



Chapitre de livre

2009

Published version

Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

Trade and the environment : the WTO's efforts to balance economic and sustainable development

Marceau, Gabrielle Zoe; Wyatt, Julian Gordon

How to cite

MARCEAU, Gabrielle Zoe, WYATT, Julian Gordon. Trade and the environment : the WTO's efforts to balance economic and sustainable development. In: Économie, environnement, éthique : de la responsabilité sociale et sociétale : Liber amicorum Anne Petitpierre-Sauvain. Trigo Trindade, Rita, Peter, Henry & Bovez, Christian (Ed.). Genève : Schulthess, 2009. p. 225–235. (Collection genevoise. Recueils de textes)

This publication URL: <https://archive-ouverte.unige.ch/unige:34569>

Trade and the environment: The WTO's efforts to balance economic and sustainable development

GABRIELLE MARCEAU* and JULIAN WYATT**

For many years, the GATT was vehemently criticised for the lack of scope it gave Contracting Parties for non-trade policies including those designed to protect the environment. However, the WTO, which evolved out of the GATT, was able to adapt to new international calls for sustainable development. The need to protect the environment found reflection in WTO jurisprudence which interpreted the WTO agreements so as to provide Members with more policy space for measures based on justifiable non-trade concerns applied in good faith.¹

This aspect of the evolution of the international trading system is in part due to the attention devoted to environmental issues by pioneers of the environmental law movement such as Anne Petitpierre. That the growth of environmental law was being championed by someone who participated in so many different aspects of Swiss public life cannot have gone unnoticed by international organizations based in Geneva, of which the GATT/ WTO is but one. In this sense, Anne Petitpierre is one of the environmental law avant-garde who, noting the increased attention of the trading system to environmental concerns, then became involved in the further development of the WTO's environmental agenda, directing, for example, a long-running project on one of the key contemporary issues of this area: Trade, the Environment and Biotechnology. The present contribution hopes to highlight how far the GATT/WTO has come in terms of the environment during Anne Petitpierre's career by charting the course of the evolution of its jurisprudence on trade and environment.

* Associate Professor, Department of Public International Law, Faculty of Law, University of Geneva. Legal Counsellor to the Director-General, World Trade Organization (opinions expressed herein neither represent nor bind in any way the WTO or its Members).

** PhD Candidate/ Teaching and Research Assistant, Department of Public International Law, Faculty of Law, University of Geneva.

¹ From its very first report, the WTO Appellate Body has steadfastly held that WTO law should not be read in clinical isolation from wider international law and that trade law should not be divorced from other international concerns, including protection of the natural environment (see: WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (DS 2)* (*US – Gasoline*), 29 April 1996, pp. 15-16).

I. The birth of the WTO, its sustainable development objective and the reinterpretation of GATT article XX

The Marrakesh Agreement Establishing the World Trade Organization incorporated in an unchanged form the provisions of the old GATT 1947 (that became the main part of GATT 1994), including its article XX on general exceptions.²

Article XX sets out the general exceptions to GATT obligations. This means that if a Member's policy falls within the scope of and satisfies the conditions of GATT article XX, such a measure will be permitted to deviate from GATT obligations. For the purposes of environmental protection broadly defined, paragraphs (b) and (g) of article XX or of particular relevance :

Article XX General exceptions

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 :

- ... (b) necessary to protect human, animal or plant life or health ;
- ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ; ... »

These exceptions, in existence since the entry into force of the GATT in 1947, were given a rather limited interpretation by panels deciding cases in the multilateral trading system's GATT era from 1947 to 1994. Under the WTO, however, the Appellate Body gave them a new lease of life.

On the basis of the evolution of the international community's attitude towards the importance of the environment reflected in the new reference to « sustainable development » in the WTO preamble,³ which the Appellate Body has said « gives colour, texture and shading to the rights and obligations of Members under the WTO Agreement », ⁴ together with the creation of the new

² General Agreement on Tariffs and Trade 1994, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 UNTS. 187 ; 33 ILM 1153 (1994) (« GATT 1994 »), article 1 incorporates the provisions (as amended) of the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (« GATT »).

³ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 ; 33 I.L.M. 1144 (1994).

⁴ WTO Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products (DS 58)* (« US – Shrimp »), 12 October 1998, para. 155.

trade and environment committee,⁵ the Appellate Body felt that it was entitled, or even obliged, to read the provisions of GATT article XX in a more expansive manner to ensure that Members' rights to take environmental measures are not «illusory». This new WTO objective to respect sustainable development was interpreted as a consecration of WTO Members' fundamental right to take measures to protect the environment and, as discussed further below, at a level they consider appropriate.

In its very first report, *US – Gasoline*, the Appellate Body was confronted with the issue of how to interpret article XX of the GATT which the United States had invoked to justify a clean-air measure otherwise inconsistent with GATT article III on national treatment. The Appellate Body offered an innovative teleological interpretation of the provisions of article XX, in light of the overall structure and architecture of the GATT 1994, by underlining both the importance of the rights protected by article XX and the market access rights of other Members, commenting that:

... Article XX of the General Agreement contains provisions designed to permit important state interests – including the protection of human health, as well as the conservation of exhaustible natural resources – to find expression ... Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.

This first Appellate Body report made clear that WTO Members have the *right* to favour policies other than trade, so long as they meet the conditions of article XX, including of its chapeau which requires that this right not be abused. In the next key environmental dispute, the two *US – Shrimp* cases, the Appellate Body reaffirmed (contrary to the conclusions reached in the two *US – Tuna* reports decided by GATT panels⁶) the right of Members to take even unilateral trade restrictive environmental measures so long as a *balance* of rights and obligations is maintained «between the right of a Member to invoke one or another of the exceptions of Article XX ..., on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand»⁷.

⁵ Established through the accord of Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14-15 April 1994. See: Decision on Trade and Environment, 15 April 1994, available online at: http://www.wto.org/english/docs_e/legal_e/56-dtENV_e.htm (last accessed 21 April 2009).

⁶ See: GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September 1991 and GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 16 June 1994.

⁷ WTO Appellate Body Report, *US – Shrimp*, above n. 4, para. 156.

In this dispute, the Appellate Body also noted that measures falling within the scope of one or other of the exceptions of Article XX frequently condition market access on whether exporting members comply with a policy unilaterally prescribed by the importing member. While full multilateral cooperation in pursuit of an environmental objective is always preferred, the *US – Shrimp* report opened up the possibility that a Member which finds itself in a small minority unwilling to cooperate on an international environmental issue, may suffer trade consequences and thus be indirectly forced to adopt an environmental protection policy.

Another fundamental environmental principle clarified by the WTO jurisprudence is the « *undisputed right* » of each Member to determine the level of risk that it is willing to accept in the circumstances and the level of protection it considers appropriate in a given situation ». ⁸ It could even consider that the appropriate level of protection, or acceptable level of risk, should be as close to « zero risk » as possible. ⁹ In the *EC – Asbestos* dispute, for example, France (as part of the EC) was entitled to measures adopted on the basis of a zero-risk level against cancer ¹⁰.

Clearly, since its inception, the WTO dispute settlement bodies have unambiguously confirmed the existence of a right to take measures protecting the environment, even if at the same time they have imposed conditions on article XX so as to ensure that this right is not abused for protectionist purposes. The purpose of Part II of this contribution is to discuss the evolution in the article XX conditions imposed on the exercise of this right in order to assess the scope for environmental protection under the GATT as it is currently interpreted.

⁸ WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (DS 135)* («*EC – Asbestos*»), para. 168.

⁹ WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon (DS18)* («*Australia – Salmon*»), 20 October 1998, paras. 124-125 (where the Appellate Body referred to the right of a Member to determine its own appropriate level of protection to be «zero risk»). See also: WTO Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (DS48)*, 16 January 1998, para. 186.

¹⁰ See: WTO Appellate Body Report, *EC – Asbestos*, above n. 8. This fundamental right is also explicitly recognized in two agreements falling outside the scope of this short paper, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994 («*SPS Agreement*») and the *Agreement on Technical Barriers to Trade*, 15 April 1994 («*TBT Agreement*»), which both grant a Member the right to protect animal or plant health and the environment at the level it sees fit. There is accordingly no authentic « proportionality » test in the WTO since a Member cannot be asked to even modestly reduce its desired level of protection even though it would greatly diminish the trade restrictiveness of its measure.

II. The evolution of the conditions placed on environmental protection under article XX of the GATT

In the first instance, two key questions arise in relation to the scope article XX of the GATT gives to environmental protection measures which have a trade impact: (a) what (environmental protection) policy objectives fall within the scope *ratione materiae* of these paragraphs? and (b) what measures will be considered, within the terms of these paragraphs of article XX, necessary to achieve, or related to, such environmental protection policy objectives?

The Appellate Body jurisprudence on the first question has been unambiguous in extending the policy space available for the pursuit of environmental objectives. As regards what *type* of objectives may legitimately be pursued by a governmental measure for the exception in GATT article XX to apply, the *US – Shrimp* report was groundbreaking. By interpreting the phrase «exhaustible natural resources» in a dynamic and evolutionary manner – so that it includes all living resources, rather than just non-living resources – the Appellate Body ensured that the entire range of policy goals commonly referred to as environmental protection objectives will fall within the combined scope of article XX paragraphs (b) and (g).¹¹ The jurisprudence in relation to the second question regarding the relationship between the measure and the policy objective pursued will be the focus of the following part of our analysis before we briefly discuss the control exercised by the WTO over the manner in which an environmental measure is actually applied from the perspective of trade concerns.

A. The required relationship between the measure adopted and the objective pursued

In its interpretation of the paragraphs of article XX in *US – Gasoline*, the Appellate Body examined whether «the means (the challenged regulations) are, in principle, reasonably related to the ends» and whether «such measures are made effective in conjunction with restrictions on domestic production or consumption» («... a requirement of even-handedness in the imposition of restrictions»)¹² However, in setting out this test it also insisted on the distinct wording of the paragraph XX(b) and paragraph XX(g) exceptions, saying that their coverage and scope of application were very different. Paragraph XX(g) – measures *relating to the conservation of natural resources* – was considered broader in reach, while the XX(b) exception – measures *necessary for the protec-*

¹¹ WTO Appellate Body Report, *US – Shrimp*, above n. 4, paras 128–134.

¹² WTO Appellate Body Report, *US – Gasoline*, above n. 1, pp. 20–22.

tion of health – required a more stringent « necessity » test. However, the *Brazil – Tyres* jurisprudence, further discussed below, seems to have merged these two tests so that, to a large extent, the relationship required by the two paragraphs is equivalent, bringing closer the operation of the environment and health policy exceptions.

A few years later, in a dispute dealing with a « necessity », rather than a « relating to », test under Article XX(d)¹³, *Korea – Various Measures on Beef*, the Appellate Body called for an authentic weighing and balancing of (at least) the following three variables to determine whether a trade restricting measure is necessary: (i) « [t]he more vital or important those common interests or values are, the easier it would be to accept as « necessary » a measure designed as an enforcement instrument »;¹⁴ (ii) « [t]he greater the contribution [to the realization of the end pursued], the more easily a measure might be considered to be « necessary » »;¹⁵ and (iii) « [a] measure with a relatively slight impact upon imported products might more easily be considered as « necessary » than a measure with intense or broader restrictive effects ».¹⁶

Korea – Beef's weighing and balancing test seems to have been relaxed by the *Brazil – Tyres* decision of December 2007.¹⁷ In that dispute, Brazil invoked both GATT article XX(b) and XX(g) in support of an import ban it had placed on re-treaded tyres. It argued that such a ban was necessary to prevent the accumulation of waste tyres which, apart from their environmental impact, also functioned as breeding grounds for mosquitoes and therefore as a source of mosquito-borne illnesses such as malaria and dengue fever.

Even though it had a strong line of jurisprudence on how to interpret the word « necessary » in GATT paragraph XX(b), the Appellate Body in *Brazil – Tyres* seems to have moved away from the *Korea – Beef* test on « weighing and balancing » to concentrate on one essential element of this determination: will this restrictive measure materially contribute to the policy goal invoked? In addition, while it arguably could have handled the entire issue of whether the measure came within an exception through reference to the arguably more flexible paragraph (g), the Appellate Body instead insisted on tackling the analysis of the relationship between the measure and the goal pursued under

¹³ Article XX(d) reads: « [measures] 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 ».

¹⁴ WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (DS 161/DS 169)* («*Korea – Beef*»), 11 December 2000, para. 162.

¹⁵ *Ibid.*, para. 163.

¹⁶ *Ibid.*

¹⁷ WTO Appellate Body Report, *Brazil – Measures affecting imports of retreaded tyres (DS 332)* («*Brazil – Tyres*»), 3 December 2007

paragraph (b), the strictness of which it seems to have loosened. This approach may have been taken in the knowledge that the parallel GATS exception provision (article XIV) does not contain an exception equivalent to GATT article XX (g), only an equivalent of GATT article XX(b).¹⁸ Although the Appellate Body made no reference to this fact, it may have been influenced by the potential for an absurd incoherence pursuant to which one environmental protection measure may end up being permissible insofar as it impinged on trade in goods, but not permissible insofar as it affected trade in services.

In elaborating its new, arguably combined paragraphs (b) and (g) test, the Appellate Body commented that while a trade ban for health or environmental reasons cannot be «by design as trade-restrictive as can be»¹⁹, neither is «the word <necessary> [...] limited to that which is <indispensable>».²⁰ Indeed, a measure will be sufficiently linked to an objective if it is «apt to make a *material contribution to the achievement of its objective*».²¹ The Appellate Body then elaborated on what constitutes a material contribution saying:

A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant ...²²

Importantly, the Appellate Body added that such «contribution» does not have to be immediately observable, noting that «it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy».²³

When all these *Brazil – Tyres* pronouncements are considered together alongside the weighing and balancing test of *Korea – Beef*, the new test seems somewhat less stringent in terms of what relationship it requires between the measures adopted and the policy objective pursued – thus producing more policy space for, amongst other things, environmental protection measures.

This loosening of the test is, as is often the case in jurisprudential developments, in part attributable to the facts of the case. In *Brazil – Tyres*, Brazil did not provide any such *quantitative* proof of contribution and instead relied on a

¹⁸ *General Agreement on Trade in Services*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183 (<GATS>), article XIV.

¹⁹ WTO Appellate Body Report, *Brazil – Tyres*, above n.17, para. 150 citing Panel Report of 12 June 2007, para. 7.211.

²⁰ *Ibid.*, para. 141 citing WTO Appellate Body Report, *Korea – Beef*, above n. 14, para. 161.

²¹ WTO Appellate Body Report, *Brazil – Tyres*, above n. 17, para. 150.

²² *Ibid.*, para. 210.

²³ *Ibid.*, para. 151.

mere logical and *qualitative* approach based on the merits of its overall environmental programme. In accepting such arguments as proof of a material contribution by Brazil's measures to the policy objectives pursued, the Appellate Body reframed the test, insisting on the measure's *aptitude* to contribute and recognising the fact that an actual contribution may be difficult to isolate from other elements of a comprehensive policy and only perceptible after an extended period of time.

B. The requirement that no WTO-consistent alternative to the measure is reasonably available

In the GATT-era, one of the most important conditions on the invocation of article XX was that there was no «less-trade restrictive alternative available». In *Korea – Beef* this test was seemingly replaced by the new «weighing and balancing» test mentioned above. However, in the next relevant case, *EC – Asbestos*, the Appellate Body further developed its new test by indicating that the «weighing and balancing process» was *part of* the «determination of whether a WTO-consistent alternative measure' is reasonably available». ²⁴

But what does it mean in practice? The Appellate Body stressed that to qualify as a reasonably available alternative, that alternative measure must «achieve [the Respondent's] chosen level of protection». Given that France had chosen zero risk as its level of protection, the Appellate Body concluded that alternatives such as «controlled use» would not achieve the end sought by France (and the EC) and thus that there was no «alternative measure that would achieve the same end and that is less restrictive of trade than [the challenged] prohibition». ²⁵

The strict interpretation of reasonably available alternatives continued to evolve with the *US – Gambling* case where the GATS exception provision regarding measures necessary for the protection of public morals was invoked. ²⁶ The Appellate Body held that an alternative measure may be found not to be «reasonably available» not only where it did not achieve the Respondent's chosen level of protection but also «where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs

²⁴ WTO Appellate Body Report, *EC – Asbestos*, above n. 8, para. 172.

²⁵ WTO Appellate Body Report, *EC – Asbestos*, above n. 8, paras. 172-174.

²⁶ Noting that «[s]imilar language is used in both provisions, notably the term «necessary» and the requirements set out in their respective chapeaux», the Appellate Body found «previous decisions under Article XX of the GATT 1994 relevant for [its] analysis under Article XIV of the GATS» (WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS 285) (*US – Gambling*)), para. 291 (footnotes omitted).

or substantial technical difficulties».²⁷ This position was affirmed and extended in *Brazil – Tyres*, which in an important step for developing countries wishing to protect their citizens' health or natural environment, stated the «the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve prohibitive costs or substantial technical difficulties».²⁸

The *US – Gambling* and *Brazil – Tyres* reports also established a new position on the burden of proof for the no reasonable available alternative condition, which, like the strict interpretation of «reasonably available», appears to relax this requirement to the benefit of respondents introducing health or environmental protection measures. When this less-trade restrictive alternative requirement was initially developed in the two GATT panel *US – Tuna* disputes, it was understood that the country invoking the exception would have to prove the absence of alternatives. In *US – Gambling*, however, the Appellate Body concluded that «while the responding Member must show that a measure is necessary, it does not have to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives».²⁹

In the *Brazil – Tyres* dispute itself, the Appellate Body found that most of the alternatives proposed by the EC such as improving the re-treadability of tyres, or better implementation of existing collection and disposal schemes, were complementary to the import ban and were «mutually supportive elements of a comprehensive policy to deal with waste tyres» rather than «real alternatives».³⁰ Proposed alternatives such as landfilling, stockpiling, or incineration carried «their own risks or, because of the costs involved, [were] capable of disposing of only a limited number of waste tyres».³¹ To use the words of the test as formulated by the Appellate Body itself, since the responding Member had demonstrated that the measures proposed by the complaining Member were not a genuine alternative or not «reasonably available», taking into account the interests or values being pursued and the responding Member's desired level of protection, it followed that the measure at issue was necessary.³²

²⁷ *Ibid.*, para. 308.

²⁸ WTO Appellate Body Report, *Brazil – Tyres*, above n. 17, para. 171 citing, at the end of the quotation, *US – Gambling*, above n. 26, para. 308.

²⁹ WTO Appellate Body report, *US – Gambling*, above n. 26, para. 309. (original emphasis).

³⁰ WTO Appellate Body Report, *Brazil – Tyres*, above n. 17, para. 211.

³¹ *Ibid.*, para. 211.

³² *Ibid.*, para. 311.

In effect, this means that a panel cannot reject an environmental protection, or indeed a public health, measure by pointing to a less trade restrictive alternative unless that alternative is technically and financially feasible for that specific Member and provides at least the same level of protection as that desired by the Member adopting the measure.

C. The requirement that the actual application of the challenged measure reflects authentic environmental concerns

Once a measure is considered to be consistent with one of the paragraphs of GATT article XX, it must also be tested under the introductory clause of article XX which emphasises the manner in which the measure in question is applied. The rationale for this control is that while an environmental measure may appear fair and just on its face, its application may reveal that it is actually misused for the ultimate purpose not of protecting the environment, but rather of favouring domestic producers or discriminating against foreign products. The chapeau of article XX is considered to be «but one expression of the principle of good faith».³³ Panels and the Appellate Body have thus required that the Member introducing the trade-restrictive measure has, for example, adopted efficient policy to this effect domestically and made a legitimate effort to co-operate with other Members so as to achieve the policy goal through multi-lateral action often so crucial in the pursuit of environmental ends. In other words, the chapeau of article XX essentially ensures that the measure is not merely a «means of arbitrary or unjustifiable discrimination» or a «disguised restriction on international trade», but truly a measure to protect the environment.

This test thereby operates as an important qualification on the right to take an environmental protection measure, requiring in effect that the environmental objective of a measure be balanced against its trade consequences and ensuring that mutually agreed trade interests are not unjustifiably subverted in the name of environmental policy. Indeed, in several disputes, this *chapeau* test has in fact proven to be decisive for findings that a challenged environmental protection measure violates WTO law, outcomes in keeping with the WTO's long-standing fight against protectionism.

³³ Appellate Body Report, *US – Shrimp*, above n. 4, paras. 158-160.

III. Conclusion

As this small selection of Appellate Body reports relevant to environmental protection measures reveals, when the GATT evolved into the WTO, its consideration of environmental issues also matured, largely on the basis of the new explicit WTO objective for sustainable development. As has been shown, the Appellate Body interpreted the paragraphs of the pre-existing GATT article XX in an evolutionary manner. It insisted on the importance of the right to protect health and environment as well as on the right of Members to set their own level of protection, even if that level is as high as possible or zero risk. It also relaxed the necessity test to a material contribution test, reversed the burden of proof and reduced the scope of reasonable available alternatives to take into account the actual capacity and the level of development of the challenged Member. However, while the World Trade Organization grants considerable greater flexibility for environmental policies than its GATT predecessor, it retains its role as watch-dog over trade protectionism.

By relaxing the requirements of the paragraphs of GATT article XX while maintaining a strict interpretation of the defence against protectionism in that provision's chapeau, the Appellate Body has enabled the international trading system to mature into a balanced system which acknowledges the importance of contemporary priorities such as environmental and health protection without abandoning its trade-focussed *raison d'être*.