undermines the sovereign ability of Members to determine their own appropriate level of protection, which is central to their ability to protect their environment and consumer health.\(^96\)

Had such an approach been sustained, it would have seriously jeopardised the long-term stability of the *SPS Agreement* as it would have prioritised the desire for strong trade above that of sovereignty, democracy and a strong environment. Thus, from both your concerns about the impact of globalisation and environmental and consumer health deepen, it becomes more pressing for domestic regulatory authorities to address how factors other than science can be incorporated into the risk assessment process. The strains of this issue can be seen running through the debates such as the trade in GMOs, the use of bovine somatotrophin in milk production, and many others. Excluding subjective elements from the risk assessment process seriously undermines the sovereign ability of Members to determine their own appropriate level of protection, which is central to their ability to protect their environment and consumer health.\(^96\)

Had such an approach been sustained, it would have seriously jeopardised the long-term stability of the *SPS Agreement* as it would have prioritised the desire for strong trade above that of sovereignty, democracy and a strong environment. Thus, from both

\(^94\) That is, whether the measures were taken to achieve a Member’s appropriate level of protection, whether they minimised trade effects, whether they gave rise to distinctions in levels of protection between comparable products, and whether they were not more trade restrictive than required to achieve the appropriate level of protection. See in Appendix A.


\(^96\) Compare Sandford, who argues that the concept of ‘appropriate level of protection’ was indeed central to the Panel’s determination, a factor overlooked by the Appellate Body in that case. By removing the distinction between the scientific and subjective assessment of risk, he argues that it “reduce[d] the moderating effect that scientific discipline could have had on the Article 5 process. It remove[d] some of the certainty that would have been created had the Panel’s distinction remained.” Sandford, I., ‘Hormonal imbalance? Balancing free trade and SPS measures after the decision in *Hormones*’ (1999) 29(2) *Victoria University of Wellington Law Review* 389, at 423. Even setting aside the legal methodology
a legal as well as a practical perspective, the Appellate Body’s decision is to be preferred.

The Panel’s interpretation in *Australia – Salmon*, the second SPS case to be considered by the WTO, also threatened to severely limit Members’ domestic regulatory authority to implement measures to protect health and safety within their territory. In that case the Panel stated:

... we consider that a risk assessment, on which to base an import prohibition in accordance with Article 5.1, cannot be premised on the concept of “zero risk”. Otherwise, all import prohibitions would be based on a risk assessment since there is a risk (i.e., a Possibility Of an adverse event occurring), however remote, associated with most (if not all) imports.97

This point was not appealed, but was raised by the EC as third parties and commented on by the Appellate Body in their report. In coming to its conclusion, the Panel appeared to rely on the statement made by the Appellate Body in *European Communities – Hormones* That:

... the Panel opposes a requirement of an “identifiable risk” to the uncertainty that theoretically always remains since science can never provide absolute certainty that a given substance will not ever have adverse health effects. We agree with the Panel that this theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed.98

There is a difference between trying to assess a risk which is so low that it is only theoretically possible to assess, and a Member deciding, once a risk has been assessed, that it is not prepared to accept that risk. That is, that they favour a ‘zero risk’ policy. The first has to do with the scientific determination of the event and ensuing damage occurring, and the second depends upon the psychological evaluation of the attitudes people have towards that event and the willingness to tolerate its occurrence. Had the Panel’s ruling been sustained, it would once more have had the effect of excising the ‘management’ of the risk from the risk assessment process. It would also have prevented Members from prohibiting the introduction of a substance, even if they chose

---

not to tolerate the risk posed by that substance to the environment or human health. This point was brought home by the Appellate Body which stated:

The European Communities is concerned that what the Panel affirmed might be misconstrued to mean that "zero risk" as an appropriate level of protection is not a choice open to Members under the SPS Agreement. ... we merely note that it is important to distinguish -- perhaps more carefully than the Panel did -- between the evaluation of "risk" in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in European Communities — Hormones, the "risk" evaluated in a risk assessment must be an ascertainable risk; Theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed." This does not mean, however, that a Member cannot determine its own appropriate level of protection to be "zero risk".  

There is no minimum level of risk which a risk assessment must identify before a measure may be taken to respond to it, and the likelihood of an event occurring "may be expressed either quantitatively or qualitatively" in a risk assessment. Moreover, a risk assessment does not have to arrive at a 'monolithic' conclusion, but may represent both 'mainstream' and 'divergent' scientific opinions. It is entirely within the terms of the SPS Agreement for Members to choose to base their SPS standards on the body of divergent opinions "coming from qualified and respected sources". As stated by the Appellate Body in European Communities — Hormones, SPS standards which reflect 'divergent' opinion may be reasonable "especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety."

Language of "clear and imminent threat" is not to be found in the SPS Agreement, and nor would it be sensible to limit the acceptance of divergent science to these situations only. A risk which is sizeable yet distant because of the cumulative effects of factors contributing to the risk should not be marginalised merely because it is supported by qualified and respected albeit 'divergent' opinion. This would be to ignore the manner

---

100 Ibid, at para 124; see also the Report of the Appellate Body in European Communities — Hormones, at para 186, overruling the Panel's implicit finding on this point.
101 Report of the Appellate Body in Australia — Salmon, at para 124, affirming the Panel's finding on this point.
103 Ibid, at para 194.
in which scientific opinion is constructed. Rather than science being a slow accretion of facts leading to inevitable conclusions with which all parties are in accord, science often proceeds by 'lurches' when unexpected discoveries and compelling syntheses promote a revision of thinking such that an area previously regarded as a minority position becomes the new mainstream. Take, for example, Rachel Carson's publication of *Silent Spring* which heralded a shift in attitude towards the incremental effects of pesticides on human health and the environment.\(^{104}\)

While the complete eradication of risks is a worthy goal to strive for, it is ultimately unrealistic. The central question for society remains not whether we want to live with risk, but what sorts of risks we do want to live with, and how we should prepare to deal with the risks when the inevitable eventuates.\(^{105}\) Once this has been worked out, however, in order to support a strong environment, Members must have the latitude to implement SPS measures to protect the domestic environment from the time at which the minority opinion gains sufficient credibility that mainstream thought begins to take notice of the scientific concerns raised. This is regardless of whether a landslide movement to embrace that opinion has yet occurred. The Appellate Body's rulings allow sufficient scope for Members to do so.

*The relevance of PPM factors in risk assessments and establishing an appropriate level of protection*

In a marked departure from the furor caused by the legality of process standards under the *General Agreement*, Article 5.2 of the *SPS Agreement* makes it explicit that it is entirely appropriate for risk assessments, and consequentially measures, to take into account the circumstances of how a product is produced.

The decision of the Appellate Body in *European Communities – Hormones* also reflects this. The Appellate Body in that case pointed out that the issue which was of most

concern to the EC was the risk associated with hormone abuse. That is, improper treatment of cattle during the production phase. However, while detailed studies had been presented to the Panel discussing the health effects of hormones applied according to good veterinary practice, the details of studies which had examined the risk associated with hormone abuse were not put before the Panel. To demonstrate an objective relationship between the risk assessment and the measure under review would have required the results of such a study. Without such a study, it was impossible to find that the measures were based upon a risk assessment as required by Article 5.1. There was no suggestion that the *SPS Agreement* would not support a measure based on such a study, that study examining the PPMs of beef.

In *Australia – Salmon*, the Panel confused two products, fresh, chilled and frozen salmon and heat treated salmon, by failing to recognise that the very act of applying heat to (that is, processing) the salmon, changed its nature as a product. As a result, it confused itself as to what the measure was, which in turn affected its investigation as to whether the measure was ‘based on’ a risk assessment.

Australia banned the introduction of fresh, chilled or frozen salmon, but allowed the introduction of smoked or canned salmon. Notwithstanding that the product at issue was fresh, chilled and frozen salmon, the Panel deduced that the measure in relation to all salmon product was heat treatment, and incorrectly determined that the risk assessment had to evaluate the effectiveness of heat treatment. Article 5.2 only requires that ‘relevant’ PPMs be assessed, and heat treatment was a PPM which was irrelevant to the risk addressed by Australia’s measure (an import prohibition on fresh, chilled and frozen salmon). Accordingly, it was appropriate to exclude it from the risk assessment. As noted by Australia on appeal:

> Clearly, a process method is only “relevant” if it is actually used in producing the product to be imported in fresh, chilled or frozen form. Thus, if a process method embodied in a “measure” is not a relevant process method for fresh, chilled or frozen salmon, there is no obligation on WTO Members to assess that process method.

---


107 See the Report of the Panel in *Australia – Salmon*, at paras 8.18, 8.95 and 8.96.
According to Australia, there is no basis in the *SPS Agreement* for concluding that for a measure to be based on a risk assessment, it is required that the risk be assessed on a process method which does not have application to the product at issue. To suggest that a risk assessment on heat treatment could provide the basis for an import prohibition on fresh, chilled or frozen product is not only a logical absurdity but would nullify the meaning of the term based on as used in Article 5.1 of the *SPS Agreement*.²⁰⁸

The Appellate Body reversed the Panel’s finding that the measure at issue was heat treatment.²⁰⁹ It found, however, that the document Australia relied upon as its risk assessment did not meet the requirements of a risk assessment, so its measure was not applied in accordance with Article 5.1 or, by implication, Article 2.2 of the *SPS Agreement*.

Finally, the Appellate Body in *European Communities – Hormones* seemed to indicate that, in certain circumstances, it is appropriate for Members to maintain different levels of protection based on a product’s PPMs.²¹⁰ In that case, the Appellate Body accepted that the differing circumstances in which hormones are used justified differing levels of protection. In particular, it stated that a higher level of protection was justified for beef administered with hormones for growth promotion purposes than for therapeutic and zootechnical purposes.²¹¹ It made this finding despite the fact that there is no easily observable difference in beef treated for growth promotion and therapeutic or

---

²⁰⁹ At paras 103-104 it stated “In our view, the SPS measure at issue in this dispute can only be the measure which is actually applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon.

“We also do not share the Panel’s view that the import prohibition and the heat-treatment requirement are ‘two sides of the same coin’. Smoked salmon and fresh, chilled or frozen salmon are different products and the SPS measures applied to each are not ‘two sides of the same coin’. We agree with Australia that it is not a consequence of the requirement that smoked salmon be heat-treated that imports of fresh, chilled or frozen salmon are prohibited. Imports of fresh, chilled or frozen salmon are prohibited as a direct consequence of the application of QP86A, and this prohibition has not been revoked, but has, in fact, been continuously maintained since 1975.”
²¹⁰ See part XII of the Appellate Body Report, particularly at paras 223-225.
²¹¹ The Appellate Body noted that hormones used for growth promotion purposes are generally administered as implants to the whole herd and are used continuously for a long period of time. They may or may not be administered by a veterinarian. In contrast, hormones used for therapeutic purposes are administered only on a small scale and are generally used on cattle not intended for slaughter. Hormones used for zootechnical purposes may be administered to the whole herd, but only once per year. Furthermore, hormones used for therapeutic and zootechnical purposes must be administered by a
zootechnical purposes, and that distinguishing between beef to which hormones have and have not been added can be quite difficult.

Their ruling also made it clear that the measures can be applied ‘extraterritorially’ in the sense that the methods used by producers to produce a product in another country may be taken into account. The measure is still applied within the territory of the Member, however, as it is the consumer residing within the territory of the Member who is protected by the measure. This action falls entirely within the ordinary bounds of jurisdiction recognised at international law.

Article 5.5: Consistency of Levels of Protection and Resulting Discrimination or Restriction on International Trade

The SPS Agreement constrains the domestic regulatory authority of Members by requiring that measures not be maintained without sufficient scientific evidence and be based on an assessment of the risks, as appropriate to the circumstances. Risk assessments help Members to establish their appropriate level of protection against risks of an SPS nature. Article 5.5 of the SPS Agreement limits the choice of an appropriate level of protection by the requirement that distinctions in levels of protection are not arbitrary or unjustifiable such that they result in discrimination or a disguised restriction on international trade.

As evident from Article 5.5, a goal of the SPS Agreement is that Members must maintain an approach to risk which is internally consistent. This goal is not, however, a legal obligation, and consistency does not have to be perfect. At the same

veternarian who must comply with strict and binding administration and reporting conditions, and implants are not used.

112 See Guidelines to further the Practical Implementation of Article 5.5, G/SPS/15, 18 July 2000. This document was prepared to assist Members in the practical implementation of Article 5.5 of the SPS Agreement. The guidelines are not intended to add to or detract from existing rights and obligations of Members under the SPS Agreement or WTO Agreement, nor to provide for any legal interpretation or modification of the SPS Agreement.

113 Report of the Panel in European Communities – Hormones, at para 8.169; Report of the Appellate Body in European Communities — Hormones, at para 213. Only the Appellate Body noted that
time, Article 5.5 must be read in context with the remainder of the agreement, and in particular with Article 2.3. Therefore, if a measure results in a level of protection different to that found in different situations, and that distinction results in discrimination or a disguised restriction on international trade, the measure will be found to be inconsistent with Article 5.5.

The Appellate Body in *European Communities – Hormones* expressed the test in Article 5.5 as having three cumulative elements:

a) the Member imposing the measure complained of has adopted its own appropriate levels of sanitary [or phytosanitary] protection against risks to human [animal or plant] life or health in several different situations,

b) those levels of protection exhibit arbitrary or unjustifiable differences ("distinctions" in the language of Article 5.5) in their treatment of different situations, and
c) the arbitrary or unjustifiable differences [achieved by the measure] result in discrimination or a disguised restriction on international trade.\(^{114}\)

Use of the term ‘different situations’ means that Article 5.5 has the potential to have an extremely broad application, and consequently an enormous impact on domestic regulatory authority. In *European Communities – Hormones*, the Panel found that ‘different situations’ encompassed situations where the same substance or the same health effects are involved.\(^{115}\) In *Australia – Salmon*, the Panel found that where the risk being assessed is the entry, establishment or spread of a pest or disease within the territory of an importing Member, the associated biological and economic consequences presented by that risk also form a basis for comparison under Article 5.5, “irrespective of whether they arise from the same product or other products”.\(^{116}\) The Appellate Body approved of both of these approaches.\(^{117}\) In *European Communities – Hormones* it stated:

217.... Clearly, comparison of several levels of sanitary protection deemed appropriate by a Member is necessary if a panel’s inquiry under Article 5.5 is to proceed at all. The situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable. If the situations proposed to

consistency does not have to be perfect. In this it made the practical point that “governments establish their appropriate level of protection frequently on an ad hoc basis and over time, as different risks present themselves at different times.”


be examined are totally different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness.

The Appellate Body’s explanation sensibly establishes a ‘perimeter fence’ limiting the application of Article 5.5. Had the possibility for it to have been interpreted more broadly remained, so that, for example, all different risks to human health could be compared, not only would it have severely curtailed the types of measures a Member could maintain in support of a strong environment, it would also have dramatically expanded the task of Members in preparing risk assessments to justify such measures. Therefore, Article 5.5 does not require Members to totally rethink the basis of their SPS measures. Members may choose to be very risk adverse in some categories (such as antibiotic use or pesticides) but not in others (such as hormones). The measures must, however, be internally consistent and be based on scientific principles.

Article 5.5 was raised in European Communities – Hormones and in Australia – Salmon. When making a determination as to discrimination in European Communities – Hormones, the Panel had engaged in some questionable legal interpretation by attempting to blend jurisprudence on Article XX and Article III of the General Agreement into its reading of the SPS Agreement. It found in respect of the third element of Article 5.5 that:

in some cases the significance of the difference in levels of protection for comparable situations combined with the arbitrariness thereof may be sufficient to conclude that this difference in levels of protection results in “discrimination or a disguised restriction on international trade”.

The Appellate Body overruled this approach. It stated:

In our view, the degree of difference, or the extent of the discrepancy, in the levels of protection, is only one kind of factor which, along with others, may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure or measures embodying one or more of those different levels of protection … It is well to bear in mind that, after all, the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised

restriction on international trade, prohibited by the basic obligations set out in Article 2.3 of the SPS Agreement.\textsuperscript{119}

Parallels in the language of Article XX and Articles 2.3 and 5.5 of the SPS Agreement might make a reading which sustains cross-fertilisation of General Agreement and SPS Agreement jurisprudence attractive. Moreover, the notion that the SPS Agreement helps to “elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)”,\textsuperscript{120} which also includes the chapeau of that Article, also supports this approach. Yet Article 5.5 of the SPS Agreement requires an analysis of dissimilar treatment accorded not only to ‘like’ products, but also to ‘like’ health effects linked to ‘like’ ‘contaminants’, and, in some cases, ‘like’ biological and economic consequences. That is, like situations are assessed. Such a linking of the jurisprudence is not only inappropriate in terms of a proper reading of the text, but would be inappropriate on policy grounds. Not only does such a reading curtail the ability of Members to treat risks differently for non-protectionist reasons under the SPS Agreement (this may be as a result of, among others things, resource availability, domestic priorities, or consumer concern). It also raises the potential for the ambit of Article III:2, second sentence, of the General Agreement to be broadened in a manner not intended. This could only happen if a loose reading of Article III:2 occurred, however it is precisely such a reading that the Appellate Body criticised the Panel for in relation to many aspects of the SPS Agreement.

The Panel also relied on inferences gained from the documents preceding and accompanying the enactment of the EC’s Hormone Directives that they had protectionist motivations for enacting a total ban on hormone use for growth promotion. Yet the Appellate Body stated that it was:

\begin{itemize}
\item unable to share the inference that the Panel apparently draws that the import ban on treated meat and the Community-wide prohibition of the use of the hormones here in dispute for growth promotion purposes in the beef sector were not really designed to protect its population from the risk of cancer, but rather to keep out US and Canadian
\end{itemize}

\textsuperscript{120} Preambular statement to the SPS Agreement.
hormone-treated beef and thereby to protect the domestic beef producers in the European Communities.\textsuperscript{121}

Rather, it explained that these documents and other evidence:

[made] clear the depth and extent of the anxieties experienced within the European Communities concerning the results of the general scientific studies (showing the carcinogenicity of hormones), the dangers of abuse (highlighted by scandals relating to black-marketing and smuggling of prohibited veterinary drugs in the European Communities) of hormones and other substances used for growth promotion and the intense concern of consumers within the European Communities over the quality and drug-free character of meat available in its internal market.\textsuperscript{122}

The finding that the differences in level of protection did not result in discrimination or a disguised restriction on international trade was significant in a number of respects. Firstly, it meant that the measure only violated Article 3 of the SPS Agreement, so if the EC can complete a risk assessment analysing the risks of hormone abuse to human health, they may legitimately be able to base their measures on such a risk assessment.\textsuperscript{123}

Secondly, compared to the position under the General Agreement, Article 5.5 of the SPS Agreement significantly widens the scope for striking down domestic regulatory measures which distinguish between products. Article III allows a comparison of the treatment afforded to like products, as well as to directly competitive or substitutable products. Under the SPS Agreement, however, products which have entirely different uses may still be comparable. The potential for violations to be found has been moderated, however, as the Appellate Body has found that discrimination requires something more than mere distinctions in appropriate levels of protections for comparable products to be present.

Thirdly, the finding of the Appellate Body emphasises the distinct nature of the covered agreements. This in turn ensures that violations are found on the basis of the text the Members actually negotiated and accepted as binding, and not on the basis of policy

\textsuperscript{121} Report of the Appellate Body in European Communities – Hormones, at para 245.
\textsuperscript{122} Ibid, at para 245.
\textsuperscript{123} Note however that it is quite difficult to detect hormone abuse, thus throwing into doubt the ability of the hormone ban to be properly enforced. See further in Wynter, 1998, above at n 1; Wynter, 1999, above at n 1.
made by panellists relevant to the specific cases brought before them. Accordingly, the role of law rather than diplomacy in the WTO system has been strengthened.

Fourthly, the Appellate Body’s report moderated the provocative elements of the Panel’s report.124 While there are still ongoing issues regarding the implementation of the disputes’ findings,125 the Appellate Body report was considered to be far more acceptable to the Europeans.126 Given the extreme sensitivity of consumers to even hints of food contaminants, and the traditional scepticism consumers have towards the produce of other nations, the outcome of the Hormone dispute was never going to be satisfactory. The Appellate Body report redressed some of the disparities of the Panel report by taking into account the more ‘human’ elements of the ban, at the same time balancing these sensitivities with a strong eye towards maintaining the strength of the SPS Agreement to fend off the rise of green and consumer protectionism.

Finally, although the ruling brought to light the possible need for the EC to examine whether some of their standards were actually set high enough,127 the dispute emphasised that the SPS Agreement, like the General Agreement, does not provide the WTO with any “affirmative authority” to “offset the deregulatory effects of trade liberalization”128 as it contains no mechanism for raising standards. Instead, it only provides a mechanism for assessing whether standards are too high. It therefore remains the responsibility of domestic regulatory authorities to assess whether their

124 This has also tended to be the case in other trade and environment disputes, for example United States – Gasoline, United States – Shrimp, and European Communities – Asbestos.
125 See n 20, above.
126 See Maresceau, M., ‘Comment’ in P Mengozzi (ed), International Trade Law on the 50th Anniversary of the Multilateral Trade System (1998) 527-534, at 532, who notes that “[t]he first EC reactions to the ruling of the Appellate Body were formulated in terms of ‘a victory for European consumers’ since the Appellate Body allowed the EC to establish on a scientific basis a level of consumer protection which was higher that (sic) the level resulting from international health standards.” Referring to Agence Europe, 17 January 1998.
127 In particular, carbadox and olaquindox standards. See further in Wynter, 1998, above at n 1; Wynter, 1999, above at n 1.
standards are high enough, and if they wish to build a strong environment, implement appropriate legislation.

Article 5.6: Choosing the less trade-restrictive measure

As we saw in Chapters 4 and 5, the ‘necessary’ test in Article XX has been interpreted as a ‘least GATT-inconsistent’ test. While the legal basis of this has been challenged,\(^\text{129}\) the test was confirmed in *European Communities – Asbestos*.\(^\text{130}\) A test analogous to the ‘least GATT-inconsistent’ test, albeit concentrating more on the trade effects than on compatibility with the legal text, is the ‘least trade-restrictive’ test. This is the test reflected in the *SPS Agreement* at Article 5.6. Chapter 4 noted that when GATT panels applied the least GATT-inconsistent test and found that less GATT-inconsistent measures existed and should be applied, they seldom considered the technical and economic feasibility of such measures. Moreover, they seldom remarked upon the difference in impact which such measures would have on trade. This approach generated considerable criticism, and has been specifically addressed in the *SPS Agreement*. A footnote to Article 5.6 clarifies that a measure is not more trade-restrictive than required unless there is another measure which is:

- reasonably available taking into account technical and economic feasibility,\(^\text{131}\)
- achieves the appropriate level of sanitary or phytosanitary protection, and
- is *significantly* less restrictive to trade.\(^\text{132}\)

While the ‘effectiveness of the alternative measure test’ may have been reintroduced into Article XX(b), the *SPS Agreement’s* requirement that the alternative measure be

---

\(^{129}\) For example, by the US in *United States – Shrimp*, see Report of the Panel at 106-109, paras 248-257.

\(^{130}\) See in Chapter 5, above, and in *Korea – Beef* in relation to Article XX(d).

\(^{131}\) It is unclear whether this would also include an assessment of the political feasibility of the alternative measures being accepted by the community at risk. Comments made by the Appellate Body in *European Communities – Hormones* in relation to consumer concerns over the risks of hormone abuse make this issue relevant. As the agreement requires that alternative measures must be assessed upon the basis of whether they are *reasonably available*, this opens the possibility for a politically based assessment to be made. It is ironic that such an investigation would open the WTO to criticisms regarding incursions to national sovereignty and so may be avoided for this reason.

\(^{132}\) This test was established by the Panel in *Australia – Salmon*, at para 8.167, and approved by the Appellate Body at para 194 of its report. The Appellate Body emphasised that it considered these elements to be cumulative. See also Report of the Panel and Report of the Appellate Body in *Japan – Agricultural Products*, at para 97.
shown to be significantly less restrictive to trade, still gives domestic regulatory authorities greater discretion to implement measures to maintain a strong environment under the SPS Agreement than available under the Article XX(b) ‘least GATT-inconsistent’ test.

The precautionary principle in the SPS Agreement

We noted in Chapter 2 that the ‘precautionary principle’ is one of the central concepts of sustainable development. It is a fundamental tool in the armory of states wishing to maintain a strong environment as it allows them to act before the environmental crisis occurs. The SPS Agreement provides regulatory scope to domestic authorities to implement the principle so as to protect the life and health of their environment and citizens.

While the precautionary principle is widely accepted as an appropriate policy approach in certain circumstances, there remains debate within the international community as to its scope; the nature of evidence regarding the threat of harm; whether there must be a threshold level of harm to trigger measures; whether cost-benefit analyses of potential measures should be applied and how these should be conducted; whether and how the measures should be reviewed; as well as whether implementation of the principle shifts the burden of proof and affects issues of liability. Also contentious is the normative force of the principle, whether it is merely an ‘approach’ which may be adopted by states, or whether it has crystallised as a norm of customary international law. Until international documents begin to articulate better the content of the precautionary principle, it is likely that the debate will continue.

---


134 See, for example, Bodansky, who argues that rather than international lawyers focusing their arguments on whether the precautionary principle represents customary international law, they should focus on encouraging states to incorporate the precautionary principle into “concrete treaties and actions”
The debate as to the status and influence of the precautionary principle has arisen in a number of fora. Moreover, the principle, or approach, finds expression in a number of international documents and agreements. In these agreements, reference is made to the adoption of a precautionary approach or precautionary measures to prevent environmental harm from occurring, rather than a ‘precautionary principle’ as such. In many cases, that reference is made in the preamble rather than in the substantive clauses of the agreement. This adds fuel to the argument that the ‘precautionary principle’ has not yet received acceptance as a principle of customary international law. Nevertheless, some states are beginning to argue that the principle is of binding force, for example the EC in *European Communities – Hormones*, Australia and NZ in *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* and Hungary in *Hungary v Slovakia (Case Concerning the Gabčíkovo – Nagymaros project).*


135 These include during dispute resolution within the WTO, the ICJ, the International Tribunal for the Law of the Sea (ITLOS); in the deliberations of intergovernmental organisations such as UNEP, the Food and Agriculture Organisation (FAO), the OECD and the CTE; and during the negotiation of a number of MEAs, such as the *Kyoto Protocol*, the *Biosafety Protocol* and the *POPs Convention*.


137 Compare Article 174(2) of the *Treaty Establishing the European Economic Community as Amended by Subsequent Treaties*, opened for signature 25 March 1957, 298 UNTS 3. Entered into force 1 January 1958 (*Treaty of Rome*) which refers to the precautionary principle as a ‘principle’.


302
The principle is also increasingly influential within the domestic law of a number of states. In Australia’s case, the principle is incorporated into law, legislation and policy documents at both the state and federal level. For example, the Environment Protection and Biodiversity Conservation Act 1999 (Cth), requires the Environment Minister to “take account of the precautionary principle in making ... [certain] decision[s] ... to the extent he or she can do so consistently with the other provisions of this Act”.141

As noted by Walker, the precautionary principle “is fundamentally a policy of risk management”.142 That is, it can “guide risk assessors when they must make choices among scientifically plausible alternatives in the face of scientific uncertainty”.143 It was in this context that it was first raised by the EC in relation to European Communities – Hormones. They argued that the precautionary principle justified their measures, those measures being based on scientific evidence that hormones could be carcinogenic without knowing “exactly how, and under what circumstances, this carcinogenic effect occurred”.144 Japan also raised the application of the precautionary principle in Japan – Agricultural Products, arguing on appeal that in light of Japan’s legitimate “prohibition on the importation of host plants of codling moth”, its varietal testing requirement should be understood as a precautionary measure.145 In Australia –

140 See, eg, Cameron, 1996, above at n 133.
141 Section 391(1); see also clause 3.5 of the non-binding Intergovernmental Agreement on the Environment signed by the Commonwealth, States and Territories and the Local Government Association, which enshrines the principle. That document is intended to inform the making of environmental policy and programmes at all levels of government; section 31 of the Environment, Sports and Territories Legislation Amendment Act 1995 (Cth) amending the Great Barrier Reef Marine Park Act 1985 (Cth); the Protection of the Environment Administration Act 1991 (NSW); the Fisheries Management Act 1994 (NSW); and the Environment Protection Act 1993 (SA). For judicial consideration of the principle, see Leatch v National Parks and Wildlife Service (1993) 81 LGERA 270 at 282; Nicholls v Director-General of National Parks and Wildlife Service (1994) 84 LGERA 397 and Greenpeace Australia Ltd v Redbank Power Co Pty Ltd (unreported, NSW Land and Environment Court, 10 November 1994). See further in Gullett, 1997, above at n 133.
142 Walker, 1998, above at n 33, at note 77.
143 Ibid.
Salmon, Australia did not directly rely on the precautionary principle or approach. Rather, it indicated that its measures reflected a cautious approach to risk.\textsuperscript{146}

In \textit{European Communities – Hormones}, the EC argued that the precautionary principle was a rule of customary international law and that the \textit{SPS Agreement} must be interpreted in accordance with this principle.\textsuperscript{147} Japan did not argue that the principle was a rule of customary international law. Rather, it argued that the principle had been recognised as finding reflection in the \textit{SPS Agreement}, and that the agreement’s provisions should be interpreted in this light. In particular, Japan argued that “the requirement in Article 2.2 not to maintain an SPS measure without sufficient scientific evidence should be interpreted in light of the precautionary principle”\textsuperscript{148} and “that direct application of Article 2.2 of the \textit{SPS Agreement} Should be limited to situations in which the scientific evidence is ‘patently’ insufficient”.\textsuperscript{149}

As yet, no international tribunal has made a determination that the precautionary principle constitutes a rule of customary international law. However, arguably mindful of the hostility it would generate if it flatly rejected the existence of the precautionary principle as a rule of customary international law, the Panel in \textit{European Communities – Hormones} outlined in very qualified terms the role it saw the principle playing in the \textit{SPS Agreement}. It stated:

\textit{To the extent that this principle could be considered as part of customary international law and be used to interpret Articles 5.1 and 5.2 on the assessment of risks as a customary rule of interpretation of public international law (as that phrase is used in

\textsuperscript{146} Report of the Panel in \textit{Australia – Salmon}, at para 4.77; Report of the Appellate Body in \textit{Australia – Salmon}, at 40, para 5; p.46, para 4; p.84, para 8.

\textsuperscript{147} Their submission was strongly opposed by the US and Canada. The US argued that it was “erroneous as a matter of international law” to argue that the ‘precautionary principle’ was a principle of customary international law. Rather, it was an ‘approach’ – “the content of which may vary from context to context.” Report of the Appellate Body in \textit{European Communities – Hormones}, at para 44. Canada also argued that the principle did not form part of customary international law, but should be characterised as an ‘approach’ rather than a ‘principle’. Nevertheless, it went further than the US by stating that “the precautionary approach or concept [could be considered] as an emerging principle of international law, which may in the future crystallize into one of the ‘general principles of law recognized by civilized nations’, within the meaning of Article 38(1)(c) of the \textit{Statute of the International Court of Justice}.” (at para 60). Both the US and Canada did agree, however, that a precautionary approach was reflected in at least Article 5.7 of the \textit{SPS Agreement}, the US also citing the scope given to Members to determine their own appropriate levels of protection as evidence of the precautionary approach in the agreement.


\textsuperscript{149} Ibid, at para 84. This submission was rejected by the Appellate Body at para 84, as to adopt this interpretation, measures otherwise inconsistent with Article 2.2 would have been authorised.
Article 3.2 of the DSU), we consider that this principle would not override the explicit wording of Articles 5.1 and 5.2 outlined above, in particular since the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement. We note, however, that the European Communities has explicitly stated in this case that it is not invoking Article 5.7.

We thus find that the precautionary principle cannot override our findings made above. The Appellate Body in European Communities – Hormones was slightly less reticent than the Panel in exploring the nature and status of precautionary principle at international law and within the SPS Agreement. Nevertheless, it too declined to make a finding as to whether the precautionary principle exists as a customary rule, and agreed with the Panel's overall finding that "the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement." The Appellate Body stated:

123. The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.

124. It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the SPS Agreement. First, the principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the SPS Agreement. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the

precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement.

125. We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement. (footnotes omitted).

While the Panel limited the scope of application of the precautionary principle within the SPS Agreement by largely banishing its application to Article 5.7, the Appellate Body saw it as having wider application.\(^{152}\) For example, it agreed with the EC’s argument that Article 5.7 does not exhaust its application, but that it finds reflection also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations.\(^{153}\)

Furthermore, the Appellate Body indicated that a flexible approach should be taken by panellists when approaching a case. And “determining, for instance, whether ‘sufficient scientific evidence’ exists to warrant the maintenance by a Member of a particular SPS measure”.\(^{154}\) They emphasised a panel:

\(^{152}\) Article 5.7 is, however, that part of the SPS Agreement in which the precautionary principle is most clearly evident. Article 5.7 allows Members to impose measures on a provisional basis even if there is insufficient scientific evidence to perform a risk analysis of an SPS threat. If a Member successfully relies on Article 5.7, then no violation of Article 2.2 can be found. Article 5.7 does not, however, offer a carte blanche to Members to impose measures which have no basis in science, and indeed imposes a number of restraints on Members wishing to rely on its provisions. Members seeking to rely on its exemption must meet a two stage test. Each stage of the test has two cumulative elements. As set out in the Report of the Panel in Japan – Agricultural Products, (at para 8.54 quoting from Article 5.7 of the SPS Agreement) stage one is established in the first sentence of Article 5.7. This requires that:

- the measure is imposed in respect of a situation where “relevant scientific information is insufficient”;

If the measure meets these two elements, stage two of the test in Article 5.7 must be met. Stage two is established in the second sentence of Article 5.7 and requires that Members relying on its provisions:

- “seek to obtain the additional information necessary for a more objective assessment of risk”;

- “review the sanitary or phytosanitary measure accordingly within a reasonable period of time”.

So far, no Member has successfully relied on Article 5.7. Japan sought to shelter under its provisions in Japan – Agricultural Products, however its claim was rejected on the basis that it did not fulfil the requirements of stage two of Article 5.7.


\(^{154}\) Ibid, at para 124.
may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks are irreversible.\(^{155}\)

Part of the resistance states have towards recognising the precautionary principle as a ‘principle’ rather than an ‘approach’ is, in addition to uncertainties as to its content, the view that it authorises states to take a wide margin to respond to a risk. The concern is that this may also authorise a response not based on science. Such an interpretation would undermine the very fabric of, for example, the \textit{SPS Agreement}, the cornerstone of which is the requirement to base measures on scientific principles. Yet such an interpretation would also seem incompatible with most expressions of the precautionary principle, those expressions implying that while full scientific certainty is not necessary, scientific justification is still an essential ingredient.

Accordingly, even if the precautionary principle were to become recognised as a principle of customary international law, it would be unlikely to ‘override’ or strip the \textit{SPS Agreement} of its disciplines. The international law rules on interpreting treaty and custom together are such that if the treaty and custom do not conflict, then the issue of whether or not the precautionary principle is or could be enshrined in customary international law is not contentious, and if the treaty and custom do conflict, and the treaty is later in time, the treaty will prevail.\(^{156}\)

If the treaty and custom do conflict, and the customary international law is later in time, the position is unclear. Dixon argues, however, that:

\begin{quote}
In practice, it is likely that subsequent custom can modify treaty obligations for state-parties only in very exceptional circumstances, perhaps only where there is a manifest
\end{quote}

---

\(^{155}\) Ibid, at para 124. The Appellate Body omitted to indicate that the writings it referred to demonstrate that the status of the acceptance of the precautionary principle into international environmental law were written primarily before UNCED and the adoption of the Rio Declaration, and that since that time a number of international and multilateral environmental agreements have been entered into between States embracing that principle, or approach. Nevertheless, the subsequent application of the principle in the few \textit{SPS Agreement} cases which have arisen does not appear to have been affected in any negative sense. A worrying feature in its report is, however, the distinction it drew between customary international \textit{environmental law}, and general or customary international law, (at para 123 of its report, emphasis in original). This seemed to slightly undermine the Panel’s cautious acceptance that emerging international environmental principles may influence its jurisprudential development. Again, however, this distinction does not appeared to have affected reasoning of panels in subsequent cases. Wynter, 1997, above at n 1; Wynter, 1998, above at n 1.

and overwhelming consensus among parties to the treaty that it should be abandoned. The better view is that the treaty continues to govern the relations between parties even though a new practice has developed. ... [Furthermore, the ICJ, and the same could be said of the WTO] will strive to avoid this kind of conflict. So, even though at first sight a treaty and custom may appear to conflict, the ICJ [or WTO] will attempt to interpret the treaty as complementary to the new custom as far as possible.\textsuperscript{157}

It is highly unlikely that a ‘manifest and overwhelming consensus among parties’ would occur to adopt a formulation of the precautionary principle which conflicted with the degree of flexibility Members now have to take a cautious and scientific approach to risks to human health and the environment already present in the SPS Agreement, or, for that matter, the WTO Agreement. Accordingly, it unlikely that any scope for it to be taken into account in dispute settlement, for example under Article 31(3)(c) of the Vienna Convention, would result in it overriding and undermining the provisions of either the SPS Agreement or the WTO Agreement.\textsuperscript{158}

Some commentators have noted that even to the extent that the precautionary principle has been accepted into the SPS Agreement, that it does not constitute a viable defence under that agreement.\textsuperscript{159} On the basis of the current decisions, this view is difficult to support.\textsuperscript{160} In European Communities – Hormones, the issue was not so much that the EC was prevented from adopting a cautious approach in the face of existing scientific evidence and uncertainties. Rather, on the basis of evidence put before the Panel, including its own studies, there was no scientific justification for its approach. Similarly, in Japan – Agricultural Products, there was a lack of scientific evidence supporting Japan’s quarantine approach.

\textsuperscript{157} Ibid, at 34-35.
\textsuperscript{158} For example, the burden of proof in the covered agreements, which in any event is very low, is unlikely to change unless there is ‘manifest and overwhelming consensus among parties’; similarly the standard of review is unlikely to change.
\textsuperscript{159} Kennedy, 2000, above at n 57; Thorn, C. and M. Carlson, ‘Part II: review of key substantive agreements: Panel II D: Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS): the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade’ (2000) 31 Law and Policy in International Business 841.
\textsuperscript{160} Indeed, it can be said that their comment raises the wrong issue regarding the principle, which should be seen as an interpretive tool rather than a defence, \textit{per se}. 308
In Japan – Agricultural Products, the Panel found that the US had “raised a presumption that Japan’s varietal testing requirement ... [was] ... maintained without sufficient scientific evidence and that ... [it was not] ... sufficiently rebutted by Japan.” 161 Japan argued, however, that because evidence existed to suggest that the effectiveness of quarantine treatment differed between varieties, until sufficient evidence had been gathered to support, with a sufficient level of confidence, the effectiveness of quarantine treatment across varieties, Japan had a right to maintain its measure in place on a provisional basis. 162 The Panel had found that there had been no reported occurrence in Japan, or elsewhere in the world, of the need to modify quarantine treatment for one variety of a product to ensure it was as effective for that variety as opposed to another variety of the same product. 163 Article 5.7 of the SPS Agreement allows measures to be applied on a provisional basis in the face of insufficient scientific evidence. Japan’s argument effectively meant that it was using Article 5.7 to place the lion’s share of the burden of proof on the importer to prove beyond reasonable doubt that a certain course of action was safe, in circumstances where there was little evidence to the contrary.

While ostensibly a cautious approach, this would have significantly distorted the normal understanding of how the precautionary principle applies. That is, although the scientific evidence may not be ‘full’ or ‘conclusive’, precautionary action is justified when there is enough (as opposed to almost no) scientific evidence to suggest that a certain course of action could well result in serious or irreversible damage. 164 Had Japan’s interpretation of Article 5.7 been accepted, it would have weakened trade disciplines without necessarily providing the grounds for a strong environment based on rigorous scientific principles. This would likely have had systemic and long-term

162 Ibid, at para 8.50.
164 See Principle 15 of the Rio Declaration “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation” (emphasis added), and the explanation of the precautionary principle provided by Cameron and Abouchar that the principle envisages the prevention of adding certain substances or conducting certain activities “even if there is no conclusive scientific proof linking that particular substance or environmental activity to environmental damage” (emphasis added). Cameron, J. and J. Abouchar, ‘The precautionary principle: a fundamental principle of law and policy for the
consequences for the convergence of trade and environmental interests, re-igniting pro-free trade militancy in searching for a strong trade regime not weakened by environmental restraints.

In contrast, in *Australia – Salmon*, the Appellate Body confirmed the ability of Members to take a cautious approach, or adopt a precautionary approach, in the choice of their own appropriate level of sanitary or phytosanitary protection, by allowing them to support a zero risk policy towards particular risks if those risks are ascertainable. Thus, it stated:

... As stated in our Report in *European Communities – Hormones*, the “risk” evaluated in a risk assessment must be an ascertainable risk: Theoretical uncertainty is “not the kind of risk which, under Article 5.1, is to be assessed.” This does not mean, however, that a Member cannot determine its own appropriate level of protection to be “zero risk”.  

Following the adoption of the *Australia – Salmon* reports, Australia conducted a new Import Risk Analysis and lifted its salmon import ban. At the same time, it imposed various quarantine conditions on salmon imports, and tightened controls on the importation of other kinds of fish. Upon review, these measures were substantially upheld, and Australia and Canada reached a Bilateral Settlement as to the one outstanding measure. Australia still maintains its very cautious quarantine approach to the importation of salmon, and the result emphasises the discretion which the *SPS Agreement* affords to Members to choose a high appropriate level of protection based on a cautious, or precautionary, approach backed up by science. The balance reached in the three *SPS Agreement* cases considered to date does not diminish the importance of the role the precautionary principle plays in the *SPS Agreement*, rather it lends some rigour to the application of the principle. Moreover, because of its basis on objective protection of the global environment’ (1991) 14 Boston College International and Comparative Law Review 1, at 2.


168 See Report of the Panel in *Australia – Salmon (Recourse to Article 21.5)*.
evidence, it is considerably more supportive of regime capable of delivering sustainability through trade.

**Conclusion**

Ziegler describes the *SPS Agreement* as introducing “a new generation of integration measures into the world trading system by restricting domestic measures to proportionate and necessary measures despite their equal application to domestic and traded goods.”\(^{169}\) This proposition has been supported to some extent by the SPS cases considered to date. Whereas some facially non-discriminatory measures may escape scrutiny under the *General Agreement*, such measures will be found to be inconsistent with the *SPS Agreement* if they have not been properly based on a risk assessment or on sufficient scientific evidence.

The *SPS Agreement* does not, however, use the language of proportionality. Instead it relies on the tool of risk assessment and the requirement of sufficient scientific evidence to integrate measures into the world trading system. It also introduces the goal of consistency between measures in their application to domestic and traded goods.

While the *SPS Agreement* and Article XX(b) of the *General Agreement* share the task of disciplining measures which are necessary to protect human, animal or plant life or health, the requirements of an assessment of the risk addressed by the SPS measure and the goal of consistency are novel to the *SPS Agreement*. Consistency does not have to be perfect, but extends beyond analysing the treatment of like or directly competitive and substitutable products to analysing the treatment of comparable products and situations. The comparison of products on this basis will have far-reaching implications for the design of existing and future environmental and consumer health and safety standards at both the domestic and the international level. For example, commentators have already noted an increased politicisation of standard-making

activities of international bodies such as the Codex. On the domestic scene, the time and expense of preparing risk assessments and ensuring the other criteria of the SPS Agreement is itself likely to introduce some element of regulatory chill, even if the disciplines themselves do not.

In our discussion of the General Agreement, we saw a contrast between the interpretative style of panels compared with that of the Appellate Body. On the whole, the Appellate Body, in applying the rule of law to the interpretation of that agreement, has generally supported an interpretation which affords more scope for regulatory discretion to domestic authorities. This has also tended to be the case in their approach to the interpretation of the SPS Agreement. For example, in European Communities – Hormones, we saw the Appellate Body overturn the Panel’s application of the burden of proof which resulted in the defendant having to bring a prima facie case to show its challenged measures were in compliance with the SPS Agreement. We also saw it overturn the Panel’s approach to the determination of an appropriate level of protection which minimised the role which subjective elements of a risk assessment play, and in Australia – Salmon, clarify that states may, in appropriate situations, take a zero approach to risks. In Japan – Agricultural Products we saw the Appellate Body emphasise that it is the complainant which must raise a prima facie case of inconsistency with the SPS Agreement, and that such a case may not be made by the Panel.

In contrast to our discussion of the General Agreement, our discussion of the SPS Agreement has shown that the use by domestic regulatory authorities of PPM-based trade measures to implement environmental or consumer health and safety policy has not been controversial. Of the cases considered in this Chapter, the measure in dispute in Australia – Salmon was arguably treated as a product-based PPM measure (although the Panel was incorrect to do so), and the measure in dispute in European Communities – Hormones arguably raised non-product-based PPM issues. In both cases there was no suggestion by either the parties to the dispute, or the adjudicators, that such measures

170 ICTSD, 1999, above at n 75 at 1; Stewart and Johanson, 1998, above at n 57, at 52; Kennedy, 2000, above at n 57, at 100.
were per se in contravention of the SPS Agreement. Moreover, in European Communities – Hormones, the Appellate Body indicated that it may be appropriate for Members to maintain different levels of protection based on a product’s PPMs depending on the circumstances. Indeed, Article 5.2 makes it explicit that it is appropriate to take into account PPM factors when designing measures.

Based on their understanding of the operation of the General Agreement, states have generally been hesitant to use non-product PPM-based trade measures to implement stronger environmental disciplines for fear of breaching international trade law. While there are strong policy reasons to avoid the use of non-product PPM-based trade measures to solve environmental problems, as we saw in Chapters 3, 4 and 5, the understanding that such measures were not available was largely founded on the unadopted and erroneous interpretation of the agreement in the Tuna-Dolphin decisions. Only recently has this understanding changed with the Appellate Body’s decision in United States – Shrimp clarifying that non-product PPM-based trade measures may be permissible if properly applied.

In the case of the SPS Agreement, it is of course only applicable to those measures which a Member has applied to protect human, animal or plant life or health within its territory. For those measures to which it is applicable, they must meet the ordinary requirements of the SPS Agreement if they are to stand. Yet the mere fact that a measure may be ‘non-product-related PPM-based’ is not a basis upon which to find a violation. The regulatory chill associated with the use of such measures to achieve a strong environment should, accordingly, be mitigated.

Furthermore, since Article 2.4 of the SPS Agreement presumes that a measure which conforms to the relevant provisions of the SPS Agreement is “in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)”\(^\text{171}\), any residual regulatory chill associated with the General Agreement is accordingly reduced. A violation of each agreement would have to be separately argued, for, as
noted by the Appellate Body in *European Communities – Hormones*, the *SPS Agreement* and the *General Agreement* are separate and free-standing agreements and the jurisprudence of one cannot be ‘casually imported’ into the other.172

Like the *General Agreement*, the *SPS Agreement* does impose strong trade disciplines on Members. This of course influences the choice of regulatory measures available to Members to implement environmental and health and safety policy mechanisms which may encourage a ‘California effect’ to occur.173 The agreement does, however, accord to Members sufficient regulatory discretion to implement measures to achieve a strong environment, should they wish to do so. For example, it is for Members to determine their appropriate level of protection; such a level cannot be determined by the WTO adjudicators, the Secretariat, a panel of experts or any other Member acting collectively or individually. Even if an international standard, guideline or recommendation exists which is relevant to a risk and the level of protection a Member might choose, Members are not required to conform to or base their measures on such standards. Instead, they may choose a measure which implements a higher level of protection in response to that risk. Moreover, Members may base their measures on divergent scientific opinion if it is from a sufficiently qualified and respectable source, they do not have to follow the majority approach, and they may implement measures on a precautionary basis.

Nevertheless, the *SPS Agreement* does contain a number of novel mechanisms to ensure that a strong trade position is not compromised. Firstly, the agreement requires that the choice of level of protection must be backed up by a thorough risk assessment. If a measure is challenged, panels will not accept risk assessments unquestioned. Indeed, they are entitled to seek expert opinion to inform them of the current strands of scientific opinion on the issue.

Secondly, the agreement encourages Members to take a consistent approach to risk, preventing Members from arbitrarily choosing an appropriate level of protection which

---

171 Article 2.4 of the *SPS Agreement*.
172 At para 239.
differs not so much according to the risk they are seeking to minimise, but the industry they are seeking to protect. This requirement can, however, be beneficial to the environment, by exposing situations where the environment receives insufficient protection. As we saw in Australia – Salmon, the requirement for consistency resulted in Australia largely raising its quarantine requirements for several species of fish in order to ensure that the quarantine status of Australian salmon would not be compromised.

Thirdly, the agreement requires that, except in limited circumstances, measures be supported by sufficient scientific evidence. That is, Members must show a sufficient connection between the risk assessment and the standards in place. While this is not expressly stated under the General Agreement, arguably the position is the same. A measure not based on scientific principles could well be found to be arbitrarily or unjustifiably discriminatory or a disguised restriction on international trade. Accordingly, if the measure was inconsistent with one of the Articles of the General Agreement, it would not be saved by Article XX.

Yet the limits on domestic regulatory authority to use such measures also ensures that any tolerance which business and community members might have regarding the use of SPS measures to implement environmental policy is not quickly exhausted by their frivolous use. Often Members are beset by lobbyists from both sides of the cloth: those resisting the use of trade measures for fear of the impact they will have on their profits, and those wishing for more measures to be implemented, either to serve environmental or protectionist ends (or both). If Members conform to internal protectionist forces, such action can have a long term negative impact on their domestic economy, and possibly lead to a cycle of counter-retaliatory trade war action with disastrous consequences for both the economy and the environment.

The requirement that measures have a sound scientific basis assists Members seeking to avoid the 'trading

---

173 Nevertheless, because the SPS Agreement only applies to measures applied to protect human, animal or plant life or health, or prevent or limit other damage “within the territory of the Member”, it only constrains Members in relation to measures falling within this category.

174 While this is not expressly stated under the General Agreement, arguably the position is the same. A measure not based on scientific principles could well be found to be arbitrarily or unjustifiably discriminatory or a disguised restriction on international trade. Accordingly, if the measure was inconsistent with one of the Articles of the General Agreement, it would not be saved by Article XX.

nations dilemma’, as Members wishing to resist such temptation, can point to an external source for doing so.

Overall, despite the constraints the SPS Agreement places on domestic regulatory authorities to implement measures to protect the environment and the health and safety of citizens, Members may still take a cautious approach to risk. The agreement can therefore be viewed as one where a strong-trade-strong-environment position can be maintained fairly successfully. Accordingly, it provides useful guidance for an agreement designed to regulate the use of PPM-based trade measures while allowing a strong-trade-strong-environment position to be maintained.
Strengthening the Environment through Trade: problems with the TBT Agreement in using technical regulations and standards to improve safety and empower consumer decision-making

This thesis has primarily been concerned with how international trade rules influence the behaviour of states wishing to control the importation of products to promote a strong environment. In Chapters 3-5, we saw that the General Agreement places considerable restraint on states wishing to differentiate between products on the basis of how they have been produced, but has now been interpreted to allow states a limited ability to use non-product-related PPM-based trade measures to protect their domestic environment as well as environmental attributes outside their territory. In Chapter 6, we saw further constraints placed by the SPS Agreement on states wishing to protect their domestic environment, but no distinction between the ability of a state to use product and non-product-related PPM-based trade measures to do so. Of these two agreements, it is the General Agreement which most influences the ability of states to exert a ‘pull’ towards higher environmental production standards as, unlike the SPS Agreement, its application is not limited to measures taken to protect the environment within the territory of the Member imposing the measure. Nevertheless, we saw that the SPS Agreement can also influence production standards to the extent that such standards have an effect within the territory of the Member imposing the measure.

We have considered a number of cases to highlight how the GATT and WTO regimes have interpreted international trade rules to influence such behaviour. The mechanisms which have been primarily used have been taxes and trade bans. A concern which arises from using trade bans to change behaviour is that individual freedom is considerably constrained by state action, and that state action is frequently arbitrarily bent to the service of commercial interests. We have seen that both the General Agreement and the SPS Agreement have been designed to limit the use of measures which arbitrarily serve domestic commercial interests. Even if the measure is not considered to be arbitrary, not only can the individual freedom of the producer be
affected by the measure, the consumer can also be affected. This is because the trade ban limits their access to a product or competitive pricing.

It is not merely trade bans which can block the entry of a product on to a market, however. Technical regulations and standards\(^1\) may be applied in such a manner that a product is effectively denied market access because it cannot meet the criteria specified. Alternatively, they may be applied in such a manner that some message may be sent to the consumer to discourage him/her from purchasing the product. In contrast to trade bans however, technical regulations and standards do not necessarily have to restrict market access – they may be beneficial. This is generally true when they help or allow some positive aspect of the product to be identified. Thus, in contrast to regulatory measures such as product bans and restrictions, technical regulations and standards can, depending on their design, help provide somewhat more scope to persuade rather than force actors to embrace more environmentally responsible behaviour. ‘Actors’ may be either ‘producers’ or ‘consumers’. Where technical regulations and standards allow a product into the market and the consumer is informed about its environmental effects, a more dynamic partnership is established between the two.\(^2\) Where consumers are environmentally conscientious, and make purchasing decisions accordingly, a strong-environment-strong-trade position can develop. This approach may be seen as more democratic in that it allows consumers a greater participatory role in choosing how to balance the trade and environment dynamic. As noted in Chapter 2, the sustainability discourse supports the democratisation of the environmental decision-making process so that civilians as well as NGOs and business groups can participate.

The *SPS Agreement* governs the maintenance and implementation of technical regulations and other measures applied in the SPS context. This Chapter is concerned with the *TBT Agreement*, which sets out the international rules governing how all other technical regulations and standards may be applied to products.\(^3\) The *TBT Agreement*

---

\(^1\) Technical regulations and standards are defined at Annex 1 of the *TBT Agreement*, see at Appendix A. Essentially, the difference is that whereas compliance with technical regulations is mandatory, compliance with standards is voluntary.

\(^2\) Technical regulations and trade bans which deny market access allow only a more limited partnership – between a state and the producers and possibly other states.

\(^3\) See Article 1.5 of the *TBT Agreement*. 

318
disciplines technical regulations and standards as they affect trade in a product; packaging, marketing and labelling requirements; and conformity assessment procedures. While the agreement covers all technical regulations and standards as they apply to products other than those applied in the SPS context, it is unclear whether the agreement also covers technical regulations and standards as they apply to non-product-related PPMs.

The application of the *TBT Agreement* to non-product-related PPM measures is highly contentious. Environmental labelling (or eco-labelling) programmes are an example of an increasingly popular form of measure which raises this issue. Such programmes, either voluntary or mandatory, may be based on criteria which look at the performance and disposal of a product once it has crossed the border (the final product), or at a product's environmental impact during its life cycle. Programmes which fall into the latter category may judge a product according to both product-related as well as non-product-related PPM-based criteria. The *TBT Agreement* contains some fairly strict disciplines to ensure that technical regulations and standards do not become an unnecessary obstacle to international trade. Not only does it discipline the regulatory action of states, it is capable of influencing the activities of certain non-governmental bodies and private and other entities also. Therefore, if the *TBT Agreement* does apply to non-product-related PPM-based technical regulations or standards, the potential to use eco-labelling programmes to encourage more sustainable consumption and production patterns is more limited.

This Chapter shall explore the *TBT Agreement* to determine whether it applies to technical regulations and standards which specify non-product-related PPM-based criteria, and examine more generally the constraint placed by the agreement on domestic regulatory authorities and private entities wishing to implement measures to encourage a strong environment.
The development of the Standards Code and the TBT Agreement

The TBT Agreement, or Standards Code as it was previously known, was originally concluded during the Tokyo Round of international trade negotiations. It entered into force on 1st January 1980 for those contracting parties who acceded to it. Membership was not mandatory, and only a total of 36 countries acceded. Accordingly, contracting parties were unevenly disciplined when implementing technical regulations and standards. The Standards Code was renegotiated during the Uruguay Round. The resulting TBT Agreement now forms part of the ‘WTO package’ which all Members are party to and bound by.

The Standards Code was originally negotiated because contracting parties and others recognised that technical regulations and standards could, either intentionally or unintentionally, be designed so as to constitute significant obstacles to international trade. As noted by Middleton writing on the Standards Code:

> successive rounds of [negotiations on] tariff reductions have revealed the much more serious and complex problem of non-tariff distortions of trade. Among the most complex and numerous of these are distortions due to disparities between national standards and technical regulations and the certification, testing and approval procedures which frequently accompany them.

The real impact of the Standards Code was that it outlined a number of obligations establishing the procedure according to which product standards (both voluntary and mandatory) could be developed by each of the signatory nations. The Standards Code required that governments when formulating standards allow, to the extent possible, “foreign nations and their producers with an interest in exporting” to have the “opportunity to be heard and to present facts and arguments to standards-making bodies during the formulation of standards.” Moreover, it called for ‘transparency’ of

---

standards, namely adequate notice and time to comply with the standards. Further, it urged the development of international standards, and encouraged contracting parties to mutually recognise each others’ standards and testing procedures. Finally, the text of the agreement encouraged contracting parties to develop standards in the nature of performance rather than design specifications. Thus, the aim of the Standards Code was to encourage a strong trade regime by minimising trade obstacles created by a range of standards being applied to products by different contracting parties, particularly in circumstances where information about the standards was difficult to obtain and they were introduced with little or no consultation with those affected.

The Standards Code was instrumental in solving some trade disputes, but significant procedural flaws in the Code were revealed by the 'hormones dispute'. As we saw in Chapter 6, the hormones dispute was eventually considered by the WTO in relation to the SPS Agreement. Originally, however, the US attempted to use the Standards Code to resolve it. In March 1987, it engaged in extensive unsuccessful negotiations and consultations with Europe to have the hormone ban removed. Six months later, it requested a technical experts group to be formed under Article 14.5 of the Standards Code to consider, from a scientific point of view, “whether the measure was necessary for the protection of human, animal or plant life or health, and whether a legitimate scientific judgment [was] involved.” The ban was, on its face, non-discriminatory, since all countries, including the European Community, were required to comply with it. The US argued, however, that the ban was not necessary and not scientifically based.

8 For example, Jackson notes in a discussion of the effectiveness of that Code, that following the lodgement in 1982 of a formal bilateral complaint by the US against Japanese ‘lot’ inspections of metal bats produced by the US, the Japanese changed their law to permit US producers to obtain the appropriate ‘type’ approval. Jackson, 1989, above at n 7, at 198, note 32.

9 See European Communities – Hormones, US Panel Report, at para 2.34. At the time, Dr. Houston, Administrator of the Food Safety Inspection Service, United States Department of Agriculture, claimed an EU-type hormone ban in the US would be “legally impossible” as US law “requires approval of animal drugs shown to be safe and effective”. Quoted from “Hormone ban is technical trade barrier, US says in complaint” Food Chemical News 28, No.50 (16 February, 1987) in United States Department of Agriculture Food Safety and Inspection Service, Economic Impact of the European Economic Community’s Ban on Anabolic Implants (1987), at 20.
The European Community blocked the formation of a technical expert group. It argued that its measure was a production standard, and that whereas the Standards Code provided jurisdiction to rule on product standards, its jurisdiction did not cover situations where the standards were PPM-based standards. It based this argument on an explanatory note to Annex I (which it had insisted upon being included during the Tokyo Round negotiations) which excluded “codes of practice” from being investigated under the Standards Code. The “codes of practice” were generally understood to refer to PPM-based standards. It maintained “that parties to the [Standards Code] only had an obligation not to use PPMs to circumvent the Agreement” and invited the US to join them in “evaluating the rights and obligations of Parties deriving from Article 14.25”. This would have meant examining the legal applicability of the Standards Code to PPM-based trade measures, and the European Community suggested that a panel of “government officials knowledgeable in the area of technical barriers to trade and experienced in the field of trade relations and economic development” should be established to do this. The US considered that the European Community’s legislation could have equally been expressed as a product standard and escaped examination on technical grounds only. Nevertheless, it declined to have the issue examined before a panel.

There was also a failure to resolve under the Standards Code a previous dispute between the US and the United Kingdom, in which standards had been written as PPM standards and not as product requirements. In that case, Britain had imposed processing requirements on imported poultry in order to reduce the possibility of salmonella contamination. The ban was discriminatory because it only applied to non-EC

---

10 Vogel, D., Trading Up: Consumer and Environmental Regulation in a Global Economy (1995). The EC were unwilling to engage in a purely scientific examination of the hormone ban. Rather it wished factors such as consumer fears about hormone use to be taken into account when evaluating the ban. While the United States believed that it would be successful in the scientific aspects of the dispute resolution under the TBT Agreement, it was unsure of a positive result if the dispute had gone to a committee deciding on the legal aspects of the ban given its facially non-discriminatory character. This created a stalemate between the parties and adjudication was not forthcoming.


14 Halpern, 1989, above at n 11, at 147.
countries. The US eventually dropped its complaint however, because its officials “realized that many signatories felt the processing methods adopted by the British were indeed legitimate processing methods and outside the Code’s jurisdiction”.16 In fact, the applicability of the Code to the poultry case was doubtful anyway because the British processing requirements were passed before the Standards Code came into effect. It was understood that the Standards Code would only apply prospectively to measures introduced by contracting parties.17

The hormones and poultry disputes operated as examples of how fine a line could be drawn between the regulation of products based on their final characteristics and their PPM specifications. They showed the Standards Code to be incomplete in that it only regulated the former.

The re-negotiation of the TBT Agreement during the Uruguay Round saw the removal of the explanatory note to Annex 1 which excluded “codes of practice” from the scope of the agreement. While the new text has clarified that product-related PPM-based technical regulations and standards are covered by the TBT Agreement, it has left ambiguous whether, and to what extent, non-product-related PPM-based technical regulations and standards are covered. Moreover, while the TBT Agreement is one of the few of the covered agreements to expressly provide for concessions to be made for the ‘environment’ in its substantive provisions, it appears to have substantially limited Members’ ability to implement discriminatory domestic regulatory measures in order to protect the environment. The next section explores the possible application of the TBT Agreement to non-product-related PPM-based technical regulations and standards, and the remainder of the chapter shall discuss the regulatory constraints the TBT Agreement places on Members’ ability to encourage a strong environment.

15 See further Vogel, 1995, above at n 10, at 164-171.
16 Halpern, 1989, above at n 11, at 147. Note that many of these ‘signatories’ were European Community countries, and that they too were required to comply with the European Community Directive. Halpern, 1989, above at n 11, at 147, note 106.
17 Ibid, at 147.
The coverage of PPM-based trade measures under the TBT Agreement

The essential difference between a technical regulation and a standard under the Standards Code was that technical regulations were mandatory obligations and standards were voluntary. The TBT Agreement retains this distinction. Furthermore, whereas the Standards Code contained no reference to the ‘processes and production methods’ of a product in its definitions, the TBT Agreement makes express reference. Yet, as noted above, it is unclear whether the reference extends the scope of application of the agreement to regulate non-product-related PPM-based trade measures, or whether its scope is limited to regulating only product-related PPM-based trade measures specifying criteria detectable either by sophisticated testing methods or on the basis of a purely visual analysis.

This question has been a central feature of discussions among Members in the WTO Committees dealing with Technical Barriers to Trade and the Trade and Environment. Three main views are apparent. The first view is that the TBT Agreement does not cover non-product-related PPM-based trade measures, and that measures which specify non-product-related PPM criteria are inconsistent with the agreement. The second view is that the TBT Agreement does not cover non-product-related PPM-based trade measures, and that such measures are not disciplined by the TBT Agreement. The third view is that the TBT Agreement arguably does cover non-product-related PPM-based trade measures. Canada is a major proponent of this view. It argues that an understanding should be reached on such measures because, particularly in the case of eco-labelling programmes, their use is so prevalent in the marketplace.

18 The Standards Code defined technical regulations and standards in terms of technical specifications. A technical specification was “a specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to product.” A ‘technical regulation’ was “a technical specification, including the applicable administrative provisions, with which compliance is mandatory.” A ‘standard’ was “a technical specification approved by a recognised standardising body for repeated or continuous application, with which compliance is not mandatory.”

19 See, for example, the 1996 CTE Report at para 70, and the Non-Paper by the Arab Republic of Egypt, WTO Committee on Trade and Environment, 18 June 1996. This interpretation is inconsistent with international law: if a treaty does not cover a particular activity, it means the activity is not disciplined, not that the activity is prohibited. Thus, in the case of the TBT Agreement, a states’ right to have a TBT
In order to assist clarification of the matter, the WTO Secretariat prepared a note on the Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods unrelated to Product Characteristics. This note covered the drafting of the agreement during both the Tokyo and the Uruguay Rounds. It stated:

Standards that are based on processes and production methods (PPMs) related to the characteristics of a product are clearly accepted under the TBT Agreement, subject to them being applied in conformity with its substantive disciplines. The negotiating history suggests that many participants were of the view that standards based inter alia on PPMs unrelated to a product’s characteristics should not be considered eligible for being treated as being in conformity with the TBT Agreement. Towards the end of the negotiations, some delegations proposed changing the language contained in the “definitions” in Annex 1 of the Agreement to make it unambiguous that only PPMs related to product characteristics were to be covered by the Agreement, but although no participant is on record as having opposed that objective, at that late stage of the negotiations it did not prove possible to find a consensus on the proposal.

As discussed in Chapters 3 and 4, Article 31 of the Vienna Convention makes it clear that it is the text of a treaty which forms the basis of interpretation, and that the general rule of treaty interpretation (reflecting customary international law) is that the text must primarily be conducted by examining the text of the treaty in its context and in the light of the treaty’s object and purpose. The negotiating history of an agreement would only be relevant in defined circumstances as a secondary means of determining the meaning of the treaty provisions. In particular, it should only be used as a supplementary tool to confirm the meaning once the general rule has been applied, or to determine the meaning when the interpretation according to the general rule has left the meaning ambiguous or obscure or has led to a manifestly absurd or unreasonable result. Thus, were any dispute to arise over the extent to which the TBT Agreement covers non-product-related PPM trade measures, the interpretation of the treaty must be conducted by examining the text of the treaty in its context and in light of the object and purpose of the treaty prior to examining the negotiation history prepared by the Secretariat or otherwise. The following section sets out to do so.

regime does not flow from the TBT Agreement. Rather, the TBT Agreement cuts away the rights of a state to maintain certain technical regulations and standards which violate the terms of that agreement.

20 WT/CTE/W/10; G/TBT/W/11; 29 August, 1995.

21 Ibid, at 2.
Technical regulations

A technical regulation is defined as:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. [emphasis added]

Explanatory note
The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called “building block” system.

Of the technical regulations which specify PPM-based criteria, many commentators take the view that only those which specify product-related PPM-based criteria are covered by the TBT Agreement. This is partly based on the view that the term ‘product characteristic’ as it appears in Annex 1 of the TBT Agreement only covers those characteristics which are detectable in the final product, and partly on the view that the definition only refers to ‘related’ PPMs, ie, “those which have an effect on the product characteristics such as its quality or performance.”

---

22 Article 32 of the Vienna Convention.
24 For example, in Rege’s view “Production methods that are related ... [are] those which have an effect on the product characteristics such as its quality or performance.” Rege, 1994, above at n 23, at 110. According to one dictionary meaning, the term ‘related’ merely means to “having relation to, or relationship with, something else; having mutual relation or connexion”. Simpson, J.A. and E.S.C. Weiner, The Oxford English Dictionary (2nd ed, 1989). It does not resolve the nexus issue. As we have noted previously, Members and others use the terminology of ‘product-related PPMs’ and ‘non-product-related PPMs’ to categorise PPM-based trade measures. There is no evidence however, that the term ‘related PPMs’ has acquired any special significance in GATT/WTO law. For example, the terms ‘product-related PPMs’ and ‘non-product-related PPMs’ are not found in the WTO Agreement or covered agreements, and an examination of the jurisprudence has shown that only in Indonesia – Automobiles has a panel referred to non-product-related criteria (albeit not in such terms), stating that the importation of a product which is ‘like’ a domestic product “cannot be made conditional on any criteria that is not related to the imported product itself” (at para 14.143). The Panel did not specify in that case what it considered “criteria that is not related to the imported product” might be, (see above at Chapter 3) and its comment
The words ‘or their’ (in the plural) in the first sentence of the definition seems to indicate that the ‘related processes and production methods’ refer to the ‘characteristics’ of the product, not merely to the ‘product’ itself. Accordingly, whether measures specifying non-product-related PPM criteria are covered by the agreement will depend on how broadly the term ‘product characteristic’ is interpreted. If it includes features not detectable in the final product but able to be determined using objective criteria, then such non-product-related PPM measures are also likely to be covered. While impact-based PPM measures derived from objective criteria could fall within this category, producer-based PPM measures would be likely to be excluded.

Both the Panel and Appellate Body in European Communities – Asbestos articulated views on the meaning of the term ‘product characteristic’ within the definition of a technical regulation. The Panel noted that “[t]he ordinary meaning of ‘characteristic’ is ‘that which constitutes the distinctive feature, is typical of a person or thing’, ‘a recognizable distinctive feature’.” The Appellate Body elaborated:

The word “characteristic” has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the “characteristics” of a product include, in our view, any objectively definable “features”, “qualities”, “attributes”, or other “distinguishing mark” of a product. Such “characteristics” might relate, inter alia, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.

was made in the context of another of the covered agreements, with a quite separate text and its own distinct body of jurisprudence.

The reference to “applicable administrative provisions” of the PPMs is also not determinative. According to the Appellate Body in European Communities – Asbestos, “The heart of the definition of a ‘technical regulations’ is that a ‘document’ must ‘lay down’ – that is, set forth, stipulate or provide – ‘product characteristics’.” (Report of the Appellate Body in European Communities – Asbestos, at para 67.)

Taking this comment into account, and noting the placement of the comma in the definition, if a document lays down mandatory ‘administrative provisions’ applicable either to a product’s characteristics or related processes and production methods, it may be considered to be a technical regulation. Whether ‘applicable’ provisions could stipulate non-product-related PPM requirements and still fall within the definition of a technical regulation is likely to be guided by the interpretation of the terms “product characteristics” and “their related [PPMs]”.

If the related PPMs referred merely to the product, it would be more arguable that the phrase covered measures which specified product or non-product-related PPM criteria.

While they may be ‘related’ to the product via the producer, their connection to the product characteristics would be considerably more tenuous. See above in Chapter 3 for further for discussion of ‘impact-based’ and ‘producer-based’ PPM measures.

at 406.

These examples of ‘characteristics’ are attributes which are detectable in the ‘final product’. On this basis, non-product-related PPM measures would appear to fall outside the definition of a technical regulation as they specify product attributes or requirements not detectable in the ‘final product’.

The Appellate Body also indicated that ‘product characteristics’ may include features and qualities which are not only ‘intrinsic’ to the product itself, but also characteristics which are related. It stated:

In the definition of a “technical regulation” in Annex 1.1, the TBT Agreement itself gives certain examples of “product characteristics” – “terminology, symbols, packaging, marking or labelling requirements”. These examples indicate that “product characteristics” include, not only features and qualities intrinsic to the product itself, but also related “characteristics”, such as the means of identification, the presentation and the appearance of a product.29

This statement appears to widen the category of measures capable of falling within the definition of a technical regulation. Arguably, non-product-related PPM-based measures which are capable of being objectively related to the product and which affect the product’s identification, presentation and appearance are covered by the agreement. For example, a measure which stipulates that a product’s label must display certain devices or information if certain criteria relevant to the product are met would probably fall within these confines. An example of such a measure would be one which stipulates that white-goods must bear a label indicating the amount of carbon released during the product’s manufacture. While the non-product-related PPMs in this example may not affect the particular product’s quality or performance30 directly, they are capable of being reflected in the final product as they will affect how it may be identified and marketed to consumers. In that sense they may be considered to be ‘related’ to the product.31

29 Ibid.
30 See Rege above at note 24. But note that many environmentalists would consider that a product’s performance includes the mark the product leaves on the earth, whether that mark is made prior to, or as a result of consumption of the product. A marketer of the product might also consider these factors, as the overall environmental impact of the product could contribute to the branding of the product.
31 If the measure merely stipulated that certain processes, not capable of later detection, must not be used in the manufacture of the white-good, the product’s characteristics would not be affected. Such a
The first and second sentence of the definition of a technical regulation refer to PPMs differently. The second sentence refers to “product, process or production method[s]”, whereas the first refers to “product characteristics or their related processes and production methods” (emphasis added). This difference has generated some debate as to whether the scope of coverage of the agreement is affected by the words.

One view has been that the second sentence provides merely an illustrative list of those items to which the first sentence of the definition pertains, providing guidance on how the measure may be implemented but not altering the types of measures covered by the definition. Others have argued that the word ‘also’ indicates that the second sentence performs some function beyond that of a mere illustrative list. Rather it expands the category of documents which may be considered to be a technical regulation by clarifying that terminology, symbols, packaging, marking or labelling requirements may also be considered to be technical regulations.

It has also been argued that because the second sentence does not contain the words “characteristics or their related processes and production methods”, any qualification the words might add to the definition in the first sentence is omitted. Accordingly, even if the first sentence of the definition does not cover measures addressing non-product-related PPM criteria, if the measure is concerned with terminology, symbols, packaging, marking or labelling requirements, both product-related and non-product-related criteria may be specified.

---

32 Staffin, 1996, above at n 23, at 238, note 219; Chang, S.W., ‘GATTing a green trade barrier: eco-labelling and the WTO Agreement on Technical Barriers to Trade’ (1997) 31(1) Journal of World Trade 137, at 142. Chang reports that “the majority of Member countries participating in discussions at the CTE [on the scope of application of the TBT Agreement to PPMs] share this view” (at note 17) See also Mexico’s statement reported in WT/CTE/W/10; G/TBT/W/11; 29 August, 1995, at 6.

33 This view was expressed by Finland during the Uruguay Round negotiations, and was shared by the US and EC. WT/CTE/W/10; G/TBT/W/11; 29 August, 1995, at 6, see also Chang, 1997, above at 32, at 142, note 18.

34 This approach is based on the view that the term ‘related PPMs’ has acquired special significance in GATT/WTO law through the use by Members and others of the terms ‘product-related PPMs’ and ‘non-product-related PPMs’, to categorise PPM-based trade measures. There is no evidence to support this view however. See above at n 24.
Another view is that the second sentence clarifies that terminology, symbols, packaging, marking or labelling requirements may be considered to be technical regulations, even if they are partly based on non-product-related PPM criteria. That is, if a technical regulation addresses product-related PPM criteria, and non-product-related PPM criteria are also addressed, the whole scheme will nevertheless be covered by the rules on technical regulations.35

The Appellate Body appears to have bypassed this issue in its comments in European Communities – Asbestos, and, while that case did not raise the issue of the application of the TBT Agreement to non-product-related PPM-based measures, the Appellate Body’s comments suggest that this distinction will not be a future focus of their enquiries. Rather, because it found that the term ‘product characteristics’ encompasses features and qualities both intrinsic to the product as well as ‘related’ (so that matters such as the “means of identification, the presentation and the appearance of a product” are affected), the determinative issue is likely to be whether the measure requires the product to be presented in a distinctive way even if it is not physically distinctive.

Summary

It is unclear whether the rules on technical regulations apply to measures specifying non-product-related PPM criteria. A measure may specify product requirements, where failure to comply effectively results in the product being denied entry to the import’s market. Alternatively, the measure may place constraints on how the product is presented in the market, but still allow the product to be sold. A measure which specifies non-product-related PPM product requirements which, if not met, deny market access, is likely to be considered to fall outside the scope of the TBT Agreement. In contrast, a measure which requires a product to be presented in a manner which is distinctive would probably be considered to fall within the scope of the TBT Agreement. This is so even if the feature which is the subject of the measure is not measurable in

35 Ward proposes this interpretation in relation to the second sentence of the definition of standards, however the position is also arguable in relation to technical regulations. Ward, H., ‘Trade and
the final product. On this basis, mandatory eco-labelling schemes, including those based on non-product-related PPM criteria, would be covered by the rules.

If the rules do not apply, then such measures go unregulated by the TBT Agreement but may be covered by the General Agreement and the other covered agreements. While the ambiguity remains, states acting cautiously are more likely to avoid implementing measures which might contravene the agreement.

**Standards**

It is also ambiguous whether the definition of a ‘standard’ covers documents specifying non-product-related PPM-based criteria. The first sentence of the definition of a standard differs from that in the definition of a technical regulation in that it does not refer to “product characteristics or their related processes and production methods” but only to “products or related processes and production methods”. The second sentences are identical. A standard is defined as a:

> Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with the terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note
The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement only deals with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. ...

Just as there has been debate as to the scope of coverage of a technical regulation resulting from the differing reference to PPMs in the first and second sentence of that definition, so too has the difference in the first sentences of the definition of a technical regulation and a standard also generated debate. One view has been that if the words ‘characteristics’ and ‘their related’ in the first sentence of the definition of a technical regulation serve to restrict the scope of that definition to cover only product-related environmental issues in voluntary eco-labelling and life cycle analysis’ (1997) 6(2) Review of European Community Law and International Environmental Law 139, at 1-3.
PPM-based measures, their absence in the definition of a standard makes it arguable that a standard encompasses measures aimed both at non-product-related PPM-based criteria as well as product-related PPM-based criteria. Another view has been that the absence of the word 'characteristic' and 'their' is irrelevant as the word 'related' in GATT/WTO law has a special meaning; the word 'related' used in this context means that the definition of a standard only covers measures aimed at product-related PPM criteria and not non-product-related PPM criteria. As discussed previously, however, nothing exists in GATT/WTO case law to indicate that this is so.

The approach which is more likely, however, is that since the Appellate Body found in relation to technical regulations that “product characteristics” could encompass features and qualities both intrinsic to the product as well as ‘related’, it would make the same decision in relation to standards. While there is not quite the same emphasis on ‘characteristics’ in the definition of a standard as there is in the definition of a technical regulation, it is likely that definition of a standard would be read as having at its ‘heart’ the features and qualities intrinsic and ‘related’ to a product. Therefore, if the standard required a product to be presented in a distinctive way, even if the feature targeted by the measure is not detectable in the final product, it would likely fall within the scope of the TBT Agreement.

---

36 Ibid.
37 The second sentence of the definition of a standard has been interpreted in a manner similar to the second sentence of a technical regulation. That is it may be seen as merely clarifying that certain terminology, symbols, packaging, marking or labelling requirements may be considered to be standards without affecting the scope of coverage of the definition in the first sentence (Staffin, 1996, above at n 23 at 238, note 219; Appleton, 1997, above at n 5 at 93; Bartenhagen, E.P., ‘The intersection of trade and the environment: an examination of the impact of the TBT Agreement on ecolabeling programs’ (1997) 17 Virginia Environmental Law Journal 51 at 74); as establishing an alternative definition of a standard, so that measures which specify non-product-related PPM requirements for terminology, symbols, packaging, marking or the labelling of products may be considered to be standards for the purposes of the agreement (Bartenhagen, 1997, at 74; Ward, 1997, above at n 35, at 143); or clarifying that terminology, symbols, packaging, marking or labelling requirements may be considered to be standards, even if they are partly based on non-product-related PPM criteria. That is, if a standard is partly designed to address product-related PPM criteria and partly designed to address non-product-related PPM criteria, then the whole scheme is nevertheless covered by the rules on standards. Ward considers this a 'more practical' interpretation of the second sentence of the definition of standards. Ward, 1997, above at n 35, at 143.
38 See at n 24, above.
39 The definition states that the relevant document need not only lay down 'product characteristics', but also rules and guidelines for products or related processes and production methods. This widens the scope for standards specifying non-product-related PPM criteria to be covered by the TBT Agreement.
40 A result similar to this has been forwarded by Bartenhagen, 1997, above at n 37 at 80. He has suggested that the term 'like product'-be interpreted in such a way that eco-labels be viewed "as a part of
Summary

It is unclear whether the definition of a standard in the TBT Agreement applies to documents establishing non-product-related PPM-based criteria. There is arguably more scope for standards specifying such criteria to be covered. Voluntary eco-labelling programmes are now becoming increasingly popular. One form of label assessing products according to their environmental impact during their life-cycle. This assessment may be based on both product-related as well as non-product-related PPM-based criteria, and has raised the issue of whether such labels are regulated by the TBT Agreement. If the definition of a standard in the TBT Agreement is interpreted so that documents which employ non-product-related PPM criteria fall outside its scope, then, notwithstanding some views to the contrary, standards employing such measures go unregulated by the TBT Agreement. Given that the second sentence of the definition expressly applies to labels, and the recent comments of the Appellate Body in European Communities – Asbestos, it is likely that eco-labelling programmes which affect how a product is identified, presented or will appear in the market place will be considered to fall within the scope of the agreement, whether or not they address non-product-related criteria.

The substantive obligations of the TBT Agreement and their effect on non-product-related PPM requirements

Since the TBT Agreement may discipline certain non-product-related PPM-based trade measures, particularly eco-labelling programmes, it is pertinent to examine how their use by domestic regulatory authorities and others is constrained by the substantive obligations of the agreement. This section seeks to do so.

---

the product, similar to the packaging or content of the product”. This would allow ‘like’ products to be compared, even if the factors used to assign the label to the product would be based on non-product-related PPM criteria. The label would pass MFN and national treatment scrutiny if it gave equality of treatment to domestic and imported products.
Disciplines on Technical regulations

Most-Favoured-Nation and National Treatment: implications for PPM-based trade measures

Article 2.1 of the TBT Agreement establishes the basic most-favoured-nation and national treatment obligations which Members must observe when applying technical regulations. Members must ensure that technical regulations are applied so that imported products are treated no less favourably than ‘like products’ of national origin, or ‘like products’ originating in any other country.\(^{41}\)

We saw in Chapter 3 that in relation to Articles I and III of the General Agreement, where the most-favoured-nation and national treatment obligations occur, the term ‘like product’ has generally been interpreted to exclude non-product-related PPM criteria as a basis for comparison. We also saw that there were good reasons to differentiate between impact-based PPM measures assessing the environmental impact of production and other non-product-related PPM-based measures, such as country-based PPM measures and producer-based PPM measures, where the characteristics of the country of export or producer are respectively assessed. While the term ‘like product’ in the TBT Agreement may be interpreted in a manner similar to that found in the General Agreement, if the definition of a technical regulation does include non-product-related PPM-based trade measures, then it is possibly arguable that the term ‘like product’ allows for a comparison of products on the basis of their non-product-related PPM criteria. This is perhaps more so in the case of impact-based PPM criteria which are capable of objective assessment.

---

\(^{41}\) It is likely that the term ‘no less favourable’ in Article 2.1 of the TBT Agreement would be interpreted in a manner similar to that in Article III:4 of the General Agreement, that is, that a panel would look to see whether there existed an “effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products” United States – Gasoline at para 6.10 referring to United States – Section 337, at para 5.11.
If the term ‘like product’ in Article 2.1 allows products to be compared on the basis of non-product-related PPM criteria, then physically similar or identical products may be considered to be ‘not like’ and be treated differently. If the term ‘like product’ does not allow products to be compared on the basis of non-product-related PPM criteria, then technical regulations which apply such criteria to products will be seen to differentiate between products in a manner which contravenes either most-favoured-nation treatment or national treatment contra Article 2.1. For example, if a measure specifies mandatory non-product-related PPM product requirements (such as an upper limit for carbon emissions), only those products which meet the requirements will be allowed entry to the market. Clearly, those products will receive treatment more favourable than products denied entry.

In the case of eco-labels, a measure which specifies mandatory non-product-related PPM labelling requirements may be implemented to prevent the sale of a product unless the product meets the standards of, and bears, a particular label. Alternatively, the measure may require information as to the production history of the product be displayed on the label, without specifying what the production process should entail. This type of label provides information to consumers, allowing them scope to make a more informed choice about the product. Schemes which condition the sale of a product on it bearing a particular label are more properly regarded as establishing product requirements, the labelling aspect of the scheme being merely incidental. Schemes which require the product to display certain information, for example, the method or materials used to produce the product, arguably provide an equality of treatment to all products and do not offend against the obligations of most-favoured-nation treatment and national treatment. All products are assessed according to the same criteria, and no product is denied market access based on the outcome of the assessment. Not all labels are created equal, however. The scheme may require the products to display information which plays to consumer prejudices, or stigmatises it in the eyes of the consumer. This is so even if the information is objectively accurate.

---

42 Appleton, 1997, above at n 5, at 115.
43 Thus, in Commission v. United Kingdom & Northern Ireland, Case 207/83, 1985 E.C.R. 1201, the ECJ found that the requirement that certain products bear a “clear and legible” (at 1201 3) mark of their national origin was non-discriminatory in form only. The requirement allowed British consumers to act...
In this instance, it may be open to a panel to find that the label affords treatment which is less favourable. The purpose of the TBT Agreement is to prevent Members from enacting technical regulations which are unfairly prejudicial, and it is appropriate that their use is curtailed. However, since eco-labels are one of the least trade restrictive of measures available, it is important that the term ‘no less favourable’ in Article 2.1 is not interpreted so restrictively so as to compromise a Member’s ability to use them to promote sustainability through trade.

Unnecessary obstacles to international trade

Article 2.2 of the TBT Agreement requires Members to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This Article establishes both an ‘aims’ test as well as an ‘effects’ test. That is, even if a measure does not create an unnecessary obstacle to international trade, if it was prepared ‘with a view to’ doing so, it would appear to be in breach of Article 2.2.

As discussed in Chapter 4, Article XX(b) of the General Agreement allows Members to introduce measures which are necessary to protect human, animal or plant life or health. The ‘necessary’ test in Article XX(b) establishes a ‘least GATT-inconsistent’ test. Article 2.2 of the TBT Agreement establishes a ‘least trade restrictive’ test, which can be thought of as the practical equivalent of the legal ‘least GATT-inconsistent’ test. The Article 2.2 test is, however, arguably a more moderate test than that found in Article XX(b) as it does not focus solely on the ‘least trade restrictive’ element. Article 2.2 specifies that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” The phrase ‘taking account of the risks non-fulfilment would create’ prejudicially against foreign goods, so had “the effect of slowing down economic interpenetration in the Community”, (at 1201 17) contra Article 30 of the Treaty of Rome.

44 Note also that the measure might impose so many information requirements that it becomes burdensome to comply with. In this case the measure might be considered to constitute an unnecessary obstacle to international trade, see text accompanying nn 45-48, below.
seems to allow Members to weigh risks against each other, and appears to provide scope for Members to take a precautionary approach when implementing measures.\footnote{We noted in Chapter 4 that Esty argues that a ‘least trade restrictive’ test “could work as an efficiency precept, forcing attention to the means chosen to pursue environmental goals, without threatening the goals chosen”, but that “Unfortunately, the GATT jurisprudence has developed without regard to this ends-means distinction” Esty, D., \emph{Greening the GATT: Trade, Environment and the Future} (1994), at 48, note 15. To ask a panel to make a decision as to whether the means chosen to pursue environmental goals was appropriate to the goals themselves would invest it with considerable discretion, with the potential to significantly curtail Member discretion. Adopting such an interpretation would not be recommended. Appleton suggests that the phrase ‘taking account of the risks non-fulfilment would create’ “may still be a proportionality requirement, despite the deletion of a footnote in an earlier draft of the \emph{WTO Agreement} which established this point”. He also agrees that there is some scope for precautionary action allowed by this phrase. Appleton, 1997, above at n 5, at 113.} Relevant factors to be taken into account when assessing risks include “available scientific and technical information, related processing technology or intended end uses of products”.\footnote{Note however the of relevant factors is not exhaustive, and potentially allows non-product-related PPM criteria to be taken into account when assessing risks. For example, assuming the \emph{TBT Agreement} allowed products to be compared on the basis of their life-cycle impact, a factor relevant to technical regulations implementing the comparison would be the processing technology used to produce the products in question.} These factors would be most relevant to product-based technical regulations and product-related PPM-based technical regulations. For example, a technical regulation might specify that a particular process be employed when manufacturing a product because, whereas the use of a particular processing technology might result in a safe product, a ‘related processing technology’ might result in an unsafe product. Note however that the list of relevant factors is not exhaustive, and \emph{potentially} allows non-product-related PPM criteria to be taken into account when assessing risks. For example, assuming the \emph{TBT Agreement} allowed products to be compared on the basis of their life-cycle impact, a factor relevant to technical regulations implementing the comparison would be the processing technology used to produce the products in question.

It its important to note that whether or not Article 2.2 of the \emph{TBT Agreement} introduces a more moderate ‘least trade restrictive’ test than the ‘necessary’ test in the \emph{General Agreement}, a measure will only be assessed in relation to Article XX(b) if a violation of the \emph{General Agreement} is found, for example under Article I, III or XI; and Article XX(b) is invoked by the defendant.

In contrast, Article 2.2 of the \emph{TBT Agreement} applies \emph{irrespective} of whether a finding of discrimination under Article 2.1 has been made. As pointed out by Appleton, the
national treatment obligation in Article III of the *General Agreement* provides Members with a "broad leeway to enact non-discriminatory domestic laws and regulations in furtherance of domestic policy goals." Article 2.2 of the *TBT Agreement* considerably limits this freedom, imposing a 'necessary' requirement on all domestic regulatory measures which have trade implications, including those enacted in conformity with Article III and Article I of the *General Agreement*. Depending on how strictly the necessary requirement is interpreted in the *TBT Agreement*, it has the capacity to severely limit the types of technical regulations Members may use to raise environmental standards. While this helps to buttress strong markets, it inhibits the potential for a strong environmental position to be maintained.

Article XX of the *General Agreement* categorises a number of areas in which trade measures otherwise inconsistent with the *General Agreement* are authorised. The *TBT Agreement* goes further. Article 2.2 sets out a non-exhaustive list of 'legitimate objectives' authorising certain domestic regulatory measures. The list includes national security requirements, the prevention of deceptive practices, the protection of human health and safety, and animal and plant life and health. Notably, the environment is independently listed. While the term 'the environment' is not defined, it is arguable that this includes both non-living as well as living attributes. Moreover, given that it is now established in science that to properly protect the environment, an eco-systems approach should be taken, the inclusion of the environment as a 'legitimate objective' in Article 2.2 possibly justifies an eco-systems assessment of what protection of those attributes might entail. Non-product-related PPM criteria would be relevant in this circumstance.

It is to be noted, however, that Article 2.2 differs from Article XX(b) of the *General Agreement* in that it does not appear to allow Members to derogate from the Article 2.1 most-favoured-nation and national treatment obligations. Accordingly, a measure which fulfils a legitimate objective of a Member may still be found to be in violation of

---

46 Article 2.2.
47 Appleton, 1997, above at n 5, at 111.
Article 2.1 because it either breaches the most-favoured-nation or the national treatment obligation. Non-product-related PPM-based trade measures will breach Article 2.1 unless the term ‘like product’ is interpreted to allow products to be compared on the basis of their non-product-related PPM criteria. Therefore, if, for example, a technical regulation prevented the sale of a product or awarded a product a label based on its lifecycle history, and this measure was found to fulfil a legitimate objective such as protection of the environment, the measure could still otherwise be in breach of Article 2.1 if the measure required non-product-related PPM criteria to be used as the point of comparison of products. This amounts to a very severe limitation on the types of technical regulations Members may use to raise environmental standards and develop a strong environment. Two options to remedy this deficiency may be advanced:

1. Clarify that ‘like products’ in the context of the TBT Agreement can be compared on the basis of impact-based PPM criteria (for example, to allow the results of lifecycle analysis to be taken into account); and/or

2. Include an Article XX type provision in the agreement, so that measures taken to fulfil a legitimate objective are able to discriminate between physically ‘like products’ if applied in a manner which does not amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Canada has noted the need for clarification of the disciplines of the TBT Agreement for non-product-related PPM measures in relation to eco-labelling. As it has pointed out, eco-labelling programmes are of growing importance in the market place, and increasingly, comprehensive life-cycle approaches are used in the development of eco-labelling criteria. Canada has noted that:

[i]t has been argued that non-product-related PPM-based measures are not consistent with WTO rules when these measures discriminate between “like products”, solely because the methods used to manufacture or process them are different. Such measures would be inconsistent with non-discrimination obligations of the GATT 1994 and the TBT Agreement.49

49 Communication from Canada, WT/CTE/W/21; G/TBT/W/21, 21 February 1996 at 4.
Canada has argued in response however that it would:

seem excessive to suggest that eco-labelling programmes should not be viewed as compatible with the WTO simply because one of their essential tools, the life-cycle approach, uses some components that may or may not fall within the scope of the TBT Agreement.\(^50\)

Accordingly, it recommended that “the joint CTE/CTBT consider the benefits of interpreting the scope of the TBT Agreement to cover the use of certain standards based on non-product-related PPMs.”\(^51\) It noted that the standards “would have to adhere strictly to multilaterally-agreed eco-labelling guidelines” and would:

be developed in such a way so as to be consistent with the obligations of the GATT 1994 and the TBT Agreement such as non-discrimination; national treatment; transparency and consultation; use of relevant international standards when they exist; and consideration given to available scientific and technical information.

Canada also mentioned that “[c]onsideration should also be given to equivalency of standards and mutual recognition based on a case-by-case approach” and emphasised that its proposal:

should not be interpreted as providing any scope or safe haven for the use of standards based on unilaterally-determined non-product-related PPMs that do not strictly adhere to multilaterally-agreed eco-labelling guidelines.\(^52\)

Canada’s proposal is more narrowly targeted than the amendments suggested at points 1 and 2 above. It relates only to voluntary eco-labelling programmes which adhere to multilaterally agreed eco-labelling guidelines and not to all technical regulations and standards which differentiate between products on the basis of how they have been produced. To the extent that it would lead to greater certainty as to the use of eco-labelling programmes, and would encourage the harmonisation of such programmes, Canada’s approach of developing multilaterally-agreed eco-labelling guidelines is sensible. It is also consistent with the suggestion, made in Chapter 3, that an

---

\(^{50}\) Ibid.

\(^{51}\) Ibid, at 5. The acronym ‘CTE/CTBT’ stands for the Committee on Trade and Environment and the Committee on Technical Barriers to Trade. For recent discussions on eco-labelling in the WTO, see The CTE’s List of Working Documents, WT/CTE/INF/4, 19 September 2001, which details the submissions in relation to Item 3(b) of the CTE’s work programme being the relationship between the provisions of the multilateral trading system and requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling.

\(^{52}\) Communication from Canada, WT/CTE/W/21; G/TBT/W/21, 21 February 1996 at 5.
international agreement be developed which assesses non-product-related environmental externalities by applying environmental valuation techniques as a means of distinguishing between physically ‘like’ products. Yet Canada’s proposal would address only a portion of the schemes able to be used, and the ability of Members to use otherwise non-discriminatory measures would still be significantly curtailed.

If Canada’s proposal was extended to include mandatory eco-labelling programmes, or other technical regulations specifying non-product-related PPM-based criteria, the issue of how it would impact upon the disciplines in Articles I and III of the General Agreement would have to be addressed. Would such a programme, which fell within the confines of the TBT Agreement, be then tested against the disciplines of the General Agreement? In the case of an eco-labelling scheme, for example, it is difficult to see how it would pass its ‘non-discrimination’ and ‘national treatment’ tests as, by definition, eco-labelling schemes based on a life-cycle approach have the potential to treat ‘like products’ differently. Unless those Articles were also modified to accept that ‘impact-based’ criteria were appropriate, then the eco-labelling scheme would have to be addressed.

---

53 One issue which would have to be addressed is whether the eco-labelling programme would be considered to be a measure capable of being regulated by the General Agreement. Article III of the General Agreement regulates not only measures (laws, regulations or requirements) which are mandatory in character, but also applies to conditions that an enterprise accepts in order to receive an advantage from the government. Report of the Panel in Canada – FIRA, at para 5.4ff; report of the Panel in EEC – Regulation of Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132, at para 5.21. This includes situations where the advantage consists of a benefit with respect to the conditions of importation of a product. Report of the Appellate Body in European Communities – Bananas, at para 211; report of the Panel in Canada – Automobiles, at para 10.72. Accordingly, Article III of the General Agreement would apply to a technical regulation because its is mandatory in character. It may also apply to a standard enforced by a company if there is a high level of government involvement such that the government could be characterised as conferring an advantage to the enterprise. Government regulations to prevent fraudulent claims made about a standard would not appear to meet this criterion, Report of the Panel in tuna-Dolphin I. See n 79, below.

Note that Measures which breach the rules of the General Agreement and the covered agreements are presumed to nullify or impair the benefits of other Members contra Article XXIII of the General Agreement. Article 3.8 of the DSU; Uruguayan Recourse to Article XXIII. A Member does not have to prove that the measure has caused an adverse trade effect, rather that it has caused or may cause an adverse change to the conditions of competition. The ‘Superfund’ case at para 5.19; Report of the Appellate Body in European Communities – Bananas, at para 136. See Jackson, J.H., ‘The legal meaning of a GATT dispute settlement report: some reflections’ in J H Jackson (ed), The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations (2000) 118-132, at 124; Williams, B.G., ‘Non-violation complaints in the WTO system’ in P Mengozzi (ed), International Trade Law on the 50th Anniversary of the Multilateral Trade System (1999) 675-797.

54 Note that unlike Article 2.4 of the SPS Agreement, measures which conform with the TBT Agreement are not presumed to be consistent with the relevant provisions of the General Agreement. Assessment under that agreement would therefore seem likely.
find shelter under Article XX. If this is the case, why not modify the *TBT Agreement* so that more closely reflect the disciplines of the *General Agreement*? The restriction preventing Members from using discriminatory measures affects a broader category of measures than eco-labels, and includes product-based measures, so the modification suggested at point one above (inclusion of an Article XX type provision) would seem to be more appropriate to achieve this result. This would, correspondingly, allow greater regulatory discretion to Members to implement measures to achieve sustainability through trade.

Further mechanisms which curtail domestic regulatory freedom and buttress strong markets are found in the remainder of Article 2 of the *TBT Agreement*. For example, Article 2.3 of the agreement limits Members' domestic regulatory freedom by requiring Members to monitor whether their measures remain appropriate to the circumstances. It specifies that Members may not maintain technical regulations:

> if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

Members must assess whether measures can be implemented in a less trade-restrictive manner if some change in circumstances or objectives are found. Unlike Article 5.6 of the *SPS Agreement* however, there is no requirement that the alternative measure be significantly less trade-restrictive. In a dispute situation, a complainant’s burden of proof could be satisfied by raising a *prima facie* case that the measure was not the least trade restrictive. This requirement is burdensome as the obligation to find a less trade-restrictive measure could continue until the *least* trade restrictive measure was found.\(^{55}\)

**Harmonisation of technical regulations**

Article 2.4 of the *TBT Agreement* introduces a strong harmonisation provision. Harmonisation can be beneficial for both producers and consumers. Producers benefit as it reduces the scope for different Members to impose different criteria for products,\(^{55}\)

---

potentially exposing producers to a myriad of different requirements. In the case of eco-labelling schemes, consumers benefit as there are fewer schemes with which they need to familiarise themselves with if wishing to engage in sustainable purchasing patterns. Moreover, the harmonisation of eco-labelling criteria can lead to the adoption of schemes which allow for greater product comparison. A significant criticism of current eco-labelling schemes is that consumers are faced with a range of environmental and technical information about products, but little information to compare the environmental impact of one product to another.

We saw in Chapter 6 that the *SPS Agreement* contains a strong harmonising provision. The harmonisation provision of Article 2.4 of the *TBT Agreement* is in fact stronger than that seen in the *SPS Agreement*. Under the *SPS Agreement*, Members may choose to apply SPS measures which conform to international standards, guidelines or recommendations. If they do so, such measures will be presumed to be consistent with the relevant provisions of the *SPS Agreement* and the *General Agreement*. However, Members also have an autonomous right to choose a higher level of protection than that afforded by international standards, if there is scientific justification or if a Member determines it to be appropriate in accordance with the relevant provisions of paragraphs 1-8 of Article 5 of the *SPS Agreement*. The measures reflecting this level of protection do not have to be ‘based on’ the international standards.

In contrast, Article 2.4 of the *TBT Agreement* requires Members to use existing international standards, guidelines and recommendations as a basis for their technical regulations unless such standards “would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued”. While Article 2.4 probably allows Members to implement technical regulations which achieve a higher level of protection than the relevant international standard, Members do not have the option of disregarding international standards unless they can demonstrate that they are ineffective or inappropriate for the relevant legitimate objective. How heavy a burden is involved in this task is unclear. Accordingly, Member’s domestic regulatory
authority is constrained, and the international standards, generally adopted as non-binding instruments “addressed directly to private entities”, 57 are potentially vested with an “with obligatory force and effect”, transforming them into something close to “binding norms”. 58 As noted by Wirth:

those national regulatory requirements that are not based on the output, when it exists, of ... [an international standardisation] body are therefore particularly vulnerable to challenge as unnecessary obstacles to international trade. And the sorts of governmental requirements most likely to impede international trade are those that are more rigorous than the international requirements and which may stem from a least common-denominator consensus in an industry-dominated forum. 59

Wirth therefore notes that the effect of provisions such as Article 2.4 of the TBT Agreement is that private standardising organisations become the forum for setting ceilings for environmental regulations, and that such ceilings are generally set low. Meanwhile, like the SPS Agreement, the TBT Agreement provides no mechanism for ensuring that environmental regulations do not fall below a certain minimum. 60

Under Article 2.5 of the TBT Agreement, even if a Member prepares, adopts or applies a technical regulation for one of the legitimate objectives outlined in Article 2.2 in accordance with relevant international standards, it is only rebuttably presumed not to create an unnecessary obstacle to international trade. This seems to indicate that if a prima facie case is raised to show that the obstacle to international trade which the technical regulation creates is unnecessary, then the Member who has prepared,

---

56 Article 2.6 of the TBT Agreement encourages Members to participate in international standardising organisations developing relevant technical regulations, and Article 2.7 encourages the mutual recognition of technical regulations.
58 See comments made by the Appellate Body in relation to the Panel’s interpretation of Article 3.1 of the SPS Agreement in the report of the Appellate Body in European Communities – Hormones, at para 165.
59 Wirth, 1997, above at n 57, at 350.
60 Note, however that Wirth considers that this part of the TBT Agreement allows Members greater regulatory flexibility than that under the SPS Agreement because there exists a “much broader range of” objectives considered as legitimate, and, unlike under the SPS Agreement, “national regulations that are more stringent or rigorous than comparable international standards need not meet a scientific test.” Wirth, D.A., ‘The role of science in the Uruguay Round and NAFTA trade disciplines’ (1994) 27 Cornell International Law Journal 817, at 829. While the SPS Agreement does require either scientific justification or a risk assessment which takes into account economic and trade impact aspects, I would argue that it is a harder task to prove something is ineffective or inappropriate than to provide scientific justification for an alternative.
adopted or applied the measure must defend it. In contrast, Article 3.3 of the *SPS Agreement* states that:

> Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be *deemed to be necessary* to protect human, animal or plant life or health, and *presumed* to be consistent with the relevant provisions of this Agreement and of the GATT 1994. (emphasis added).

Accordingly, technical regulations based on international standards are somewhat more susceptible to attack than under the *SPS Agreement*. That is, consistency with the *SPS Agreement* and the *General Agreement* is presumed, although admittedly, a complainant would only have to show a *prima facie* case that a violation occurred to require a Member to defend its measure.

Articles 2.9 and 2.10 of the *TBT Agreement* set out the applicable procedure for when a Member decides that the relevant international standard does not exist or is not relevant. These Articles are designed to ensure that affected producers are, as far as possible, appropriately informed and the procedure for their introduction is transparent. Publication of all measures is required by Article 2.11, and Article 2.12 requires that an appropriate interval of time elapses between notification and entry into force of the measure to allow producers to be able to adjust their products or methods of production to the technical regulations as specified.

It is to be noted that Article 2.12 does not appear to draw a distinction between product-related and non-product-related PPMs. Reading the definition of a technical regulation in context with Article 2.12 possibly shifts the balance of interpretation more towards a view that the definition of a technical regulation includes measures specifying non-product-related PPM criteria as well as product-related PPM criteria. It is also arguable, however, that no distinction is drawn between product-related and non-product-related PPMs in Article 2.12 because the definition of a technical regulation makes such a distinction irrelevant.
Basing measures on product requirements

Article 2.8 of the TBT Agreement states “Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.” A weaker version of this Article was included in the Standards Code, the object being to encourage (rather than require) Members to apply product requirements in such a fashion that they allowed producers the maximum amount of flexibility in meeting them. Middleton explains that:

[product requirements] expressed in terms of end objectives (i.e. performance) [means that] the producer is free to develop his own design specifications; if detailed design requirements are imposed, not only does the manufacturer lose his design freedom but the regulation or standard can have a discriminatory effect in that it reflects exclusively national manufacturing practices.

The requirement to base measures on performance characteristics wherever possible encourages technical regulations which are less trade restrictive. Furthermore, technical regulations which focus on the design of a product may also stray into PPM aspects, including non-product-related PPM aspects of the design. Directing product requirements to be specified in terms of performance characteristics reduces the opportunity for this to occur.

Regulatory constraints on local government and non-governmental bodies

The TBT Agreement extends its disciplines not only to situations where technical regulations are applied by Members, but also where they are applied by local government and non-governmental bodies. In a federalist system, environmental laws are commonly applied at the state, provincial or local level, or through statutory authorities or NGO initiatives. The TBT Agreement establishes that Members cannot

61 This is also the case in Article 13 of the SPS Agreement. That Article points out that “Members are fully responsible under this Agreement for the observance of all obligations set forth herein”, thus clarifying that Members cannot escape the disciplines of the agreement by having their sub-federal entities enforce quarantine and health and safety regulations on their behalf. Compare Article 13 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 Which does not refer to NGOs, merely that “Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be
avoid its disciplines merely by delegating to other bodies the authority to implement technical regulations.

Article 3.1 of the *TBT Agreement* requires Members to take “such reasonable measures as may be made available to them to ensure compliance by such bodies with the provisions of Article 2”. Moreover, the agreement states that:

3.4 Members shall not take measures which require or encourage local Government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.62

For the purposes of the *TBT Agreement*, a local government body is a:

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

A Non-governmental body is a:

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation. (emphasis added)

Since technical regulations are mandatory, the body applying such a measure must have some authority to be able to enforce it. Bodies which have been vested with some regulatory authority by a Member would clearly fall within this category, but would it also cover supermarket chains or NGOs which, for example, require their suppliers to produce goods in a specific manner? Supermarket chains might have contracts with such suppliers and would be able to ‘enforce’ agreements by way of contract. Would the ability to bring such an action be considered to be ‘legal power to enforce a technical regulation’?

---

62 Similar requirements are made in Article 13 of the *SPS Agreement*. 

available to it to ensure such observance by regional and local governments and authorities within its territory.”
It is unlikely that such a reading would be sustained as it places a very heavy burden on Members to monitor the conduct of such entities which fall within their jurisdiction.\textsuperscript{63} It is more likely that the concept of a mandatory requirement which a body has the ‘legal power’ to enforce would be interpreted to mean something other than the ability of a private entity to bring a private law action to enforce, for example, a contract. Article 3.5 would then only operate to prevent governmental bodies from delegating their authority to sub-federal entities or NGOs to introduce technical regulations which would otherwise result in the Member being in breach of the \textit{TBT Agreement}.

The obligation on the Member to ensure the removal of such measures is also unclear. For example, does the requirement that Members take “such reasonable measures as may be made available to them to ensure compliance by such bodies with the provisions of Article”\textsuperscript{64} require them to pass laws to constrain local government and non-governmental bodies which apply technical regulations from acting inconsistently with the \textit{TBT Agreement} disciplines? In \textit{Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies},\textsuperscript{65} the Panel recalled:

the last sentence of the Note Ad Article III:1 [of the \textit{General Agreement}], ... indicated that the term “reasonable measures” could be interpreted to permit the elimination of inconsistent measures “gradually over a transition period, if abrupt action would create serious administrative and financial difficulties”.

\textit{Canada Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies}.

It found in that case that although the CONTRACTING PARTIES had requested Canada in 1988 to bring certain practices into conformity with the \textit{General Agreement}, six years later it still had not done so. The Panel accordingly found that Canada had “not made serious, persistent and convincing efforts to secure elimination of ...[its non-}

\textsuperscript{63} This is supported by the international law principle of \textit{in dubio mitius}. As the Appellate Body explained in \textit{European Communities – Hormones}, “The principle of \textit{in dubio mitius} applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.” At para 165 note 154, quoting Jennings, R. and A. Watts, \textit{Oppenheim’s International Law} (9th ed, 1992), at 1278. See also Lennard, M., ‘Navigating by the stars: predicting the Appellate Body’s approach to interpreting China’s accession protocol’ (Paper presented at \textit{China and the WTO Conference}, Australian National University, Canberra, 17 March 2001), at 20-21, noting reservations in the use of this principle as an interpretive approach.

\textsuperscript{64} Article 3.1 of the \textit{TBT Agreement}.

conforming practices] and that it had not taken all the reasonable measures as might be available to it to ensure observance [of the relevant authorities].

Given that this decision was made in the context of the General Agreement, and during the GATT regime, it must be treated with some caution. It does indicate, however, that Members would have some time and latitude to use non-regulatory measures to bring the actions of local government and non-governmental bodies into conformity with the obligations of the agreement. The Member remains fully responsible for the observance of all provisions of Article 2, so they would be liable at international law for any technical regulation which was inconsistent with that Article and the DSB may authorise the suspension of concessions or other obligations equivalent to the level of nullification or impairment.

Disciplines on Standards

Article 4 of the TBT Agreement deals with standards. It disciplines Members in the preparation, adoption and application of voluntary measures introduced by central government standardising bodies, local government and non-governmental standardising bodies within their territory, and regional standardising bodies of which they or one or more bodies within their territories are members.

A Code of Good Practice for the Preparation, Adoption and Application of Standards ('Code of Good Practice' or 'Code') is established in Annex 3 of the TBT Agreement. The Code sets out a number of obligations regarding the preparation, adoption and application of standards, and is open to acceptance by any standardising body within

66 At para 5.39. The case of Australia – Salmon, may provide guidance on this issue. In its Bilateral Settlement of the dispute with Canada, Australia has undertaken to "adhere to its obligations under Article 13 of the SPS Agreement, including formulating and implementing positive measures and mechanisms in support of the observance of the provisions of the SPS Agreement by other than central government bodies, including Tasmania".

At http://www.dfat.gov.au/trade/negotiations/environment/salmon1.html. So far Australia has only entered into consultations with Tasmania and has not passed inconsistent legislation.

67 Article 22 of the DSU.

68 See Appendix A.
the territory of a Member. This includes central, local and non-governmental bodies, as well as certain governmental and non-governmental regional standardising bodies. If any standardising body accepts or withdraws from the Code, it must notify this fact to the ISO/IEC Information Centre in Geneva.

The Code deals with issues such as requiring standardising bodies to accord national treatment and most-favoured-nation treatment to like products with respect to standards, and to ensuring that standards do not present unnecessary obstacles to international trade. It also covers issues such as transparency and the harmonisation of international standards.

Acceptance and compliance with the Code is mandatory for central governmental standardising bodies. Article 4.1 of the TBT Agreement requires Members to ensure that their central government standardising bodies accept and comply with the Code. Therefore, Members must pass the appropriate laws and regulations, or have in place the appropriate administrative procedures, to ensure that this is done. Their regulatory authority to introduce high standards is accordingly constrained.

It is unclear, however, to what extent the TBT Agreement requires Members to direct relevant local government, non-governmental and regional standardising bodies to accept and comply with the Code. The provisions of Article 4 in relation to standards mirror those of Article 3 in relation to technical regulations. Article 4.1 requires Members to take such reasonable measures as may be available to them to ensure that local government and non-governmental standardising bodies within their territory, as well as relevant regional standardising bodies, accept and comply with the Code. It also specifies that Members may not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardising bodies to act in a manner inconsistent with the Code. While it remains unclear how interventionist a Member must be to secure the compliance of standardising bodies within their territory with the Code, certainly it seems to be a Member’s interest to be interventionist. Article 4 establishes that the obligations of Members with respect to the compliance of standardising bodies to the Code remain, irrespective of whether such standardising bodies has accepted the Code, and Article 14.4 of the TBT Agreement, while drafted

350
somewhat ambiguously, seems to suggest that Members are fully responsible for the actions of standardising bodies within their territory.69

The structure of Articles 3.1 and 4.1 and 14.4 of the TBT Agreement is such that Members are increasingly encouraged to monitor and constrain the conduct of non-state actors within their territory. Note however that such non-state actors had only a peripheral ability to participate in the negotiations of the agreement and have only an indirect ability to influence any legal arguments concerning the application of the Article should it become the subject of a dispute. Their ability to participate in the trade and environment dynamic is, accordingly, compromised.

Standards based on non-product-related PPM criteria

The ‘like product’ issue arises in the Code of Good Practice in respect of voluntary standards. Paragraph D of the Code is similar to Article 2.1 of the TBT Agreement, requiring that with regards to standards, standardising bodies accord most-favoured-nation and national treatment to like products.

As in the case of Article 2.1, whether Paragraph D allows products to be compared on the basis of non-product-related PPM criteria is unclear. If the definition of a standard includes non-product-related PPM-based trade measures, then it is arguable that the term ‘like product’ more clearly allows for a comparison of products on the basis of their non-product-related PPM criteria. This is particularly so in the case of impact-based PPM criteria capable of objective assessment.

If the term ‘like product’ in Paragraph D allows products to be compared on the basis of non-product-related PPM criteria, then any standard which specifies such criteria must

69 Article 14.4 states “In this respect, such results shall be equivalent to those as if the body in question were a Member”. Note, however, that action may only be taken by another Member if it considers the defendant “has not achieved satisfactory results” in encouraging or ensuring that the relevant standardising bodies accept and comply with the Code of Good Practice and their trade interests are significantly affected”. Appleton considers, correctly, that “the use of the phrase ‘significantly affected’ suggest that more than a showing of nullification or impairment of obligations may be required” to bring a successful action. Appleton, 1997, above at n 5, at 132.
be applied in conformity with the most-favoured-nation and national treatment obligations of that Paragraph. If the term ‘like product’ does not allow products to be compared on the basis of non-product-related PPM criteria, then standards employing such criteria to specify product requirements will treat physically similar or identical products differently. In this case, imported products may not receive most-favoured-nation treatment or national treatment, in violation of Paragraph D. The standard may, however, allow products to display an environmental label or make a claim about a product, this being based on non-product-related PPM criteria. It is arguable that in this instance the standards afford ‘like products’ an equality of treatment in the same way that technical regulations do, outlined above.\(^70\) In this case, no violation of Paragraph D occurs. A serious situation would arise if the opposing view was taken. If standards specifying non-product-related PPM labelling criteria are regarded as treating ‘like products’ differently in contravention of most-favoured-nation and national treatment principles, and if a strict approach to the interpretation of ‘reasonable measures’ were taken, not only would Members be constrained from using such eco-labelling schemes to encourage consumers to make environmentally more sustainable purchases, they might very well be required to prevent other bodies, including private non-governmental entities such as NGOs or supermarket chains, from implementing such schemes.\(^71\) For similar reasons to those stated above in relation to technical regulations, such an interpretation would be highly unlikely. It would expose the TBT Agreement as one which benefited strong markets at the expense of the environment, and would probably unleash such a storm of protest against the WTO that the agreement would have to be rewritten.

---

\(^70\) See text accompanying nn 41-44.

\(^71\) As noted by Ward, “eco-labelling schemes challenge traditional distinctions between the ‘public’ and ‘private’ spheres. Absence of government involvement in the administration of eco-labelling schemes need not signify absence of government concern.” She suggests that “[t]he desire to protect its voluntary, non-governmental scheme, for example, may have affected the US position [and others] in the CTE deliberations on eco-labelling.” Ward, 1997, above at n 35, at 146. This is likely to continue.
Harmonisation of standards

The Code of Good Practice applies similar requirements in relation to the use of international standards for preparing voluntary domestic standards as Article 2 of the TBT Agreement does for the preparation of technical regulations. Where relevant international standards do not exist however, the Code possibly makes it more difficult for standardising bodies to prepare, adopt or apply standards which might create an obstacle to international trade. Both Article 2 of the TBT Agreement and Paragraph E of the Code prohibit the preparation, adoption or application of technical regulations or standards with a view to, or with the effect of, creating unnecessary obstacles to international trade. Article 2 of the TBT Agreement indicates that for this purpose a measure may not be more trade restrictive than necessary to fulfil a legitimate objective. In contrast, the Code does not indicate what would amount to an 'unnecessary obstacle' to international trade, nor does it mention 'legitimate objectives'. While the definition of what constitutes an 'unnecessary' obstacle to international trade for the purposes of Paragraph E could be determined with reference to Article 2 of the TBT Agreement, it is arguable that the failure to identify legitimate objectives for the purpose of the Code could create problems for standardising bodies wishing to introduce measures in the absence of international standards on the subject-matter.

---

72 Article F, Code of Good Practice and Article 2.4 of the TBT Agreement. Query whether the ISO 14000 management standard constitutes an international standard for the purposes of the TBT Agreement. Rather than setting out product requirements or processing requirements for internationally traded products, the criteria according to which technical regulations and standards are judged, they establish guidelines for Environmental management systems according to which producers should operate. At most, they can be considered to be producer-based PPMs. Developing countries have expressed concern, however, that ISO 14000 will become a barrier to trade if companies, or WTO Members, require producers to comply with the standard in order to gain entry to a market or receive advantages within the market place. The status of the standard will require clarification if made compulsory by Members. Murray, P., 'The international environmental management standard, ISO 14 000: a non-tariff barrier or a step to an emerging global environmental policy?' (1997) 18 University of Pennsylvania Journal of International Economic Law 557, at 580, 608, notes 19 and 187.

Even if a strict view of what constitutes an unnecessary obstacle to international trade is taken in respect to Paragraph D of the Code, voluntary eco-labelling programmes which use a life-cycle analysis (which may include non-product-related PPM-based criteria) may not necessarily be classified as ‘unnecessary’. As noted by Appleton:

because of their voluntary nature, the standards utilized in eco-labelling schemes do not, in themselves, create obstacles to international trade. Unlike trade regulations, eco-labelling standards do not in any way legally restrict the sale of unlabelled products. Unlabelled products have equal access to markets and are often more attractive than labelled products from a price perspective. Given that such schemes are not mandatory, that there is no de jure trade restriction, and generally no government coercion to participate in such schemes, it is difficult to imagine a panel ruling that the standards used in voluntary eco-labelling schemes are more trade restrictive than necessary to fulfil a legitimate objective.74

Indeed, as Appleton goes on to explain:

Such a determination would be tantamount to ruling that consumers cannot be provided information that would permit them to discern and purchase environmentally superior products.75

It is possible, however, that if an international standard which establishes eco-labelling criteria for a particular product exists or is imminent, then the latitude for a standardizing body to implement their own eco-labelling programme is somewhat curtailed by the Code. Given the propensity for international standards to reflect the ‘lowest-common denominator’ view, this is worrisome.

Paragraph F of the Code, like Article 2.4 of the TBT Agreement, requires domestic standardising bodies to use international standards where they exist or their completion is imminent as a basis for their own standards unless “such international standards or relevant parts would be ineffective or inappropriate, for instance, because of ... fundamental climatic or geographical factors Or fundamental technological problems.” Additionally, Paragraph F allows standardising bodies to deviate from using the international standards when such standards would provide “an insufficient level of

74 Appleton, 1997, above at n 5, at 128-129. Compare Tietje, who considers that voluntary eco-labelling schemes arguably do not fulfil a ‘legitimate objective’ per the TBT Agreement and are as such an unnecessary obstacle to international trade. Tietje, 1995, above at n 73, at 135-136. Tietje’s view is criticised by Appleton who is, in my view, correct. Compare also the situation for government mandated standards which use non-product-related PPM criteria. Given the greater amount of government involvement, these may more easily be considered to be trade restrictive.

75 Appleton, 1997, above at n 5, at 129, note 206.
protection”. Arguably, this addition means that Paragraph F provides more discretion to standardising bodies than Article 2.4 provides to Members, but it is unclear to what extent a panel would defer to the decision of a standardising body when determining whether the international standard provided an “insufficient level of protection”. Unlike the SPS Agreement, there appears to be no provision in the TBT Agreement whereby domestic standardising bodies are authorised to choose their own level of protection. Accordingly, Paragraph F has the potential to be interpreted in a manner which constrains governmental entities, and possibly also private entities, in their attempts to introduce measures to support a strong environment.76

Conformity with Technical Regulations and Standards

In addition to regulating the preparation, adoption and application of technical regulations and standards, the TBT Agreement also disciplines conformity assessment procedures conducted by central government bodies as well as by local government and the non-governmental bodies.

As the name suggests, conformity assessment procedures are a means of ensuring that products comply with the technical regulations and standards as specified by the relevant body.77 Article 6 of the TBT Agreement requires Members to endeavour to recognise the conformity assessment procedures of other Members if Members are “satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures”. If satisfied, they may enter into mutual recognition agreements (MRAs) recognising each others’ procedures. MRAs do not necessarily require Members to alter the level of their technical regulations or standards in any way, merely to recognise that the testing procedures of conformity assessment bodies located in the other country meet their own requirements.

76 On balance, I would agree with Wirth, at n 60 above, that because Paragraph F does not require a science based test, that the constraint on such bodies is less than that in the SPS Agreement. It is also far less than the constraint that occurs in Article 2.4 of the TBT Agreement.
77 Conformity assessment procedures are defined in Annex 1 of the TBT Agreement. See in Appendix A.
The domestic regulatory authority of Members is constrained to the extent that if conformity assessment procedures are conducted by central government bodies, Article 5.1.1 of the *TBT Agreement* requires that like products be accorded both most-favoured-nation and national treatment, and are not "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade" (Article 5.1.2). Where relevant guides or recommendations which have been issued by international standardising bodies exist or their completion is imminent, Members are required by Article 5.4 to ensure that their central government standardising bodies use them as a basis for their conformity assessment procedures except where they are inappropriate for the Members concerned. The protection of the environment and protection of human health or safety and animal or plant life or health are recognised as grounds upon which the use of international standards may be considered inappropriate.78

Local government and non-governmental bodies are also affected by this section of the *TBT Agreement*. Articles 7 and 8 require Members to take 'reasonable measures' to ensure, with the exception of notification requirements, compliance by such bodies with the provisions of Articles 5 and 6, and refrain from taking measures which require or encourage local government bodies within their territory from acting in a manner inconsistent with the provisions of Articles 5 and 6. Accordingly, local government and non-governmental bodies are discouraged from introducing measures which impede conformity assessment procedures for foreign products.

**Conclusion**

The terms of the *TBT Agreement* contain aspects of Articles I, III and XX of the *General Agreement*. Yet while it has now been made clear that states may use non-product-related PPM-based trade measures in limited circumstances to implement

78 Members are also encouraged to formulate and adopt international systems for conformity assessment and to become Members of such systems. To the extent that such systems comply with Articles 5 and 6

356
stronger environmental principles, it is unclear whether this is the case for the TBT Agreement. This Chapter attempted to interpret the TBT Agreement to determine the scope of its application, whether technical regulations and standards cover non-product-related PPM-based trade measures, and whether such measures may be found to be consistent with that agreement.

Technical regulations which specify non-product-related PPM product requirements are probably not disciplined by the TBT Agreement. Standards which specify non-product-related PPM product requirements may fall within the agreement’s scope. Although this result may seem perverse, note that such technical regulations are nevertheless subject to the requirements of the General Agreement, whereas, unless they have a significant degree of government involvement, standards are not. Labelling schemes which are based on non-product-related PPM are likely to be disciplined by the TBT Agreement. This is so whether the scheme is mandatory or voluntary. Labelling schemes which employ non-product-related PPM criteria to differentiate between physically similar or identical products are not necessarily inconsistent with the agreement. In particular, schemes which operate to provide information to allow consumers to make more informed purchasing decisions, and do not place restrictions on the sale of the item, may be consistent with the TBT Agreement. They must, however, be based on the relevant international standards where they exist, and not create either an unnecessary obstacle to international trade or accord treatment less of the TBT Agreement, Members are required to ensure that their central government bodies comply with such systems.

Standards are voluntary measures, that is, the product does not have to comply with the standard to obtain market access. As noted above, the General Agreement, and Articles I and III in particular, applies to measures which are mandatory in character, although it also applies to conditions that an enterprise must accept in order to receive an advantage from the government. Report of the Panel in Report of the Panel in Canada – FIRA, at para 5.44f; report of the Panel in EEC – Regulation of Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132, at para 5.21; report of the Appellate Body in European Communities – Bananas, at para 211; report of the Panel in Canada – Automobiles, at para 10.73. See n 53, above. Tuna-Dolphin I considered the situation where government legislation prohibited products from making a claim or bearing a label that tuna products were ‘dolphin safe’ unless they met certain requirements. The Panel found that this legislation did not restrict the sale of tuna products in the US, as they could be sold whether or not they bore the label. Moreover, the Panel did not consider that the US legislation established conditions that an enterprise must accept in order to receive an advantage from the government, as any advantage resulting from access to the label depended on the free choice of consumers to give preference to products bearing the label. Report of the Panel at para 5.42. Although the Tuna-Dolphin I report remains unadopted, it provides some indication of how this issue might be handled in future cases.
favourable in contravention of the principles of most-favoured-nation and national treatment.

In addition to exploring whether the TBT Agreement applies to non-product-related PPM-based trade measures, this Chapter has also explored more generally the constraint placed on domestic regulatory authorities and private entities wishing to implement measures to protect the environment. It noted that the TBT Agreement recognises that the protection of human, animal and plant life and health and the environment are 'legitimate objectives'. Nevertheless, the TBT Agreement provides no mechanism to ensure that low environmental health and safety standards are raised; and has a very strong harmonisation provision requiring technical regulations and standards to be based on international standards where they exist or are imminent. Such standards often represent only the 'lowest common denominator' position which countries are able to agree on by consensus. Moreover, the agreement appears to be stricter than the General Agreement in that Members and others are prevented from derogating from the obligations of most-favoured-nation and national treatment, even if this is to protect recognised legitimate objectives, such as the environment.

Accordingly, of all the covered agreements discussed in this thesis, the TBT Agreement places the strongest constraint on the domestic regulatory authority of Members and the highest substantive hurdles for measures to be enacted. While highly protective of strong markets, it seems to pay only lip service to the protection of the environment. Moreover, to the extent that it may limit the use of eco-labelling schemes based on a life-cycle approach to encourage sustainable consumption habits in consumers and promote sustainable development, it represents the greatest impediment to private actors (such as consumers, businesses and non-governmental entities) entering into the trade and environment dynamic. The uncertain application of the TBT Agreement to non-product-related PPM-based measures means, at best, that Members do not implement or support labelling campaigns to make consumers more conscious as to the impact of their purchasing decisions. At worst it means that Members actively discourage NGOs and others from initiating such measures. Accordingly, rather than allowing the environment to be strengthened through trade, the agreement potentially block states and disenfranchises private entities and consumers seeking to build such
synergistic relationships. Of all the covered agreements considered in this thesis, it is in most need of clarification and revision. Non-governmental entities might adopt this as a major platform when seeking to influence the next round of international trade negotiations.
Signs of Convergence: Trade, Environment and the Law of the WTO

In the early 1990s, the world trading system came under siege with certain elements of the environmental community decrying the GATT and its narrowly economistic views. It told of the threat the GATT posed to the global environment and to the progress in environmental protection to that point. Environmentalists began to question the very legitimacy of the GATT. Many of their concerns were inaccurate or exaggerated, yet it nonetheless became an attractive cause for many because the ‘trade and environment debate’ tapped into more generalised fears about the consequences of globalisation.

The crisis in confidence as to the direction of the world trading system and its future impact on the environment was triggered by the Tuna-Dolphin disputes, where US attempts to encourage the more sustainable harvesting of tuna were found to be incompatible with GATT rules. In the early to mid-1990s, most trade bureaucrats wanted a GATT whose commitment to a strong trade regime was not weakened by environmental constraints. In contrast, environmentalists wanted strong (sanctionable) environmental commitments that were not weakened by the globalisation of trade. In the Tuna-Dolphin decisions, trade bureaucrats scored an undisputed victory. Yet these decisions were read as having wider implications for states wishing to have strong national regulations to protect consumers and the environment, for the GATT was now seen to be an instrument capable of unduly weakening those laws. Many now feared that health and safety standards, working conditions, jobs, sovereignty, and democracy would also be at risk, subject to the growing might of transnational corporate power.

A decade on, fears about the consequences of globalisation have deepened, public support for economic globalisation is waning, and protectionist sentiments appear to be on the increase. Moreover, the WTO, which has replaced the GATT, has become a flash-point for social activism. Watching the reports of protest marches and riots at the Seattle Ministerial and successive international trade and economic gatherings, one
would be forgiven for thinking that the crisis in confidence in the world trading system had deepened, as had the trade and environment divide. Strident views are easily captured on camera, and these meetings are as much a publicity stunt for direct action groups as they are indicative of community concerns as to the path of globalisation. Nevertheless, the difficulty that nations face when moving to higher environmental standards remains a pivotal concern for mainstream and radical elements of the environmental community. Similarly, the constraint that world trade rules are seen to place on nations attempting to influence the production, processing or harvesting of imported goods so that their consumers do not contribute to further world-wide environmental decline is also controversial. A major strand of concern is the view that the WTO undermines the discretion and ability of Members to implement environmental laws and policies, and stands in the way of high environmental standards. It is this strand that has served as the focal point of the foregoing analysis.

One aspect of this is the concern that the WTO Agreement and the covered agreements, and in particular the General Agreement, do not allow Members to distinguish between products on the basis of how they are made. That is, they preclude Members from using non-product-related PPM-based trade measures\(^1\) to ban or otherwise hinder the entry of products which are physically harmless but which have been made in a manner harmful to the environment. This has considerable implications for the ability of Members to encourage or promote sustainable production and consumption patterns among their consumers and achieve sustainability through trade.

By tracing the outcomes of successive cases in the GATT and WTO regimes, this thesis has shown that contrary to the impression created by the protestors, the cause for this concern has, at least in the legal sense, diminished since the establishment of the WTO.\(^2\) This result is primarily due to the emphasis the WTO Appellate Body has

---

1 It will be recalled that non-product-related PPM-based trade measures are measures which target the methods of processing and producing products, despite the consumption or use of the product posing no direct threat to that state’s domestic environment.

2 Note, however, that the global economic community is, by in large, committed to the principles of free trade, so the process of global deregulation will continue to place pressure on environmental standards. Thus, even though the WTO rules are now understood to provide greater latitude to embrace higher environmental process standards, we are unlikely to see a rapid movement by states to take advantage of that latitude.
placed on the rule of law in the interpretation of the *WTO Agreement* and the covered agreements, and its interpretation of the text. In particular, Article XX of the *General Agreement* has now been interpreted according to its ordinary meaning, in context, and allows Members to introduce domestic regulatory measures to distinguish between products on the basis of how they are made.

Another aspect of the critics' concern is that the *WTO Agreement* and the covered agreements discourage Members from choosing high environmental standards by establishing substantive and procedural hurdles with which Members must contend. We have seen that Members must indeed contend with considerable substantive and procedural hurdles to be able to maintain high environmental standards. These requirements have been discussed in relation to the *General Agreement*, the *TBT Agreement* and the *SPS Agreement*.

The new interpretative approach of the Appellate Body has substantially moderated the disciplines of Article XX(g) and possibly Article XX(b) of the *General Agreement*. It has thus allowed a greater range of measures to find shelter within those disciplines. Meanwhile, a test developed during the GATT regime which provided panels with greater latitude to approve discriminatory environmental measures under Article III of the *General Agreement* has been ruled out.

In the case of sanitary and phytosanitary standards and technical standards, the new *TBT Agreement* and *SPS Agreement* impose strong harmonisation and other provisions which Members must meet to justify measures implementing environmental standards higher than or different to those currently advocated by the relevant international standardising body. Such justification can be a complicated and expensive process, having a chilling effect on the movement to adopt higher environmental standards. The threat of a WTO challenge can also have a chilling effect. Certainly the ambiguity in the legality of non-product-related PPM-based trade measures applied to protect the environment has meant that states have discarded many proposals to use such measures.

While the best approach to achieving sustainable trade is the internalisation of environmental costs at their source (the 'Polluter Pays Principle'), whether this be at the
point of production or consumption, in reality this does not always occur. Industry is unlikely to internalise costs unless there is either a regulatory or economic incentive to do so, and appropriate governmental policy may be lacking.

Another, less optimal approach, is to utilise the international trade regime to integrate environmental costs not previously included. A means of retaining the overall benefit of the international trading regime yet improving environmental standards over time is to allow for mechanisms in the trading system to strengthen national attempts to improve environmental standards. A central mechanism is to allow some latitude for Members to set high environmental standards so that strong or leader nation states can exert an upwards ‘pull’ on environmental standards and ‘lock-in’ those standards at the domestic level in such a manner that they become widespread. Product standards and process standards both have a role to play. The use of PPM-based trade measures, and in particular non-product-related PPM-based trade measures, is, however, one of the most contested issues in the trade and environment ‘debate’ and one which has created a log-jam for many years.

For the past decade, calls to use the trading regime to strengthen environmental standards have been vigorously opposed by many states, particularly developing countries. North-South tensions on this issue have been felt among the trading and environmental community alike. Calls to ‘green’ world trade rules are often seen by developing countries as no more than a protectionist ruse to exclude developing world exports from the markets of the developed world, just as they are beginning to become successful players.\(^3\) Moves to use non-product-related PPM-based trade measures have been seen as an invasion of sovereignty, or eco-imperialism, where the ability of nations to choose their own environmental standards and priorities for environmental protection has been usurped by the dictates of the importer. Such views ignore the fact

\(3\) For example, the Malaysian Minister of the Environment, Minister Rafidah Aziz, said during the Uruguay Round that environmental matters “are now clearly being used to promote protectionist motives, particularly to keep out imports from countries which have a better competitive edge and comparative advantage”. Third World Network, ‘After the Uruguay Round’ (1994) May Third World Resurgence. See also Esty, D., ‘An environmental perspective on Seattle’ (2000) 3 Journal of International Economic Law 176, who argues that developing world views have probably hardened against moves to ‘green’ world trade in the light of thousands of environmental protestors being seen walking arm in arm with protectionists at the Seattle Ministerial.
that the exporter remains at liberty to adapt to changed conditions or sell the goods to another party, even though there can often be a high cost associated with the adaptation of production facilities and some difficulty in finding alternative markets.

Another concern for developing countries is that environmental PPM standards may represent just the thin edge of the wedge. Even if it is accepted that such standards are justifiable on the basis that the importing nation is ultimately protecting its own environmental health and security, how soon would it be before similar labour standards could be used? Such standards would present an insurmountable hurdle for developing countries if they were to continue to participate in international trade, for it would undercut one of their most critical aspects of comparative advantage.

Developing country concerns cannot go unattended. They are essential players in both the international trade regime and in the international system designed to promote environmental protection. Moreover, the consent based nature of international law means that their participation in the development of rules and the genuine acceptance and implementation of those rules is essential to the cohesive continuance of an international trade regime where trade and environmental policies are mutually supportive. Much work remains to be done on developing country concerns and strategies for allaying such concerns has been left for others.

In examining the development of the law of the WTO in relation to the trade and environment nexus, this thesis has analysed the extent to which the WTO Agreement and its annexes allow domestic regulatory measures to improve environmental standards to flourish. The strong-trade weak-environment position, reflected by a commitment to a strong trade regime not weakened by environmental constraints, was emphatically rejected, as was a strong-environment weak-trade position. The reasons for this choice were canvassed in Chapter 2. What we have sought to discover is whether the WTO Agreement and the covered agreements are capable of supporting a regime that is strong on environment and strong on trade, one which includes checks and balances to moderate the method and level of choice of standards to encourage fairness and greater acceptance of such standards within the system. In analysing the relevant jurisprudence of the GATT and WTO regimes, we have seen that a strong-
trade-strong-environment jurisprudence has slowly begun to emerge at the WTO. I have argued that the rule of law has played an important part in achieving this win-win result. A shift from a norm of strong trade diplomacy to a clarification of legal principles that simultaneously accommodate trade and environmental concerns has been at the heart of the regime transformation we have traversed.

The development of this jurisprudence was outlined in Chapters 3 to 6. Chapters 3 to 5 focused on the General Agreement; Chapter 6 on the SPS Agreement, Chapter 7 on the TBT Agreement. Since there has been a dearth of cases concerning the TBT Agreement, Chapter 7 speculated on how it might be interpreted.

Chapter 3 discussed the relevant case law surrounding two of the core obligations of the multilateral trading system: the obligations of 'most-favoured-nation' and 'national treatment' expressed in Articles I and III of the General Agreement. These obligations rely on the concept of 'like product' which is used as a litmus test to determine whether domestic regulatory measures are permissible. We saw in Chapter 3 that a number of domestic regulatory measures exist which are capable of differentiating between products on the basis of their PPMs. Country-based and origin-neutral measures were identified, as were producer-based PPM measures and impact-based PPM measures. It was suggested that from a policy perspective, measures designed to target specific and serious environmental harms were preferable to those targeting harms of a relatively minor nature, and that origin-neutral impact-based PPM measures were preferable. Such measures focus on how the product is made rather than on who makes the product, so they can be designed only to target those products which exhibit relevant negative environmental attributes. Moreover, if based on the environmental impact of the product during its life-cycle, they are significantly more amenable to being assessed according to the 'inherently objective criteria' searched for by the Panel in United States – Gasoline. We noted that a number of valuation methodologies are now being recognised as acceptable means of assessing the lifecycle history of products, but that the field could benefit from internationally-agreed criteria or valuation methodologies which could be used to compare physically alike or identical products.
Chapter 3 argued that origin-neutral impact-based PPM measures could encourage sustainable development and promote a strong environment by balancing the principles of development through trade and sustainability through trade, for example by encouraging more sustainable consumption habits in consumers. Yet, in tracing the law relating to ‘like products’, we saw that successive GATT and WTO panels rejected the use of non-product-related PPM criteria as a basis for distinguishing between ‘like products’. Panels have generally been required to rule on either country-based or producer-based measures, not impact-based measures. We saw that current jurisprudence arguably provides some latitude to accept that objectively assessable non-product-related PPM criteria (such a product’s lifecycle history) are a legitimate means for distinguishing between otherwise physically alike or identical products. This relies on a generous reading of current jurisprudence, however, so it is an approach which traditionally conservative panels are unlikely to take. Accordingly, we concluded that the present interpretation of the ‘like product’ concept substantially confines domestic regulatory freedom and so limits space for national democracies to implement environmental policy and influence sustainable consumption habits among their consumers. Instead, the interpretation of the ‘like product’ concept buttresses a ‘strong trade’ regime.

Chapter 4 then discussed the use of Article XX of the General Agreement to excuse behaviour otherwise inconsistent with the General Agreement, tracing the use and interpretation of the ‘environmental exceptions’ during the GATT years. We saw that most of the measures considered satisfied protectionist goals and were ‘rightly’ rejected. We also saw, however, that steeped in a culture of diplomacy rather than adherence to the rule of law, panels seemed to go out of their way to interpret Article XX restrictively. National discretion to implement measures to protect the environment was significantly curtailed, and the rules were interpreted so as to buttress a ‘strong trade’ regime. This further entrenched a ‘strong-trade weak-environment’ position.
While in Chapter 3 we saw some attempt by panels to find latitude in the rules to examine the rationality of domestic regulatory categories, Chapter 4 showed that there was little evidence of this behaviour in relation to Article XX of the General Agreement. The ensuing loss of flexibility and space for national democracies to implement environmental policy and influence sustainable consumption habits among their consumers led to a wave of criticism against the GATT, the liberalisation of trade and the liberal economic paradigm. This is a criticism which radical elements of civil society sustain to this day.

The creation of the WTO, and particularly the creation of the Appellate Body of the WTO, led to a dramatic change in the observance of law in the WTO dispute settlement system, opportunities for democratic deliberation on how to accomplish green and free trade, and balance in trade and environment positions so that a strong-trade-strong-environment position might begin to emerge. These dramatic changes in the jurisprudence of the WTO were traced in Chapter 5. Analysis of the first case considered by the Appellate Body, United States – Gasoline, showed the establishment of the supremacy of the rule of law and the new interpretative approach to Article XX. For the first time Article XX was seen as being able to accord some space to states to implement environmental policy in support of a strong environment. These moves were then confirmed by the Appellate Body in United States – Shrimp, where it became clear that Article XX could support domestic regulatory measures based on non-product-related PPM criteria, and by the Panel in United States – Shrimp (Recourse to Article 21.5), where such a measure has now been authorised. Moreover, the Appellate Body allowed the participation of NGOs in the dispute settlement system, opening the way for actors other than states to be better heard in the resolution of trade and environment conflicts.

Chapter 3 discussed that the 'like product' concept can be a very blunt instrument to sort through domestic regulatory measures which serve justifiable domestic policy goals without a protectionist effect. Recognising these limitations, some panels in the later years of the GATT regime began to examine measures in terms of their aim or effect, finding products were not 'like' unless the measure afforded protection to domestic production. While this approach allows panels considerable discretion to examine the rationality of domestic regulatory categories, it is difficult to reconcile with the language of the Article. Through the observance of law and its application of well established international law principles of treaty interpretation, we saw this approach overruled by the Appellate Body of the WTO.
One of the new covered agreements concluded during the Uruguay Round was the SPS Agreement, the subject of Chapter 6. The agreement regulates Members’ ability to maintain nondiscriminatory SPS standards to ensure consumer and environmental health. As discussed in Chapter 6, the agreement introduces significant substantive and procedural hurdles for Members maintaining such standards, requiring that measures not be maintained without sufficient scientific evidence and, unless they conform to relevant international standards, be based on an assessment of the risks. Furthermore, the agreement introduced the goal of consistency, so that if a measure results in a level of protection different to that found in comparable situations, it will be tested to see whether that distinction results in discrimination or a disguised restriction on international trade. The SPS Agreement differs from the General Agreement in that it clearly articulates that provisional (or precautionary) measures may be taken by Members to protect consumer health and safety and their domestic environment, and it mitigates the severity of the necessary test of Article XX(b) by requiring that the technical and economic feasibility, availability and effectiveness of alternate measures must be taken into account when finding a measure is more trade-restrictive than required. Furthermore, the text makes no distinction between the legality of product-related and non-product-related PPM measures, nor has the suggestion yet been made in the dispute settlement context that such a distinction be made. Chapter 6 analysed the first three cases to have raised the SPS Agreement at the WTO. It showed that while the agreement does allow Members a reasonably wide margin of discretion to balance a strong trade and a strong environment position based on science, the Appellate Body’s tightening observance of the rule of law in the interpretation of that agreement has been central to ensuring the maintenance of that balance. Moreover, while Members are free to choose their own appropriate level of protection, their assessment of risk and choice of measures to implement that level of protection will not be blithely accepted by a panel in the event of a dispute, rather it will be rigorously assessed with the assistance of experts.

The final agreement, discussed in Chapter 7, was the TBT Agreement. As we saw, this agreement regulates Members’ use of technical standards and regulations to govern issues such as eco-labelling and product safety requirements. Although the agreement is one of the few covered agreements which makes specific reference to the
environment, Chapter 7 concluded that it is highly protective of strong markets and seems to pay only lip service to the protection of the environment. Of the covered agreements discussed in this thesis, it seems to place the most stringent constraint on the domestic regulatory authority of Members and on private actors seeking to build synergistic relationships to allow the environment to be strengthened through trade. Chapter 7 pointed out that a significant and unresolved issue associated with the *TBT Agreement* is whether or not non-product-related PPM-based trade measures are regulated by the agreement. It suggested modification of the agreement to:

1) Include an Article XX-type provision, so that measures taken to fulfil a legitimate objective are able to be discriminatory if applied in a manner which does not amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade; and/or

2) Clarify that ‘like products’ can be compared on the basis of impact-based PPM criteria (eg, to allow the results of lifecycle analysis to be taken into account).

Either or both of these amendments would clarify the PPMs issue and enable a better balance of ‘strong trade’ and ‘strong environment’ positions to develop. The amendment proposed at point 1 would probably achieve this result on its own, and is preferable in that it allows the structure of the *TBT Agreement* to reflect more closely that of the *General Agreement*.

By analysing the jurisprudence of the WTO emanating from the high profile and closely observed cases, this thesis has shown that, problems with the *TBT Agreement* aside, the basis for considering that the WTO is unable to balance trade and environmental concerns is diminishing. This has been evidenced in a number of ways:

- We have witnessed that Article XX is not hollow but will support national regulatory action to improve domestic and global environmental conservation if that action is properly and fairly applied and implemented. 

---

5 Report of the Panel in European Communities – Asbestos. Moreover, in European Communities – Hormones, the Appellate Body has confirmed that the *SPS Agreement*, which elaborates Article XX(b) of
• The legacy of the *Tuna/Dolphin* years have been swept away, with *United States–Shrimp* clarifying that Members can indeed maintain non-product-related PPM-based trade measures to help protect the global environment if such measures are applied in a fair and even-handed way and a genuine attempt to negotiate a multilateral solution is made.\(^8\)

• The significance of the concept of sustainable development to the interpretation of the *WTO Agreement* and covered agreements has been firmly emphasised by the Appellate Body of the WTO. Specific reference is made to “the objective of sustainable development” in the Preamble to the *WTO Agreement*, which, the Appellate Body has held, “shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.”\(^9\) The Appellate Body has stated that the objective of sustainable development “must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*.”\(^10\) We can accordingly expect to see its effect as these agreements receive further interpretation.\(^11\)

• Precautionary action to protect the environment has been recognised as a legitimate regulatory action within the context of the *SPS Agreement*. From the Panel and Appellate Body decisions in *European Communities–Hormones*, we have learnt its application is not limited to cases where scientific evidence is insufficient to justify a measure. The principle or approach can also influence the whole process by which a Member may choose to maintain a measure, including the level at which such a measure may be maintained. Accordingly, a Member can maintain a very

---

the *General Agreement*, accords Members the autonomous right to choose their appropriate level of sanitary and phytosanitary protection, albeit that right is subject to certain qualifications. See Chapter 6 at text accompanying n 72.


\(^7\) See Chapter 5, text accompanying nn 197, 250, 262-275, and 286.

\(^8\) Report of the Appellate Body in *United States – Gasoline* and in *United States – Shrimp*. See Chapter 4, n 78, and Chapter 5 at text accompanying nn 251ff.


conservative approach to environmental and consumer health risks, as long as this is done on a consistent basis. Being an aspect in which sustainable development finds more specific expression, we would expect that the General Agreement and the TBT Agreement would also be interpreted to accommodate regulatory action of a precautionary nature.\textsuperscript{12}

- The quality of information to make decisions on environmental matters has improved, with WTO panels regularly consulting experts in disputes involving environmental and technical questions.\textsuperscript{13} Arguably this has improved the quality of decision-making on environmental matters.

While it has not been a phenomenon we have systematically investigated empirically, we can also note that:

- The possibilities for democratic deliberation in the WTO have been expanded. Sustainable development emphasises the importance of democratic deliberation to reaching cooperative solutions and, notwithstanding the oftentimes vociferous objections made by Members, we have generally seen a gradual expansion of such possibilities with the dispute settlement system beginning to accommodate the notion of NGO participation in the resolution of disputes. Only lately in \textit{European Communities – Asbestos}, have we have seen some retreat from such opportunities

\textsuperscript{11} See Chapter 5, text accompanying nn 277-281.

\textsuperscript{12} See Chapter 6, text accompanying nn 134-168. The precautionary principle has not yet been explicitly considered in relation to cases raising the \textit{General Agreement} or the \textit{TBT Agreement}. It is arguable, however, that both Article XX(g) and XX(b) would sustain action precautionary in nature. Article XX(b) imposes a ‘necessary’ test, and as the Appellate Body stated “We consider that a ‘necessary’ measure is, in this continuum, located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’. In contrast, Article XX(g) only requires measures to be ‘related to’ the conservation of natural resources. It is arguable that the need for action and the magnitude or urgency of the environmental harm may be somewhat reduced in relation to Article XX(g), and that accordingly, that Article may provide more flexibility to Members to implement precautionary action. See Chapter 5, text accompanying nn 194, 292.

In relation to the \textit{TBT Agreement}, precautionary action would appear to be authorised pursuant to Article 2.2, but note the limitation which Article 2.1 places on measures available to implement a precautionary approach. See Chapter 7, text accompanying n 45ff.

\textsuperscript{13} See, for example, the Report of the Panel in \textit{United States – Shrimp, European Communities – Asbestos, European Communities – Hormones, Australia – Salmon, and Japan – Agriculture}. Indeed, the only such dispute in which a panel has not referred to experts was the first, \textit{United States – Gasoline}. See Chapter 6, text accompanying nn 45 and 55. But note reservations associated with the use of experts at Chapter 5, n 157, and Chapter 6, text accompanying n 59.
actually being made available. ¹⁴ This aspect of the system requires continued monitoring.

- Transparency or openness in the system has also expanded, with most documents, including panel and Appellate Body decisions, being published relatively quickly and freely on the internet. ¹⁵

We can therefore conclude that there has been a considerable convergence in the trade and environment ‘debate’ within the dispute resolution process since the inception of the WTO. The reasons for this could be attributed to a number of factors:

- a shift in perception of the institutional rationale from one of maximising global trade to one of maximising global welfare – and a recognition that this cannot be done if environmental issues are overlooked;

- the decision that interpreting the text of the *WTO Agreement* and the covered agreements to allow recognition of environmental issues such as the use of process standards and the precautionary principle would not have a significant impact of the behaviour of states or global economic welfare, but would benefit environmental welfare, and appease some environmental critics. (More cynically, it would also quell some critical voices);

- the concern that criticism of the WTO was becoming so strident as to destabilise the organisation so that some concessions to the environment had to be made, including the recognition that criticisms made by the more radical elements of the NGO community were being adopted by the more mainstream elements in the community;

- the work done by more mainstream environmental and other NGOs such as the Foundation for International Environmental Law and Development, the Global Environment and Trade Study, the Royal Institute for International Affairs, the WWF, the International Institute for Sustainable Development, and the International Centre for Trade and Sustainable Development to build bridges between the trade

---

¹⁴ See Chapter 2, n 198, above.
¹⁵ See Chapter 2, text accompanying nn 199-200.
and environmental communities and open a constructive dialogue with members of
the WTO Secretariat;
• the work done by the WTO Secretariat to also improve the dialogue;
• the work done by academics across a range of disciplines to inform, and provide
content to the debate; and
• the role of the panels, and more particularly, the members of the Appellate Body in
providing an interpretation of the WTO Agreement and the covered agreements
consistent with the text of the agreements and the rule of law.

It is the influence of the Appellate Body on the process of convergence which has been
a primary focus of this thesis. It has been my contention that rather than weakening
national attempts to improve environmental standards, the work of the Appellate Body
has resulted in a considerable strengthening of national abilities to make such attempts.
Furthermore, the Appellate Body's interpretation of the WTO Agreement and the
covered agreements has enhanced the scope for democratic participation in the
settlement of disputes. This has also enabled some convergence in the trade and
environment debate. The scope for democratic participation has increased. Non-state
actors now have the ability to make submissions on points of fact, policy and law to the
tribunal hearing the dispute, with at least some prospect of them being taken into
account. The ability of governments to use outside counsel, given the appropriate
accreditation, has also considerably improved the relative power of developing
countries when participating in dispute settlement.

Of course it is the text of the WTO Agreement and its annexes which ultimately govern,
and constrain, the extent to which national attempts to improve environmental standards
are permitted. Jurisprudential trends have an important influence on how such texts are
interpreted, and Panel and Appellate Body decisions which have been adopted by the
DSB do not have precedential value. This provides some justification for the concern
that any ground that has been made in respect of increasing the scope for national
attempts to improve environmental standards to be made could be eroded over time, for example by a change in membership of the Appellate Body.\(^\text{16}\)

It is, however, apparent that while there is no doctrine of *stare decisis* in the WTO, considerable reliance is placed on previous adopted decisions by panels and the Appellate Body alike.\(^\text{17}\) The consistency of the Appellate Body’s interpretative approach is assisted by their collegiate approach. That is, all Appellate Body members meet in Geneva when considering an Appellate Body report, not just those members who have been assigned to the case.\(^\text{18}\) Moreover, sovereign autonomy has now become the common concern of many citizens worried about the impact of globalisation on their lives, and not just the concern of national governments interested in protecting their sovereign preserve.\(^\text{19}\) It is likely that an erosion of national authority to improve environmental standards would be vigorously protested. Even so, Members must maintain vigilance to ensure that interpretations of WTO rules which do provide sufficient flexibility to Members to use domestic regulatory measures to support objectives consistent with the principles of sustainable development are not undermined either in dispute settlement fora or in the meetings of the WTO where interpretations


\(^{19}\) Some argue, however, that governments are now only too pleased to surrender much of their power to multinational corporations and their interest in protecting their sovereignty is becoming considerably more limited.
may be established or the rules may be changed. Domestic lawmakers should also be conscious that they are not interpreting WTO rules too cautiously, therefore letting opportunities for environmental protection slip by when action is needed.

One Direction Forward

This thesis began by examining the theories of international trade and of the environment which influence the trade and environment debate. From this, it distilled a set of guiding principles. These were crafted as a theoretical and practical commitment to a strong environment and strong markets, a commitment to development and sustainability through trade, and a commitment to the rule of law.

Using these principles, we examined three of the major agreements of the WTO to determine the constraints they place on Members to raise environmental standards. Further, we analysed all of the cases under both the GATT and the WTO regimes relevant to determining the scope allowed to Members to use non-product-related PPM-based trade measures to raise domestic and global environmental standards.

It was determined that such standards can be categorised in a number of ways. Country-based and origin-neutral measures are one such classification, with ‘producer-based’ and ‘impact-based’ PPM measures being a subset of origin-neutral measures. It was argued that ‘impact-based’ PPM measures were best suited to targeting environmental harm without creating undesirable side-effects, yet an examination of the case law showed that these measures had never been used. Instead, PPM measures were either ‘producer-based’ or country-based measures were used, carrying with them a greater potential for undesirable side effects and protectionist abuse. Thus, this thesis demonstrated that while it was generally considered that GATT case law tended to indicate that non-product PPM-based trade measures could not be used to address

---

20 In particular, at the meetings of the DSB, the Ministerial Conference and the General Council. The composition and functions of these bodies are explained at Chapter 2, n 194, above.
environmental problems, those cases provided no guide on whether the most closely tailored of measures – impact-based PPMs – could be used.

The Appellate Body of the WTO has now clarified that non-product-related PPM-based trade measures can now be maintained by Members to encourage sustainable consumption patterns among their citizens, and a subsequent Panel authorised such a measure. That measure was an impact-based PPM.

The use of trade measures to ameliorate environmental problems carries with it a number of disadvantages. One aspect of this is their unilateral nature, more likely to provoke a hostile, rather than cooperative response to resolving the environmental problem. Another aspect is their general lack of precision in addressing the source of environmental harm, and their potential to create negative redistribute side effects, particularly for developing countries. A third aspect is their tendency to target environmental harm on an ad hoc basis, capable of being influenced as much by which domestic lobbies have ascendancy as a serious need for action. Moreover, while Members could previously point to the General Agreement or others of the covered agreements as constraining their use, their ability to do so now is more limited.

One way of dealing with the problem is to negotiate a 'PPMs Agreement' to formalise their use. While the idea of a PPMs Agreement has generally been viewed as beneficial by the environmental community, within the trade community it has had little acceptance as it has been viewed as a way of making the use of PPM measures permissible. Now that the Appellate Body has opened the way for such measures to be used, it is likely that the trade community will begin to see such an agreement as beneficial if it serves to bring order to their use. Being one of new generation of WTO Agreements, and generally protective of trade interests, it is possible that the SPS Agreement would be suggested as a model for such an agreement.

In examining the regulatory constraints which the General Agreement, the SPS Agreement and the TBT Agreement place on Members in relation to the use of non-product-related PPM measures and environmental measures in general, this thesis provides a comprehensive basis upon which to draft the text of a PPMs Agreement.
Such an agreement should provide a balance of regulatory flexibility to implement PPM-based trade measures and control on protectionist behaviour so that a strong-trade-strong-environment position can be maintained. Some vital elements of such an agreement are:

- Products should only be distinguished on the basis of inherently objective criteria.
  Preferably, these criteria should be agreed in an instrument establishing acceptable approaches to environmental valuation methodologies.\(^{21}\)
- Measures should be science-based and evidence-based;\(^{22}\)
- The environmental harm must be sufficiently serious to warrant action;\(^{23}\)
- In order to ensure that PPM measures are of global concern, the need for a measure should be adjudged not just according to domestic criteria, but by an independent panel of scientific experts, an organisation such as UNEP, or an environmental advocate;\(^{24}\)

---

\(^{21}\) See Chapter 3, text accompanying nn 30, 101-103, 200-202. This requirement is similar to that in the SPS Agreement, where measures must be based on an assessment of the risks, (Article 5.1, see Chapter 6, text accompanying nn 87ff). Similarly, a PPMs Agreement could require an assessment (eg, an Environmental Impact Assessment) of the environmental impact of certain production processes based on the inherently objective criteria, and require measures to be based on that assessment.

\(^{22}\) This requirement is a corollary of the first point. For the same reason that the SPS Agreement requires measures to be science-based, this requirement would ensure that measures are used to address genuine environmental problems rather than serve ends motivated largely by protectionist concerns. See Chapter 6, text accompanying nn 63-66 and 69ff for discussion of the SPS Agreement's requirement that measures be based on scientific principles (Article 2.2 and 3.3 of the SPS Agreement). See also Chapter 6, n 174. Note also Wirth's concerns in relation to overly intrusive reviews of such measures by courts, at Chapter 6, nn 37-38.

\(^{23}\) See Chapter 2, text accompanying n 134, and Chapter 3, text accompanying n 30. This requirement is consistent with the threshold for harm required for state responsibility for environmental harm and the precautionary principle which speaks of threats of serious or irreversible damage. It is also inherent in Esty's reformulation of Article XX, where he establishes a test of 'environmental legitimacy', at Chapter 4, text accompanying nn 133-138.

\(^{24}\) Calls for the use of an environmental advocate (Chapter 2, text accompanying n 116) and an alternative institution such as an environmental organisation to adjudicate trade and environment disputes (Chapter 1, text accompanying nn 25-26) tend to arise because of commentators' scepticism as to the institutional capacity of the WTO to balance trade and environmental issues appropriately. The WTO is not institutionally equipped to judge on the environmental legitimacy of measures. It is also possibly inappropriate to leave Members as the sole arbitrators of when they consider an environmental harm to be sufficiently serious to warrant action, as this encourages the use of measures to serve domestic trade agendas. Esty suggests that presence of multilateral agreement on the subject or environmental injury to the country imposing trade measures (Chapter 4, text accompanying n 135) provides an objective basis for determining the environmental legitimacy of an action. There may, however, be environmental problems which do not fit these criteria, for example multilateral agreement on the subject matter has not yet been reached, or the parties to the treaty is small and the subject matter is not generally regarded as a high environmental priority. For this reason, an independent body with environmental expertise, capable of making an objective assessment of the matter, would be the appropriate body to determine the environmental legitimacy of taking action. It should be responsive not only to situations which pose a
• The design of measures should be appropriate to the environmental harm. Measures should be adapted to suit the urgency and magnitude of the environmental harm, and be based on the principle of cost internalisation. The words of the chapeau of Article XX offer sufficient flexibility to achieve these results, and should be included.

• Distinction should be drawn between impact-based PPM measures, producer-based PPM measures and country-based PPM measures. Measures should be origin-neutral and impact-based to the greatest possible extent. Impact-based PPM measures can be more closely adapted to suit the environmental harm by being

clear and imminent threat, but also sizeable but more distant risks which are recognised by qualified and respected opinion. See Chapter 6, text accompanying n 104, above.

25 On measures to suit the urgency and magnitude of the environmental harm, see Chapter 3, text accompanying n 30, and Chapter 4, text accompanying nn 136-143. On cost internalisation, see Chapter 2, text accompanying nn 46-47, 52-53, 130-131. Note that a distinction should be made between measures designed primarily to protect an importing state’s competitiveness, and one genuinely designed to ameliorate an environmental harm. Howse, R. and M.J. Trebilcock, ‘The fair trade-free trade debate: trade, labour, and the environment’ (1996) 16 International Review of Law and Economics 61. It is arguable that measures designed primarily to protect an importing state’s competitiveness would amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade, contra Article XX. See, for example, Brack, D., ‘Energy tax, border tax adjustments and the multilateral trading system’ (Paper presented at Institute for Environmental Studies (IVM) International Workshop on Market-Based Instruments and International Trade, Amsterdam, 19 March 1998), at 11, see Chapter 3, n 118, above. This is particularly so if any funds collected are not put towards the amelioration of the environmental harm the duty is designed to address. In contrast, if the measures, for example a border tax adjustment or countervailing duty, included a mechanism which refunded some or all of the duties to the country from which it was collected to be put towards environmental cleanup or improvements, then the process of cost internalisation would be assisted and would mitigate the view that the measure was an arbitrary or unjustifiable discrimination or a disguised restrictions on international trade. See Chapter 2, n 59.

26 See Chapter 3, text accompanying nn 515-522, Chapter 5, text accompanying n 266, and Chapter 5 generally. It may be appropriate to include a rule that measures must be proportionate to the environmental harm, or not clearly disproportionate to the environmental harm (see Esty at Chapter 4, text accompanying n 133). It would be too easy to spark a negative resurgence of the trade and environment ‘debate’ by allowing the support of policies with only trivial environmental outcomes where the trade effect of such support is large. Moreover, this would run counter to the overall goal of trade liberalisation, recognised in this thesis as an important momentum for the international community to maintain.

Proportionality is a key concept used in the legal systems of, for example, the EU and, to some extent, Australia, to judge measures taken to serve environmental goals. Trachtman, J.P., ‘Trade and ... problems, cost-benefit analysis and subsidiarity’ (1998) 32 European Journal of International Law 37; Ziegler, A.R., Trade and Environmental Law in the European Community (1996); Geradin, D., ‘Balancing free trade and environmental protection - the interplay between the European Court of Justice and the Community Legislator’ in J Cameron, P Demaret and D Geradin (eds), Trade & the Environment: The Search for Balance (1996) 204-241. It is arguable that the chapeau of Article XX’s requirement that measures not be a disguised restriction on international trade includes a requirement that measures not be disproportionate to the environmental harm. Note, however, that the implementation of the principle as a separate principle in a PPMs Agreement would lead to further domestic regulatory constraints on the lawmakering capacity of Members. Accordingly, its inclusion as a separate principle would need to be treated with caution (see Chapter 4, text accompanying nn 139-142).

targeted to only those products which exhibit relevant negative environmental attributes. This limits the scope for the occurrence of negative redistributive side effects. If based on the environmental impact of the product during its life-cycle, they are more amenable to being assessed according to ‘inherently objective criteria’.* The burden of proof on Members to demonstrate the propriety of implementing a PPM-based trade measure should increase according to whether an impact-based, producer-based or country-based is used.

- The measure should be adjudged more according to Article XX(g) criteria than Article XX(b) criteria;  
- Measures designed to implement an MEA, or achieve a goal of an MEA (such as halting the decline of sea-turtles), should be *prima facie* allowed;  
- Measures should be based on international standards, guidelines or recommendations, where they exist.  

30 Measures which comply with an international standard, guideline or recommendation of an accredited organisation, or offer equivalent protection to the environment, should be *prima facie* allowed.  

---

29 The test in subparagraph (b) or (g) would provide only the initial mechanism for sorting measures capable of addressing environmental harms. Words such as those in the chapeau of Article XX would also be important. The ‘necessary’ test in Article XX(b) establishes a ‘least GATT-inconsistent’ test, whereas the test in Article XX(g) only requires that a ‘substantial relationship’ exist between the measure and conservation goal of the whole of legislation (see Chapter 4, text accompanying nn 22-23). As such, subparagraph (g) provides greater regulatory flexibility for Members to design measures appropriate to the environmental harm (see Chapter 5, text accompanying n 287). It therefore more desirable. Note that this flexibility is balanced against the supervision by an external authority to determine if the environmental harm is sufficiently serious to warrant action. See n 24, above.  
30 See Chapter 4, nn 2, 135, 144, and Chapter 5, n 191 and accompanying text. The legal ambiguity associated with the use of trade clauses in MEAs is sometimes used as an excuse to stall on the negotiation of such clauses in MEAs, and potentially undermines the effectiveness of such MEAs by leaving them open to challenge by non-parties to MEAs. Moreover, as seen in *United States – Shrimp*, notwithstanding a Member is a party to an MEA, it may still challenge measures enacted to implement those obligations. Accordingly, the defending Member carries the burden of proof in showing that the measure is consistent with the *WTO Agreement*. Allowing measures designed to implement an MEA to be *prima facie* consistent with the *PPMs Agreement* would change this burden, the complainant then bearing the burden of showing why the measure is, for example, arbitrarily or unnecessarily discriminatory, a disguised restriction on international trade, or the Members approach to conservation in comparable situations is not consistently applied. See also Ward, H., *Trade Measures and Multilateral Environmental Agreements: Backwards or Forwards in the WTO?* (1996), at para 93. Compare the submission of the EC to the WTO on *Resolving the Relationship between WTO Rules and Multilateral Environmental Agreements*, 19 October 2000, WT/CTE/W/170, where the EC suggested that a reversal of the burden of proof be allowed only when the MEA specifically mandated the measure, at para 10.  
31 This reflects Article 3.1 of the *SPS Agreement*. See Chapter 6, text accompanying nn 69ff, above.  
32 Parallels to this provision, which encourages the harmonisation of standards, are found in Article 3.2 and 3.3 of the *SPS Agreement* and Article 2.4 of the *TBT Agreement*, see Chapter 6, text accompanying nn 74ff, and Chapter 7, text accompanying 56ff, above. This provision extends the shelter offered in
• Members should show that they have a sufficient commitment to ameliorating the harm. They may have a jurisdictional basis, but this would not be a necessary condition. Rather, they should show an enduring interest in ameliorating the particular environmental harm, for example by being a party to relevant MEAs or having in place other environmental policies which address similar harms.  

• Developing countries should be at least partially compensated for the introduction of such measures, whether it be by technology transfer, aid, foreign investment, etc;  

• Measures should be able to be precautionary in nature; and  

• Measures should not be more trade restrictive than necessary. Measures should not fail this test unless the proposed alternative would be ‘significantly less restrictive’ to international trade, as effective as the disputed measure, and, as a practical matter, could be implemented in sufficient time that further significant deterioration of the environment would not occur.  

• Measures should only be maintained while they are appropriate to the circumstances.

those agreements where weight is given to existing and future standards, guidelines and recommendations which establish industry standards for the production of goods. In order to limit the number of relevant standards, etc, relevant standardising bodies should be identified/accredited. An example of such an organisation is ISO. Note that although such a provision as this suggested would provide an incentive for environmentally conscious Members to negotiate relevant international PPM standards, etc, such standards would often reflect the ‘least-common-denominator’ approach. See Chapter 7, text accompanying nn 59. Arguably, this a necessary evil which is offset by the potential for PPM standards to be harmonised, and by a provision in the agreement which allows environmental standards which are too low to be challenged.  

This reflects Article 5.5 of the SPS Agreement, which encourages Members to apply an appropriate level of protection which is consistent in comparable situations (see Chapter 6, text accompanying nn 113-128). This requirement would be designed to limit the scope for use of PPM-based trade measures by Members to occasions when a Member felt deeply concerned about an environmental problem and was prepared to tackle the issue consistently across a number of policy fronts.  

See Chapter 2, text accompanying n 169, and Chapter 5, text: accompanying nn 284-286.  

This is consistent with Principle 15 of the Rio Declaration, the SPS Agreement, arguably the General Agreement and the TBT Agreement, and emerging customary international law. See Chapter 2, nn 134-137, Chapter 5, nn 194, 281, 292, Chapter 6 n 133-168, and Chapter 7, n 45 and accompanying text.  

This test is largely consistent with Article 5.6 of the SPS Agreement, see Chapter 6, text accompanying n 132 (Compare Article 2.3 of the TBT Agreement, Chapter 7, text accompanying n 55). The test also ensures that measures must be politically viable for them to be considered to be valid alternatives. See Chapter 4, n 37, above.  

This provision mirrors Article 5.6 of the SPS Agreement and Article 2.3 of the TBT Agreement. It is consistent with the ruling by the Panel in United States – Shrimp (Recourse to Article 21.5), where it found the relevant PPM measure only provisionally authorised by Article XX. See Chapter 5, n 295, above. The obligation to search for alternative replacement measures should be limited to measures which are significantly less restrictive to trade, see dot point above.
Furthermore, some provision should be made for challenging environmental standards which are too low; and NGO groups should be able to participate in the process of devising and adjudging PPM measures and environmental standards. How this should be done is a challenge for future work.

Notwithstanding the relaxation of control on the regulatory capacity of nation states which we have discussed, the ‘trade and environment debate’ has not yet been resolved. We are still searching for mechanisms to catalyse greater co-operative action on debating, and for refining, domestic and international regulatory balance. We need the elements of the existing regime which encourage unsustainable production (subsidies, protectionism) to be removed and measures to discourage unsustainable production methods to be implemented in a fair manner. The world still searches for ways to energise and empower participation of more of the relevant and interested stakeholders, and to encourage businesses and states to embrace higher environmental standards. And we would still wish to change the dynamics of the PPM issue from one of conflict and ad hoc adversarial dispute settlement to finding principled solutions through co-operation.

38 See Chapter 2, text accompanying nn 73-75, and n 32, above.

While searching for co-operative solutions, the WTO dispute settlement system can assist in finding the fine line between domestic regulatory autonomy and international regulatory control in the trade and environment context by providing clear and consistent recommendations so that outcomes of disputes are more predictable. Not only will this streamline the dispute process, it will help encourage compromises on the issues to be made earlier. This thesis has sought to clarify the positive role the WTO dispute settlement system is already beginning to play in the trade and environment context. There is no inevitability that under the current framework of WTO rules we shall see the development of an international order which provides for better environmental protection and fairer trade than we have had in the past. This depends on whether states use their domestic regulatory capacity to implement environmental standards which furnish a move to the top rather than allow the deregulatory force of the *WTO Agreement* to sustain a race to the bottom. My argument is that the history of the emerging WTO in the 1990s is one where an international rule of law has evolved which allows states greater regulatory space within which to act, and greater scope for democratic and scientific deliberation of measures for an order of better environmental protection and fairer trade to develop. This rule of law is evolving too slowly no doubt, and is politically fraught. Yet it has been an evolution we may learn from and build upon through the principles I have extracted from the experience of that decade.
APPENDIX A

The General Agreement on Tariffs and Trade

Article I:1
With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article II:1
1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.
Article III

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Note Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Note Ad Article III:2
A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Article XI: 1
No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XX
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importation or exportation of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to assure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply;

Provided that any such measures shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

The Agreement on Sanitary and Phytosanitary Measures

Paragraph 1 of Annex A:

Sanitary or phytosanitary measure – Any measure applied:

(a) To protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) To protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
(c) To protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
(d) To prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

Paragraph 5 of Annex A

Appropriate level of sanitary or phytosanitary protection – The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the “acceptable level of risk”.

Article 2.3:
Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 3:
1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[15] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

Article 5.1:
Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

Article 5.2:
In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

Article 5.3:
In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential
damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

Article 5.4:
Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

Article 5.5:
With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. ....

Article 5.6:
Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.  

---  

3 For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Article 5.7
In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent
information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

Article 11.2
In a dispute under this Agreement involving scientific or technical issues, a Panel should seek advice from experts chosen by the Panel in consultation with the parties to the dispute.

The Agreement on Technical Barriers to Trade

Article 2.2:
Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

Article 3:
3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

...
3.4 Members shall not take measures which require or encourage local Government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

Article 4:
4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the “Code of Good Practice”). They shall take such reasonable measures as may be available to them to ensure that local Government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the Principles of this Agreement.

Annex 1: Terms and their Definitions for the purpose of this Agreement

1. Technical Regulation
Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. [emphasis added]

Explanatory note
The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. Standard
Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with the terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note
The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement only deals with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. ...

3. Conformity assessment procedures
Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Explanatory note
Conformity assessment procedures include, inter alia, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

7. Local government body
Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. **Non-governmental body**

Body other than a central government body or a local government body, *including a non-governmental body which has legal power to enforce a technical regulation.* (emphasis added)

Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards (Code of Good Conduct)

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

**Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)**

Article 22

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the measure concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant
to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original Panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration. (footnote omitted)
BIBLIOGRAPHY


Agra Europe, ‘Consumer groups attacks Codex decision on hormones’, Agra Europe (London)1995


Arden-Clarke, C., The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development (1991)


Bhala, R., ‘The myth about stare decisis and international trade law (part one of a trilogy)’ (1999) 14 American University International Law Review 845


Bodansky, D., ‘Customary (and not so customary) international environmental law’ (1995) 3 Indiana Journal of Global Legal Studies 105


Brunner, A.E., ‘Conflicts between international trade and multilateral environmental agreements’ (1997) 4 Annual Survey of International & Comparative Law 74


Caldwell, L.K., ‘Concepts in development of international environmental policies’ (1973) 13 Natural Resources Journal 190

Cameron, J., ‘GATT and the environment’ in P Sands (ed), Greening International Law (1993) 100-121

Cameron, J., ‘Compliance, citizens and NGOs’ in J Cameron, J Wersman and P Roderick (eds), Improving Compliance with International Environmental Law (1996) 29-42

Cameron, J., ‘Environmental standards, trade barriers and self government’ (Speech presented to the Minerals Council of Australia 1996)


Cameron, J. and K. Campbell, ‘Challenging the boundaries of the DSU through trade and environment disputes’ in J Cameron and K Campbell (eds), Dispute Resolution in the World Trade Organisation (1998)

Cameron, J. and F. Darroch, WWF Amicus Brief to WTO Shrimp-Turtle Dispute (1997)


Carson, R., Silent Spring (1963)


Chang, S.W., ‘GATTing a green trade barrier: eco-labelling and the WTO Agreement on Technical Barriers to Trade’ (1997) 31(1) Journal of World Trade 137


400


Chamovitz, S., ‘Free trade, fair trade, green trade: defogging the debate’ (1994) 27 Cornell International Law Journal 460


Chamovitz, S., ‘The World Trade Organization, meat hormones and food safety’ (1997) 14(41) BNA International Trade Reporter 1781

Chamovitz, S., ‘WTO’s Alcoholic Beverages decision’ (1997) 6(2) Review of European Community and International Environmental Law 198

Chamovitz, S., ‘Environment and health under WTO dispute settlement’ (1998) 32 The International Lawyer 901


Coote, B., The Trade Trap (1992)


Demaret, P., ‘TREMs, multilateralism, unilateralism and the GATT’ in J Cameron, P Demaret and D Geradin (eds), *Trade & the Environment: The Search for Balance* (1996) 52-68


Eckersley, R., Environmentalism and Political Theory (1992)


Ehrlich, P., The Population Bomb (1968)

Ekins, P., Proposals for Reconciling Trade and Environmental Sustainability (1996)

Enders, A., ‘The role of the WTO in minimum standards’ in P van Dijck and G Faber (eds), Challenges to the New World Trade Organization (1996) 61-75

Enders, A., Openness and the WTO (1997)

Esty, D., Greening the GATT: Trade, Environment and the Future (1994)


Fauchald, O.K., Environmental Taxes and Trade Discrimination (1998)


Garner, R., Environmental Politics (1996)


Geradin, D., ‘Balancing free trade and environmental protection - the interplay between the European Court of Justice and the Community Legislator’ in J Cameron, P Demaret and D Geradin (eds), Trade & the Environment: The Search for Balance (1996) 204-241


Goodin, R.E., Green Political Theory (1992)


Gullett, W., ‘Environmental protection and the “precautionary principle”: a response to scientific uncertainty in environmental management’ (1997) 14(1) Environmental and Planning Law Journal 52


Hardin, G., ‘The tragedy of the commons’ (1968) 162 *Science* 1243


International Centre for Trade and Sustainable Development, ‘Codex Alimentarius: setting food safety standards for global trade’ (1999) Year 2(4) *Bridges between Trade and Sustainable Development* 1
International Centre for Trade and Sustainable Development, ‘Amicus brief storm highlights WTO’s unease with external transparency’ (2000) Year 4, No. 9 Bridges between Trade and Sustainable Development


Jackson, J.H., ‘The crumbling institutions of the liberal trade system’ (1978) 12 Journal of World Trade 93


Jiménez de Aréchaga, E., 'International law in the past third of a century’ (1978-I) Recueil des Cours 159 1


Kingsbury, B., 'The Tuna-Dolphin controversy, the World Trade Organization, and the liberal project to reconceptualise international law’ (1994) 5 Yearbook of International Environmental Law 1


Lennard, M., 'Weaving nets to catch the wind: extraterritorial and supraterritorial business regulation in international law’ (Paper presented at *The Attorney-General’s Legal Practice 23rd International Trade Law Conference*, Australian National University, 29 May 1997)


Lennard, M., 'Navigating by the stars: predicting the Appellate Body’s approach to interpreting China’s accession protocol’ (Paper presented at *China and the WTO Conference*, Australian National University, Canberra, 17 March 2001)


Matheny, R.L., 'In the wake of the flood: “like products” and cultural products after the World Trade Organization’s decision in Canada Certain Measures Containing Periodicals' (1998) 147 University of Pennsylvania Review 245


McDonald, J., 'Greening the GATT: harmonizing free trade and environmental protection in the new world trade order' (1993) 23 Environmental Law 397


McDonald, J., 'Big beef up or consumer health threat?: the WTO food safety agreement, bovine growth hormone and the precautionary principle' (1998) 15(2) Environmental and Planning Law Journal 115

McDonald, J., 'Mainstreaming ESD - trade and the environment in the Millenium Round' (Paper presented at Trade and Environment Round Table, Parliament House, Canberra, 29 August 1999)

McDonald, J., Sustainable Trade in Forest Products: Challenges and Opportunities for the Australian Forest Products Industry (2000)


Moorman, Y., 'Integration of ILO core rights labor standards into the WTO’ (2001) 39 Columbia Journal of Transnational Law 555

Murray, P., 'The international environmental management standard, ISO 14 000: a non-tariff barrier or a step to an emerging global environmental policy?’ (1997) 18 University of Pennsylvania Journal of International Economic Law 557


Naess, A., ‘Self-realization: an ecological approach to being in the world’ (1987) 4 *The Trumpeter*


Olson, M., *The Logic of Collective Action* (1965)

Orellana, M., ‘The EU and Chile suspend the swordfish case proceedings at the WTO and the International Tribunal of the Law of the Sea’ (2001) *ASIL Insights*

OTA and Office of Technology Assessment, *Trade and Environment: Conflicts and Opportunities* (1992)

Palmer, G., ‘New ways to make international environmental law’ (1992) 86 *The American Journal of International Law* 259


Patterson, E., ‘International efforts to minimize the adverse trade effects of national sanitary and phytosanitary regulations’ (1990) 24 *Journal of World Trade* 91

Patterson, E., ‘The US-EU Agreement to resolve the Banana dispute’ (2001) *ASIL Insights*


Pigou, A.C., *The Economics of Welfare* (1924)

Plofchan, T.K., ‘Recognizing and countervailing environmental subsidies’ (1992) 26 *The International Lawyer* 763


Reed, D., *Structural Adjustment, the Environment and Sustainable Development* (1996)

Rege, V., ‘GATT law and environment-related issues affecting the trade of developing countries’ (1994) 28(3) *Journal of World Trade* 95

Reiterer, M., ‘The international legal aspects of process and production methods’ (1994) 17(4) *World Competition* 111


Roht-Arriaza, N., ‘Precaution, participation and the “greening” of international trade law’ (1992) 7 *Journal of Environmental Law and Litigation* 57


Rowell, A., ‘Unlikely bedfellows unite to fight WTO’, The Canberra Times, 8 October 1999

Runnalls, D., Shall We Dance? What the North needs to do to Fully Engage the South in the Trade and Sustainable Development Debate (1996)


Shell, G.R., ‘Participation of nongovernmental parties in the World Trade Organization: the trade stakeholders model and participation by nonstate parties in the World


Singer, P., Animal Liberation (1977)


Stegeman, K., ‘Policy rivalry among industrial states: what can we learn from models of strategic trade policy’ (1989) 43 International Organization 43


Tsai, E.S., “Like” is a four-letter word - GATT Article III’s “like product” conundrum’ (1999) 17 Berkeley Journal of International Law 26


United States Department of Agriculture Food Safety and Inspection Service, Economic Impact of the European Economic Community’s Ban on Anabolic Implants (1987)

US Council of Environmental Quality and Department of State, Global 2000 Report to the President (1980)


Ward, H., Trade Measures and Multilateral Environmental Agreements: Backwards or Forwards in the WTO? (1996)


Wilcox, C., A Charter for World Trade (1949)


Wilson, J., ‘Ecodumping: a compromise to the conflict of international free trade and environmental responsibility’ (1994) 42 Kansas Law Review 709


World Commission on Environment and Development, Our Common Future (1987)


Wynter, M., ‘Countervailing environmental subsidies in our World Trade Order’ (Paper presented at Ecopolitics X Conference, 26-29 September, Australian National University, Canberra, 26-29 September 1996)

Wynter, M., The Agreement on Sanitary and Phytosanitary Measures in light of the WTO decisions on EC Measures concerning Meat and Meat Products


Wynter, M., ‘Beefing up our trade: environmental and consumer concerns and rural exports’ in Robertson A.I. and R Watts (eds), Preserving Rural Australia: Issues and Solutions (1999) 69-81


Zimmerman, M., ‘Marx and Heidegger on the technological domination of nature’ (1979) 23 Philosophy Today 103

Other Documents


416

G/SPS/15 Guidelines to further the Practical Implementation of Article 5.5, 18 July 2000.


Marrakesh Ministerial Decision on Trade and Environment of 15 April 1994, 33 ILM 1267.


Non-Paper by the Arab Republic of Egypt, WTO Committee on Trade and Environment, 18 June 1996

Non-paper by the European Communities on the Relationship between the provision of the Multilateral Trading System and trade measures for environmental purposes, including those pursuant to Multilateral Environmental Agreements (MEAs), 19 February 1996.


PRESS/TE 023, 14 May 1998, WTO Committee on Trade and Environment adopts its work programme for 1998, agrees to develop a WTO Environmental Database, and discusses eco-labelling and the environmental benefits of sectoral trade liberalization.


WT/CTE/W/10, G/TBT/W/11 Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods unrelated to Product Characteristics, 29 August, 1995.


WT/CTE/W/143 The 1999 Environmental Database - Note by the Secretariat, 23 June 2000.


WT/CTE/W/37 Environmental Review of Trade Agreements at the National Level, Communication from the United States, 23 July 1996.

WT/CTE/W/37 Environmental Review of Trade Agreements at the National Level, Communication from the United States, 23 July 1996.

WT/CTE/W/46 The 1996 Environmental Database - Note by the Secretariat, 29 April 1997.


WT/GC/W/304 General Council – Preparations for the 1999 Ministerial Conference – Trade and Sustainable Development – Communication from the United States