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# A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade<sup>\*</sup>

Gabrielle MARCEAU & Joel P. TRACHTMAN<sup>\*\*</sup>

*The search for an appropriate balance between trade liberalization and regulatory autonomy lies at the heart of the WTO system. In this paper, the authors examine the relationship between three WTO Agreements regulating trade in goods – the GATT 1994, the SPS Agreement, and the TBT Agreement – and explore how these treaties, individually and together, define the sphere of domestic regulatory autonomy in the context of the multilateral trading system. Drawing on new Appellate Body jurisprudence, including the recent TBT ‘trilogy’, this article provides a ‘map’ of WTO regulation of trade in goods and sheds light on the types of rules and standards contained in each Agreement, their relationship to domestic regulation and the regulatory process, and the way they incorporate by reference norms outside of the WTO system. The article also discusses the bases for invoking each Agreement and evaluates the circumstances in which they may overlap.*

## 1 INTRODUCTION

Free trade and regulatory autonomy are often at odds with one another. National measures of an importing state may impose costs on international trade, for

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<sup>\*</sup> This article is the revision of prior articles on the same subject matter. This latest version takes into account the evolution of the jurisprudence since 2003. Adapted with permission of Kluwer Law International from Gabrielle Marceau and Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of goods*, *Journal of World Trade*, Vol. 36, No. 5 (October 2002), 811–881. The views expressed in this article are personal to the authors and do not bind the WTO Secretariat or its Members. Views expressed in this article cannot be attributed to the WTO Secretariat or the WTO Members. We (only) are responsible for opinions and errors herein. The authors are grateful to John Maugman and Marios Iacovides for useful comments on earlier drafts.

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example, by regulating goods in ways that vary from home market regulation. National measures may restrict market access of imported goods but may or may not be intended to act as protectionist measures favouring domestic industry to the detriment of imports. At the same time, domestic regulation may protect important values. The distinction between a protectionist measure – condemned for imposing discriminatory or unjustifiable costs – and a non-protectionist measure restricting trade incidentally (and thus imposing some costs) is sometimes difficult to make.

The search for the right balance between disciplining protectionist measures<sup>1</sup> and allowing Member States to maintain justifiable regulatory autonomy has characterized the evolution of the application of the General Agreement on Tariffs and Trade (GATT) rules – namely, Articles I, III, XI and XX of GATT – the Technical Barriers to Trade Agreement (TBT),<sup>2</sup> and the Sanitary and Phytosanitary Measures Agreement (SPS).<sup>3</sup> This article compares the disciplines on domestic regulation contained in each of these agreements, and provides an analysis of the conditions for application of each agreement and the possibility for overlap and conflict among these agreements.

While the Marrakesh Agreement Establishing the World Trade Organization (WTO) and its annexes (WTO Agreement) is today a single treaty, its provisions were originally negotiated through fifteen different working groups,<sup>4</sup> which may not have been sufficiently co-ordinated with one another. It was only towards the end of the negotiation that the creation of a ‘single undertaking’<sup>5</sup> was agreed and

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<sup>1</sup> See the first paragraph of the Preamble of the Uruguay Round Ministerial Declaration: ‘Determined to halt and reverse protectionism and to remove distortions on trade’, Ministerial Declaration on the Uruguay Round of 20 Sep. 1986, BISD 33S/19; as well as the first paragraph of the Doha Development Agenda: ‘... We strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the WTO and pledge to reject the use of protectionism’, WT/MIN(01)/DEC (2001).

<sup>2</sup> *Agreement on Technical Barriers to Trade*, 15 Apr. 1994, *Marrakesh Agreement Establishing the World Trade Organization* (hereinafter WTO Agreement), Annex 1A, *Legal Instruments – Results of the Uruguay Round*, vol. 31, at 138 (hereinafter TBT Agreement).

<sup>3</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 Apr. 1994, WTO Agreement, Annex 1A, *Legal Instruments – Results of the Uruguay Round*, at 69 (hereinafter SPS Agreement).

<sup>4</sup> Ministerial Declaration on the Uruguay Round of 20 Sep. 1986, BISD 33S/19.

<sup>5</sup> During the Uruguay Round negotiations the concept of a single undertaking was widely used. It refers to two different concepts: the ‘single political undertaking’, referred to the method of negotiations (‘nothing is agreed until everything is agreed’, which was not inconsistent with the possibility of early implementation (early harvest)); and the ‘single legal undertaking’ which refers to the notion that the results of the negotiations would form a ‘single package’ to be implemented as one single treaty. Both concepts are reflected in the Part I:B(ii) of the Uruguay Round Declaration: ‘The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as *parts of a single undertaking*. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.’ BISD 33S/19 (emphasis added).

governments decided to annex the resulting text from each working group to the Marrakesh Agreement Establishing the WTO.<sup>6</sup> Although some efforts of legal co-ordination must have been made, the late action of the Legal Drafting Group,<sup>7</sup> combined with the resistance by the United States to the creation of a formal international organization, must have limited the ability to make changes to the texts already drafted in working groups. In grouping under a framework agreement various negotiated texts, without any extensive discussion of the internal organization and hierarchy of WTO norms, negotiators may have hoped that the flexibility inherent in some of the WTO treaty provisions would suffice to reconcile all tensions among its various provisions. The wording of some WTO provisions does not always support such hope. It becomes very difficult to define clearly and precisely the legal parameters of the relationships among the provisions of different WTO agreements.

This article focuses mainly on GATT Articles I, III, XI and XX, the TBT Agreement, and the SPS Agreement, all of which impose different regulatory constraints on government actions relating to standards, technical and sanitary regulations, and so forth. Some of these provisions are simultaneously applicable while others are mutually exclusive. We have therefore identified disciplines – inherent and common to each set of provisions and often specifically addressed in the TBT or SPS Agreements – compared them with GATT provisions, discussed their interaction and suggested some understandings. We have explored the avenues offered by teleological, contextual and objective interpretations, based on the parameters laid out in the Vienna Convention on the Law of Treaties (VCLT) and in international law principles of interpretation. It is interesting to note that some horizontal cross-fertilization has taken place, based on either an ‘effective’ interpretation of the WTO treaty or the jurisprudence’s efforts to maintain some WTO (internal) coherence. For example, the jurisprudence seems to have read into Article XX of GATT important components of the new more technical

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<sup>6</sup> The Marrakesh Agreement Establishing the World Trade Organization together with its Annexes forms the ‘WTO Agreement’. When reference is made to the Marrakesh Agreement, the intention is to focus on the institutional agreement itself. Although the European Communities, Canada and Mexico put forward a draft for the creation of a multilateral trade organization (MTO) in autumn 1991, it was only in October and November 1993, during the intensive negotiations of the Institutional Group (chaired by Ambassador Lacarte, a former member of the Appellate Body) that discussions on the relationship between the various provisions of this ‘single undertaking’ took place. Since its inception, the idea of an MTO was strongly resisted by the United States, which kept a reservation on this chapter until midnight on 14 Dec. 1993. Only then, arguably after sufficient concessions from others, did the United States lift its reservation. See Debra Steger, *WTO: a New Constitution for the Trading System*, in *New Directions in International Economic Law: Essays in Honour of John H. Jackson* 135 (M. Bronckers & R. Quick eds., Kluwer Law International 2001).

<sup>7</sup> The Legal Drafting Group was established by Director-General Dunkel, and worked initially from January to May 1992, under the chairmanship of Madan Mathur, a former Deputy Director-General. It reviewed all the agreements. *Ibid.*

provisions of the TBT and the SPS Agreements. Some aspects of this jurisprudence are now addressed in decisions of the WTO Committee on Sanitary and Phytosanitary measures (SPS Committee) and may influence the interpretation of other SPS provisions or other WTO agreements. Yet this may not always suffice to rectify inconsistent drafting among those agreements and provisions.

After a brief historical background on the use of separate 'codes' in the Kennedy Round and the Tokyo Round, we analyse the separate and varying nature of the obligations and rights expressed under GATT, the SPS Agreement and the TBT Agreement, paying attention to the types of rules and standards, their relationship to domestic regulation and the regulatory process, and the way that they incorporate by reference or take into account norms from outside the WTO system. Finally, this article analyses the bases for invoking these three sources of norms, and evaluates the circumstances under which they overlap, as well as the implications of such overlaps.

## 2 HOW THE SPS AND TBT AGREEMENTS CAME TO EXIST

Prior to the Uruguay Round, separate agreements, or 'codes' were negotiated and introduced in the Kennedy and Tokyo Rounds, in order to address certain types of non-tariff barriers, and to extend the coverage of GATT. Contracting parties entered into these agreements on what has come to be known as a 'plurilateral' basis, making the agreements binding only on the signatories. It was a GATT of concentric circles, or of multiple speeds. This led to the 'fragmentation' of the GATT: all GATT contracting parties were not necessarily bound by the same obligations and the division was often one between developed and developing countries.<sup>8</sup> The desire to avoid this type of fragmentation in the future was one of the basic principles underlying the Uruguay Round negotiations that introduced the concept of a WTO 'single undertaking'. Arguably, this has had an impact on the relationship between the obligations contained in the TBT and SPS Agreements and those of the GATT, since they now form part of a single treaty, which must be interpreted as a whole.

After the Kennedy Round, contracting parties' concerns over multiple and divergent national standards increased. A first general notification exercise<sup>9</sup>

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<sup>8</sup> At the conclusion of the Tokyo Round, Contracting Parties addressed the issue of the relationship between the provisions of the Tokyo Codes and those of the GATT in a decision which in para. 3 stated: 'The Contracting Parties also note that existing rights and benefits under GATT of contracting parties not being parties to these agreements, including those derived from Article I, are not affected by these Agreements.' Action by the Contracting Parties on the Multilateral Trade Negotiations, BISD 26/201, 28 Nov. 1979.

<sup>9</sup> COM.IND/W/13, 20, 23 and 32, L/3496, L/3756 and Spec (69)51. This compilation was updated in MTN/3B/3, 14 Feb. 1974. See also COM.TD/W/191.

confirmed the broad use of different national standards. The increasing multiplicity of standards was seen as a potential barrier to trade and pointed towards a need to consider harmonization of standards. Disciplines were needed to ensure that standards are not applied 'so as to afford protection to the domestic production'.<sup>10</sup> Harmonization of standards and the cooperation of states in the formulation of international standards<sup>11</sup> were viewed as tools to reach such results. Already at that time, contracting parties expressed the clear view that the code to be negotiated 'in no way interferes with the responsibility of governments for safety, health and welfare of their people or for the protection of the environment in which they live. It merely seeks to minimize the effect of such actions on international trade'.<sup>12</sup>

In the context of the conclusion of the Tokyo Round, the Standards Code, which covered mandatory and voluntary technical specifications, mandatory technical regulations and voluntary standards for industrial and agricultural goods, was signed by forty-three Contracting Parties. Its main provisions prohibited discrimination and the protection of domestic production through specifications, technical regulations and standards; it also proscribed the preparation, adoption and application of regulations, specifications and standards in a manner more restrictive than necessary; and it urged signatories to base their national measures on international standards and to collaborate and co-operate towards harmonization of such national norms.

In the decade following the 1979 Tokyo Round, a consensus emerged that 'the Standards Code had failed to stem disruptions of trade in agricultural products caused by proliferating technical restrictions'.<sup>13</sup> Furthermore, one of the great advances of the Uruguay Round was to introduce greater disciplines on other types of agricultural protectionism, including quotas and domestic price supports. In order to protect this advance from potential regulatory defection, it was viewed as necessary to establish the SPS Agreement, and to have it apply universally, not plurilaterally.<sup>14</sup> Of course, enforcement of the original Standards Code was weakened by the existence of a general requirement of consensus to establish a

<sup>10</sup> Spec (71) 143, 30 Sep. 1971, section III, Article 1(a).

<sup>11</sup> Spec (71) 143, section III, Article 1(c).

<sup>12</sup> Spec (71) 143, *Idem*. It is interesting to notice that Article XX of the GATT does not explicitly limit the Contracting Parties' jurisdiction to 'their' population and environment. The draft Spec (71) 143 seems to imply that governments' autonomy in protection of the safety, health and welfare of their population and their environment is limited to those situations taking place within their own jurisdiction.

<sup>13</sup> Donna Roberts, *Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations*, 1 J.I.E.L. 2, 377, 380 (1998).

<sup>14</sup> *Ibid.*

Panel and to adopt a Panel report. The Uruguay Round's Dispute Settlement Understanding remedied this weakness.<sup>15</sup>

The initial Uruguay Round negotiations were merely intended to add stronger disciplines on sanitary and phytosanitary measures to the Standards Code:

but by 1988, a separate Working Party was created to draft an SPS Agreement, as negotiators had concluded that disciplines which elaborated the circumstances under which countries could adopt risk-reducing trade measures which violated the GATT Most-Favoured-Nation (MFN) and national treatment principles could not be conveniently incorporated into the TBT Agreement.<sup>16</sup>

The original GATT, with its combination of Articles I, III, XI and XX, and with its consensus-based dispute resolution, was seen as incapable of addressing important disputes over sanitary and phytosanitary measures, including restrictions on use of growth hormones in meat production.<sup>17</sup> As a matter of treaty negotiations, it was not possible in the Uruguay Round to amend Article XX of GATT, but it was possible to add 'interpretative' agreements<sup>18</sup> or extensions of GATT obligations.<sup>19</sup>

The SPS and TBT Agreements were entered into as part of the 'single undertaking', by which states party to the Marrakesh Agreement Establishing the WTO entered into all of the WTO Agreements annexed to it (with the exception of two 'plurilateral' agreements)<sup>20</sup> simultaneously. That is, pursuant to Article II:2 of the WTO Agreement, the SPS and TBT Agreements are integral parts of the WTO Agreement, binding on all Members. Therefore, they have the same basic legal status as the GATT: they are both sources of WTO law.<sup>21</sup> The Single Undertaking also became a general principle of interpretation of the internal relationships between WTO agreements and provisions. It implies that all WTO

<sup>15</sup> This was true for dispute settlement relating to any alleged GATT violation. However, the Anti-dumping and the Subsidies Tokyo Codes had already put in place a mechanism of automatic establishment of a Panel within 60 days of its request.

<sup>16</sup> Roberts, *supra* n. 12, at 382 (citation omitted). Roberts explains that SPS measures mitigate risks that vary by source and destination – the incidence or spatial distribution of the hazard in the exporting country, and the possibility for contagion in the importing country, are relevant to the type of measure that is required. Thus, SPS measures may legitimately vary depending on the geographical source or destination, making them more likely to violate national treatment or MFN.

<sup>17</sup> See Theofanis Christoforou, *Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty*, 8 N.Y.U. Envtl. L. J. 3, 624–625 (2000).

<sup>18</sup> See, for instance, the GATT 1994 Understandings.

<sup>19</sup> See, for instance, the Multilateral Trade Agreements of Annex 1A.

<sup>20</sup> Initially, there were four plurilateral agreements. The International Dairy Agreement and the International Bovine Meat Agreement were terminated in September 1997; see documents IMA/8 and IDA/8, 30 Sep. 1997.

<sup>21</sup> We discuss further below the conflict rule of Annex 1A, which gives priority to the provisions of the TBT or SPS over those of the GATT 1994, in case of conflicts.

provisions are simultaneously and cumulatively applicable, and they should all be interpreted harmoniously within a single treaty, viewed as a whole.

An analysis of the SPS Agreement and the TBT Agreement raises interesting technical issues regarding their relationship with GATT, and with one another. These technical issues overlay important substantive matters regarding the precise disciplines applicable to national regulations. Moreover, the determination of the applicable WTO law (do GATT, SPS, TBT apply?) will affect the status of the WTO's relationship with other treaties. For instance, whether or not there is a conflict between the WTO Agreement and the Biosafety Protocol (of the Biodiversity Convention) may depend on which WTO provisions of the SPS or TBT or GATT Agreements are applicable to a specific set of facts and circumstances. The applicable WTO law is itself determined by the specific aspects of the measure challenged, the nature of the disciplines imposed by each provision, and the relationship between these provisions.

### 3 COMPARING THE DISCIPLINES OF THE SPS AGREEMENT, THE TBT AGREEMENT AND THE GATT

The SPS, TBT and GATT Agreements each contain a number of different disciplines on national regulation. This section discusses selected disciplines under the following categories:

- (1) Non-discrimination: national treatment and most-favoured-nation.
- (2) Necessity and proportionality tests.
- (3) Appropriate level of protection/scientific basis.
- (4) Harmonization; conformity with international standards.
- (5) (Mutual) recognition and equivalence.
- (6) Internal consistency.
- (7) Permission for precautionary action.
- (8) Balancing.
- (9) Product/process issues and the territorial–extraterritorial divide.<sup>22</sup>

To some extent the above disciplines relate to each other. Often, they are specifically addressed in the TBT or SPS Agreements, and the GATT jurisprudence has had to deal with them either directly or as a matter of interpretation. They represent different aspects of the WTO disciplines on the domestic normative autonomy of Members. These disciplines work in varying

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<sup>22</sup> This last parameter is addressed both in section C and in section D, below, relating to the scope of application of these agreements.

combinations within each of these three sources of WTO law. They also work together from the broader perspective of general WTO law. To a great extent, the TBT and SPS Agreements can be seen as an evolution of GATT provisions.

In this section, we simply describe the tests under these three agreements. The effective interpretation of the WTO Agreement calls for a coherent and harmonious reading of all its provisions (including the SPS Agreement, the TBT Agreement and the GATT).<sup>23</sup> But in grouping various treaty provisions under the umbrella of a single WTO Agreement, negotiators may not have envisaged all implications of possible situations of overlap.

### 3.1 NON-DISCRIMINATION: NATIONAL TREATMENT AND MOST-FAVOURLED-NATION

Obligations of non-discrimination in internal regulation, including the application of internal regulation at the border,<sup>24</sup> occupy a primary position in the GATT, the SPS and TBT Agreements. Discrimination between products and between certain situations is condemned. In this section, we examine mainly the obligation of non-discrimination as between domestic and imported products: national treatment.

#### 3.1[a] GATT

##### 3.1[a][i] GATT Article III:4: National Treatment Obligation

It is appropriate to begin with Articles III:1 and 4 of GATT, which provide:

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. (emphasis added)

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

<sup>23</sup> See Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ('*Korea – Dairy*'), WT/DS98/AB/R, adopted 12 Jan. 2000, at para. 81: 'In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole' (footnotes deleted).

<sup>24</sup> See Article III, General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 UNTS 194 (hereinafter GATT).

requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

This language has been interpreted in several GATT and WTO cases. In its first report, *Japan – Alcoholic Beverages*, the WTO Appellate Body declared that the broad purpose of Article III is to prohibit ‘protectionism’,<sup>25</sup> a concept that it did not define. It also rejected the ‘aims-and-effects’ approach to the obligation of national treatment, at least as a search for subjective intent.<sup>26</sup> It refused to see any issue of the subjective intent of the Member State in Article III determination:

[I]t does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, applied to imported or domestic products so as to afford protection to domestic production. *This is an issue of how the measure in question is applied.*<sup>27</sup> (emphasis added)

<sup>25</sup> ‘The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III ‘is to ensure that internal measures not be applied to imported and domestic products so as to afford protection to domestic production’. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products...Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. ...’ *Japan – Taxes on Alcoholic Beverages* (*Japan – Alcoholic Beverages II*), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 Nov. 1996, at 16.

<sup>26</sup> See Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 27: ‘This third inquiry under Article III:2, second sentence, must determine whether ‘directly competitive or substitutable products’ are ‘not similarly taxed’ in a way that affords protection. This is not an issue of intent. It is not necessary for a Panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent’; and at p. 29: ‘Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.’ See Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for An Aims and Effects Test*, 32 *International Lawyer* 619 (1998).

<sup>27</sup> See Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 28. A WTO Member’s measure can be challenged under GATT/WTO dispute settlement procedures, if it is binding and not discretionary, even if it is not yet in force. Three recent Panel Reports stated that although it was possible to conceive that the laws would be applied in a manner incompatible with WTO rules, the competent authorities had the discretion to apply them consistently with such rules. Therefore the laws did not necessarily violate the SCM provision (since there was no evidence of specific violations, the claims of SCM violations were rejected). See Panel Report, *United States – Measures Treating Export Restraints as Subsidies* (*US – Export Restraints*), WT/DS194/R, adopted 23 Aug. 2001, at paras 8.126–8.132; Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU* (*Brazil – Aircraft (Article 21.5 II – Canada)*), WT/DS46/RW/2, adopted 23 Aug. 2001, at paras 5.11–5.13, 5.43, 5.48, 5.5, 5.55, 5.126, and 5.142; and Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft* (*Canada – Aircraft Credits and Guarantees*), WT/DS222/R, adopted 19 Feb. 2002, at paras 7.56–7.62. The requirements of Article III:4, calling for market assessments (even potential), and those on SPS measures ‘applied’ to protect a Member’s territory, will in most cases necessitate that the measure be actually enforced (applied) before they can be challenged.

The Appellate Body stated that ‘it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application, to ascertain whether it is applied in a way that affords protection to domestic products’.<sup>28</sup> The *EC – Asbestos* Appellate Body report reiterated that the text of Article III:4 reflected the general principle of paragraph 1 of Article III in seeking ‘to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, “so as to afford protection to domestic production.”’<sup>29</sup>

For a violation of Article III:4 to be established, the complaining Member must prove that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’;<sup>30</sup> that the imported and domestic products at issue are ‘like products’; and that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.<sup>31</sup>

### *Imported and Domestic Like Products*

The prohibition against discrimination in the national treatment obligation can apply only when imported and domestic products are ‘like’. The majority of the Appellate Body in *EC – Asbestos* found that ‘likeness’ under Article III:4 is, ‘fundamentally, a determination about the nature and extent of a competitive relationship between and among products’.<sup>32</sup> To perform such an assessment, the Appellate Body recalled that the four classic, and basic, criteria, derived from the *Border Tax Adjustment* report – (i) the physical properties of the products in question; (ii) their end-uses; (iii) consumer tastes and habits *vis-à-vis* those products; (iv) and tariff classification<sup>33</sup> – are to be used as tools in the determination of this

<sup>28</sup> See Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 29.

<sup>29</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (*EC – Asbestos*), WT/DS135/AB/R, adopted 5 Apr. 2001, at para. 98.

<sup>30</sup> The Appellate Body clarified that the word ‘affecting’ assists in defining the types of measures that must conform to the obligation not to accord ‘less favourable treatment’ to imported ‘like products’ and ‘... it is, therefore, only those [regulations] which ‘affect’ the specific transactions, activities and uses mentioned in that provision that are covered by Article III:4 of GATT.’ Appellate Body Report, *United States – Tax Treatment for ‘Foreign Sales Corporations’ – Recourse to Article 21.5 of the DSU by the European Communities*, (*US – FSC (Article 21.5, EC)*), WT/DS108/AB/RW, at para. 208.

<sup>31</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea – Various Measures on Beef*), WT/DS161/AB/R and WT/DS169/AB/R, adopted 10 Jan. 2001, at para. 133.

<sup>32</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 99. Note the different opinion with regard to the very specific aspects mentioned in para. 154.

<sup>33</sup> Working Party Report, *Border Tax Adjustments*, adopted 2 Dec. 1970, BISD 18S/97.

competitive relationship between products. These criteria do not exhaust inquiry.<sup>34</sup>

The competitive relationship between imports and domestic goods is the determinant of likeness because ‘if there is – or could be – no competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production’.<sup>35</sup> This competitive relationship is to be determined using the classic criteria of the *Border Tax Adjustment* report. The balancing of the criteria identified in the *Border Tax Adjustment* report is intended to approximate the competitive relationship between the relevant goods. A more precise and refined measure of whether a competitive relationship exists is the economic concept of cross-elasticity of demand.<sup>36</sup> If the price of one good rises, to what extent do consumers shift consumption to the other good being tested? Although not as accurate or refined as testing cross-elasticity of demand to determine a competitive relationship, the qualitative *Border Tax Adjustment* factors may be used to assess a competitive relationship between products.

The more important critique of the *Border Tax Adjustment* test is that it is relatively ignorant of factors that motivate regulation. The economic theory of regulation suggests that regulation is necessary precisely where consumers cannot adequately distinguish relevant goods – where, but for the regulation, they are in close competitive relation. Thus, a competitive relationship test for likeness could often result in a finding that goods that differ by the parameter addressed by regulation are indeed like, and should be treated the same.<sup>37</sup> Hence, many domestic regulations would prima facie violate Article III – as like products would be treated differently by the said regulation and often in reducing market access to imported like products; they would need the justification of Article XX to be WTO-compatible. This is why the Appellate Body’s two-step analysis, used first in

<sup>34</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 101.

<sup>35</sup> *Ibid.*, para. 117.

<sup>36</sup> See, for instance, the criteria of cross-elasticity of demand to determine whether imported and domestic products are directly competitive or substitutable in the Appellate Body Report in *Japan – Alcoholic Beverages II*, at 26, or in Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* (*‘Korea – Alcoholic Beverages’*), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 Feb. 1999, at paras 108–124, or in the Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (*‘US – Cotton Yarn’*), WT/DS192/AB/R, adopted 5 Nov. 2001, paras 89–102. For a critique of the Border Tax Adjustments factors as a means of determining competition, see Damien Neven & Joel P. Trachtman, *Philippines – Taxes on Distilled Spirits: Toward a Border Tax Adjustment?*, 12 *World Trade Review* 297 (2013).

<sup>37</sup> Moreover, if it is true that consumers would not consider them interchangeable, then some may say that the regulation was not necessary.

*Korea – Various Measures on Beef*<sup>38</sup> and described more precisely in paragraph 100 of the *EC – Asbestos* decision, discussed hereafter, is important.

### *Less Favourable Treatment*

The less favourable treatment criterion involves part of an ‘effects test’. In *Korea – Various Measures on Beef*, the Appellate Body reversed the Panel, which had concluded that a regulatory distinction based exclusively on the origin of the product necessarily violated Article III. The Appellate Body emphasized the fact that ‘differential treatment’ may be acceptable, so long as it is ‘no less favourable’. Article III only prohibits discriminatory treatment, which ‘modifies the conditions of competition in the relevant market to the detriment of imported products’.<sup>39</sup>

Is this ‘modification of the conditions of competition to the detriment of imported products’ the benchmark to assess the existence of ‘protectionism’ condemned by Article III? In *EC – Asbestos*, the Appellate Body reiterated that the ‘broad and fundamental purpose’ of the obligation of national treatment of Article III GATT is ‘to avoid’ the application of ‘protectionist’ internal measures. This determination is based on whether such internal measures are applied in a manner that affects the competitive relationship, in the marketplace, between the domestic and imported products involved, ‘so as to afford protection to like domestic production’.<sup>40</sup> This decision establishes a two-step analysis, wherein the first step requires a determination whether like products are treated differently, and the second step determines whether this differential treatment amounts to ‘less favourable treatment’.

In *EC – Asbestos*, the Appellate Body made the following statement:

A complaining Member must still establish that the measure accords to the group of ‘like’ imported products ‘less favourable treatment’ than it accords to the group of ‘like’ domestic products. The term ‘less favourable treatment’ expresses the general principle, in Article III:1, that internal regulations ‘should not be applied . . . so as to afford protection to domestic production’ . . . . However, a Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of ‘like’ imported products ‘less favourable treatment’ than that accorded to the group of ‘like’ domestic products.<sup>41</sup>

<sup>38</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at paras 133–149.

<sup>39</sup> *Ibid.*, para. 137.

<sup>40</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at paras 96 and 98: ‘... in endeavouring to ensure ‘equality of competitive conditions’, the ‘general principle’ in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, ‘so as to afford protection to domestic production.’

<sup>41</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para 100. In *US – Clove Cigarettes*, the Appellate Body used the same concept of group of like products under Article 2.1 TBT Agreement (in particular paras 179–182 and 193–198).

And, as the Appellate Body had stated in *Korea – Various Measures on Beef*, ‘a formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4’. Whether or not imported products are treated less favourably than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products. Different treatment is neither sufficient nor necessary to prove less favourable treatment. Thus, it is not enough to find a single foreign like product that is treated differently from a domestic like product. The class of foreign like products must be treated less favourably than the class of domestic like products. In order for this to occur, it would seem necessary that the differential regulatory treatment be predicated, either intentionally or unintentionally, on the foreign character of the product. However, in *Korea – Various Measures on Beef*, the Appellate Body made clear that differential treatment based on nationality, alone, would not necessarily amount to ‘less favourable’ treatment.<sup>42</sup> Thus a violation would only occur if, after respecting the legitimate categories, the measure were still found to be less favourably treated.

Some argue that the less favourable treatment criterion only condemns protectionist or other illegitimate regulatory distinctions. It is worth noting that a similar consideration motivated the aim-and-effects test.<sup>43</sup>

### 3.1[a][ii] Most-Favoured-Nation Principle

Article I of GATT provides that for all matters referred to in paragraph 4 of Article III, any advantage, favour, privilege or immunity granted by any Member 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 Members.

### 3.1[b] TBT Agreement

Article 2.1 of the TBT Agreement, following closely Articles III and I of GATT, requires: ‘treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country’. However,

<sup>42</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 134.

<sup>43</sup> See Hudec, *supra* n. 26; and Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in *Fair Trade and Harmonization, Pre-requisite for Free-Trade* Vol. II (Robert E. Hudec & Jagdish Bhagwati eds., MIT Press 1996).

the TBT Agreement has no provision equivalent to GATT Article XX, which provides exceptions to these obligations under certain circumstances.

The 2012 *US – Clove Cigarettes* decision was the first time that the Appellate Body was called on to give a thorough interpretation of the meaning of the national treatment and MFN obligations of TBT Article 2.1. Article 2.1 lays down disciplines whose terms closely relate to those contained in GATT Articles III and I, but the TBT Agreement did not provide general exceptions to those obligations as in GATT Article XX. Nonetheless, the Appellate Body sought to preserve the GATT ‘balance’ between preventing protectionism and allowing Members to regulate their economies as they see fit within Article 2.1 and in the context of the TBT Agreement itself.<sup>44</sup>

The Appellate Body did not conclude that the exceptions of GATT Article XX were available to violations of the TBT Agreement. For the Appellate Body, the negotiators of the TBT Agreement seemed to have emphasized Members’ rights (rather than *exceptional* rights) to take measures for the protection of health, the environment, security, and other reasons, since these concerns were reflected in the TBT preamble and the text of Article 2.2.<sup>45</sup>

### 3.1[b][i] Imported and Domestic Like Products

Some had suggested that the ‘accordion’ of like products<sup>46</sup> could allow a distinction between the ‘like’ products criterion of GATT Article III (or I) and that of 2.1 TBT. In fact, this is precisely what the Panel in *US – Clove Cigarettes* argued, adding to the traditional four likeness criteria a new consideration under the TBT Agreement, namely, the ‘regulatory purpose’ of the technical regulation.<sup>47</sup> However, the Appellate Body overturned the Panel’s finding and stated that, for the purposes of the TBT Agreement, the like products requirement was to be

<sup>44</sup> On the three AB reports of 2012 discussing the TBT Agreement see *The New WTO TBT jurisprudence in US -Clove Cigarettes, WTO US-Tuna II, and US-COOL*, 8 Asian J. WTO & Intl. Health L. & Pol’y 1 (2013).

<sup>45</sup> Moreover, in light of the Appellate Body’s decision in *China – Raw Materials*, Members may only expect to rely on GATT Article XX exceptions when the provisions of another covered agreement explicitly refer to the GATT. See Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials* (‘*China – Raw Materials*’), WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, (30 Jan. 2012), at paras 303–306.

<sup>46</sup> In *Japan – Alcoholic Beverages II*, the Appellate Body stated that the ‘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.’ Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 23.

<sup>47</sup> Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (‘*US – Clove Cigarettes*’), WT/DS406/AB/R (4 Apr. 2012), at para. 104.

approached as it had been under GATT 1994, that is, by considering the *competitive relationship* between products. Any regulatory concerns that might help define the ‘likeness’ of two products must be ‘reflected in the products’ competitive relationship’ itself.<sup>48</sup>

### 3.1[b][ii] Less Favourable Treatment

The Appellate Body first interpreted the scope of the less favourable treatment requirement under the TBT Agreement in the *US – Clove Cigarettes* dispute. It found that, as a starting point, the requirement forbids treatment that has a detrimental impact on the competitive opportunities of imports vis-à-vis like domestic products. This definition follows prior GATT jurisprudence.<sup>49</sup> However, because the less favourable treatment obligation under GATT 1994 allows for certain exceptions under Article XX, while the TBT Agreement appears to impose similar obligations without recourse to GATT exceptions, the Appellate Body determined that an additional step was required for a determination of less favourable treatment under TBT Article 2.1:

[T]he existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyse *whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction* rather than reflecting discrimination against the group of imported products...<sup>50</sup> (Emphasis added)

In making this determination, the Appellate Body made reference to the interpretive context of TBT Article 2.1, including the TBT Preamble and the position of the TBT Agreement relative to other covered agreements. Comparing the GATT and TBT, it emphasized that the TBT Agreement ‘expands on pre-existing GATT disciplines’, that technical regulations under the TBT Agreement also fall within the scope of GATT Article III:4, and that ‘the two Agreements should be interpreted in a coherent and consistent manner’.<sup>51</sup> It found that the TBT Agreement provides a balance that ‘is not, in principle, different from the balance set out in the GATT 1994’ between Articles III and XX and that the TBT preamble “recognizes” the Members’ right to regulate versus

<sup>48</sup> *Ibid.*, para. 120.

<sup>49</sup> *Ibid.*, para. 180. The Appellate Body examined the development of the less favourable treatment requirement from prior GATT jurisprudence, which focused on a measure’s impact on the conditions of competition for like imported goods in the domestic market. This strand of jurisprudence was subsequently confirmed, as noted above, by the Appellate Body reports in *Korea – Various Measures on Beef* and *EC – Asbestos*.

<sup>50</sup> *Ibid.*, para. 182.

<sup>51</sup> *Ibid.*, paras 91, 100.

the ‘desire’ to avoid creating unnecessary obstacles to international trade’.<sup>52</sup> Because the TBT Agreement must achieve this balance in the absence of any recourse to GATT Article XX, the Appellate Body located this balance within the TBT provisions and within Article 2.1 itself.

The Appellate Body elaborated that the two-part balancing test within TBT Article 2.1 would proceed with a careful examination of the measure at issue and, in particular, whether any discrimination arising from the measure can be considered legitimate:

[A] panel must carefully *scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed*, in order to determine whether it discriminates against the group of imported products.<sup>53</sup> (emphasis added)

### 3.1[c] SPS Agreement

Two provisions of the SPS Agreement concern discrimination directly: Articles 2.3 and 5.5. The SPS Agreement should be understood, to some extent, as an expansion of Article XX of GATT; its drafters were concerned with the need to (1) expand the scientific and procedural requirements for a Member to impose an SPS measure and (2) encourage reliance on and participation in international standard-setting bodies. Yet the obligations of the SPS Agreement stand alone, and the Panel in *EC – Hormones* stated that, since the SPS Agreement adds to Articles III, XI and XX of GATT, there is no obligation to prove a violation of Articles III or XI before the SPS Agreement can be invoked.<sup>54</sup>

<sup>52</sup> *Ibid.*, paras 94–95. The sixth preambular recital states: ‘Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.’

<sup>53</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 178. *Ibid.*, para. 182.

<sup>54</sup> In *EC – Hormones (US)*, the European Communities submitted that ‘the ‘substantive’ provisions of the SPS Agreement can only be addressed if recourse is made to GATT Article XX(b), i.e., if, and only if, a violation of another provision of GATT is first established’. The Panels rejected this argument, indicating as follows: ‘The SPS Agreement contains, in particular, no explicit requirement of a prior violation of a provision of GATT which would govern the applicability of the SPS Agreement, as asserted by the European Communities’ (para. 8.36). The Panels added: ‘...on this basis alone we cannot conclude that the SPS Agreement only applies, as Article XX(b) of GATT does, if, and only if, a prior violation of a GATT provision has been established. Many provisions of the SPS Agreement impose ‘substantive’ obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b). These obligations are, *inter alia*, imposed to ‘further the use of harmonized sanitary and phytosanitary measures between Members’ and to ‘improve the human health, animal health and phytosanitary situation in all

The discrimination condemned in Articles 2.3 and 5.5 appears parallel to the type of discrimination referenced in the chapeau of Article XX, discussed below in subsection 3 – it prohibits discrimination between certain situations. Article 2.3 of the SPS Agreement provides as follows:

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 5.5 restricts ‘arbitrary or unjustifiable distinctions’ between ‘different situations, if such distinctions result in discrimination or a disguised restriction on international trade’.

Although both these provisions 2.3 and 5.5 seem to have adapted their operative language from the chapeau of Article XX of GATT,<sup>55</sup> the Panel in *Australia – Salmon Article 21.5 DSU* was of the view that Article 2.3 prohibits discrimination between both similar and different products.<sup>56</sup> The scope of Article 2.3 would thus be much broader than that of Article 5.5 SPS, which was said to be ‘but a complex and indirect route’<sup>57</sup> to proving the discrimination

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Members’. They are not imposed, as is the case of the obligations imposed by Article XX(b) of GATT, to justify a violation of another GATT obligation (such as a violation of the non-discrimination obligations of Articles I or III) (para. 8.38). Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States (EC – Hormones (US))* WT/DS26/R/USA, adopted 13 Feb. 1998 as modified by the Appellate Body Report, WT/DS26/AB/R, DSR 1998:III, 699.

<sup>55</sup> The chapeau requires that measures exempted under Article XX must not be applied in a manner that would constitute ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade ...’.

<sup>56</sup> Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada (Australia – Salmon (Article 21.5 DSU))*, WT/DS18/RW, adopted 20 Mar. 2000, at para. 7.112: ‘we are of the view that discrimination in the sense of Article 2.3, first sentence, may also include discrimination between different products, e.g. not only discrimination between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; but also discrimination between Canadian salmon and Australian fish including non-salmonids’.

<sup>57</sup> On the relationship between 2.3 and 5.5 of the SPS Agreement see the Appellate Body statement in *Australia – Salmon*: ‘We recall that the third – and decisive – element of Article 5.5, discussed above, requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in ‘discrimination or a disguised restriction on international trade’. Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination ‘between Members, including their own territory and that of others Members’ within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5. However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5.’ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon (Australia – Salmon)*, WT/DS18/AB/R, adopted 6 Nov. 1998, DSR 1998:VIII, 3327, at para. 252.

prohibited by Article 2.3. Article 5.5 imposes a form of internal consistency requirement. The Guidelines on Article 5.5 adopted by the SPS Committee are further discussed in sub-section 3.6 below on 'Internal Consistency'.

The test under the SPS is different from that of Articles I, III, XI and XX of GATT. There is no like products analysis (as with Article III of GATT or 2.1 TBT) in the SPS Agreement. The focus of the analysis is the justification for discrimination between situations under the SPS prohibition itself.

### 3.2 NECESSITY AND PROPORTIONALITY TESTS

One important general discipline on domestic regulation in WTO law is the necessity test, which, until the *EC – Asbestos*, *Korea – Various Measures on Beef* and *Brazil – Tyres* decisions of the Appellate Body, was generally interpreted as requiring domestic regulation to be the least trade restrictive method of achieving the desired goal. As discussed hereafter, the necessity requirement – and associated least trade restrictive alternative test – have undergone some refinement under WTO law. The TBT and SPS Agreements have made it a 'positive requirement' on all relevant regulations not to be more restrictive than necessary, while the GATT under Article XX applies it as a 'justification' for restrictions found to violate other provisions, including basic market access rights.

A broader 'proportionality' requirement may nonetheless include a least trade restrictive alternative analysis. While proportionality is a general concept of international law,<sup>58</sup> as it relates to retorsion and other international legal remedies, it has already emerged as a principle of EU law.<sup>59</sup> In the EU context, proportionality *stricto sensu*<sup>60</sup> inquires as to whether the means are 'proportionate' to the ends: whether the costs are excessive in relation to the benefits. It might be viewed as cost-benefit analysis with a margin of appreciation, as it does not require that the costs be less than the benefits. A wider definition of proportionality, developed in the European legal context, includes three tests: (i) a simple suitability, or means-ends rationality, test, (ii) a least/less trade restrictive alternative test, and (iii) proportionality *stricto sensu*.<sup>61</sup> A means-ends rationality test, or suitability test, simply inquires as to whether the measure is a rational or suitable

<sup>58</sup> See J. Delbruck, *Proportionality*, in *Encyclopedia of Public International Law* Vol. 3, 1140 (R. Bernhardt ed., Elsevier Science, 1997).

<sup>59</sup> Case 11/70, *Internationale Handelsgesellschaft* [1970] E.C.R. 1125, 1135.

<sup>60</sup> Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* 6 (Kluwer Law International 1996). See also Joel Trachtman, *Trade and...Problems*, 9 E.J.I.L. 1, 32, 74–76 (1998).

<sup>61</sup> For an explication of these tests as they have been developed in the EC context, see Jan Neumann & Elisabeth Türk, *Necessity Revisited – Proportionality in WTO Law After EC-Asbestos*, 38 JWT, 199 (2003).

means, among many others, to achieve the purported goal. It is often said to be a weak test that is generally easy to satisfy. In WTO law the two components of proportionality interact: proportionality *stricto sensu*, which is similar to a balancing test, and a less trade restrictive alternative test.

### 3.2[a] *The Necessity Test in the GATT*

Since its inception, the GATT has recognized that legitimate government policies may justify measures contrary to basic GATT market access rules. Traditionally in GATT, the exceptional provisions of Article XX (a), (b) and (d) have been available to justify measures – otherwise incompatible with other GATT provisions – if they are ‘necessary’ to achieve certain policy objectives. This has been interpreted to require that the country invoking these exceptions demonstrate that no other WTO-compatible or less restrictive alternative was reasonably available to pursue the desired policy goal:

It was clear to the Panel that 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.<sup>62</sup>

Until recently, the ‘necessity’ qualifications contained in Articles XX(a), (b) and (d) of GATT have been interpreted to require the national measure to be the least trade restrictive alternative reasonably available. A fundamental question arises from the inclusion of the ‘reasonably available’ qualification in the necessity test: what is reasonable?<sup>63</sup> If the reasonableness test amounts to a requirement that the least trade restrictive alternative not be so costly as to countervail the benefits of the regulatory measure, then it bears some resemblance to cost-benefit analysis. If not, this necessity test would truncate cost-benefit analysis by not examining the

<sup>62</sup> See GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930* (‘US – Section 337’), adopted 7 Nov. 1989, BISD 36S/345, at para. 5.26; GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* (‘US – Malt Beverages’), adopted 19 Jun. 1992, BISD 39S/206, at para. 5.52; and GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (‘Thailand – Cigarettes’), adopted 7 Nov. 1990, BISD 37S/200, at para. 223.

<sup>63</sup> The SPS Agreement specifically (although not unambiguously) adds a reasonableness qualification. These provisions leave some ambiguity in light of Article 2.2 of the SPS Agreement, which provides a necessity test in respect of the application of sanitary and phytosanitary measures, but lacks a reasonableness qualifier.

benefits of the regulatory measure, or compare those benefits with the trade restriction.<sup>64</sup>

WTO jurisprudence changed the traditional GATT reading of Article XX, including the parameters of the so-called ‘necessity test’. First, in *US – Gasoline*, the Appellate Body determined that compliance with Article XX is now to be demonstrated in a two-prong test: first, whether the challenged measure is covered by one of the subparagraphs of Article XX and, second, whether or not the measure is ‘applied’ in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade. While Members have a right to invoke the exceptions, the exceptions should not be applied so as to unjustifiably frustrate the legal obligations owed to other Member States under the GATT.<sup>65</sup> Next, the components of the necessity test have also evolved, as reviewed below.

### 3.2[a][i] The Necessity Test Under Article XX(a), (b) and (d)

In the WTO, the Article XX necessity test was first addressed in *Korea – Various Measures on Beef*, where Korea attempted to justify its dual retail system for beef by arguing the need for compliance with a domestic regulation against fraud. The Appellate Body interpreted the necessity test of Article XX(d) to imply a requirement for balancing among at least three variables:

In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.<sup>66</sup>

After reiterating that WTO Members have the right to determine for themselves the level of enforcement of their domestic laws<sup>67</sup> (a concept close to the ‘appropriate level of protection’ referred to in the SPS Agreement), the Appellate Body called for an authentic balancing and weighing of (at least) these variables: ‘The 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

<sup>64</sup> Thus, if cost-benefit analysis would analyse the regulatory benefits net of regulatory costs, and the trade costs, this test examines the trade costs, and the regulatory costs (under the ‘reasonably available’ heading), but does not evaluate the regulatory benefits.

<sup>65</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*), WT/DS2/AB/R, adopted 20 May 1996, at 22.

<sup>66</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 164.

<sup>67</sup> *Ibid.*, para. 177.

instrument’;<sup>68</sup> ‘The greater the contribution [to the realization of the end pursued], the more easily a measure might be considered to be “necessary”’;<sup>69</sup> and ‘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.’<sup>70</sup>

In *EC – Asbestos*, the Appellate Body tried to reconcile its new balancing test with the traditional least trade restrictive alternative test. For the Appellate Body, the balancing referred to in *Korea – Various Measures on Beef* is part of the determination of whether a WTO-compatible or less trade restrictive alternative exists to obtain the end pursued (as called for by the traditional necessity test of Article XX(b)).<sup>71</sup> In light of France’s chosen level of protection, and noting that the protection of human life is vital and important to the highest degree,<sup>72</sup> the *EC – Asbestos* Appellate Body report concluded that ‘the remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition’.<sup>73</sup>

In *US – Gambling* (2005), the Appellate Body further clarified the process for determining whether or not a measure is ‘necessary’. First, the responding party must make a prima facie case that its measure is ‘necessary’ by ‘weighing and balancing’ the factors outlined in *Korea – Various Measures on Beef*. Then, if the *complaining party* raises an alternative measure that it feels the responding party could have taken, it is for the responding party to rebut, showing that the proposed alternative does not achieve the regulatory goal or is not reasonably available. In contrast to certain GATT decisions in the pre-WTO era, the Appellate Body thereby determined that the burden of proof was not on the responding Member to demonstrate that there were *no* reasonably available alternatives, but rather for the complaining Member to suggest that there were.<sup>74</sup> Moreover, the Appellate

<sup>68</sup> *Ibid.*, para. 162.

<sup>69</sup> *Ibid.*, para. 163.

<sup>70</sup> *Ibid.*

<sup>71</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 172: ‘We indicated in *Korea – Beef* that one aspect of 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’. In addition, we observed, in that case, that ‘[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. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well known, and life threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.’

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (‘*US – Gambling*’) (DS 285), 7 Apr. 2005, paras 306–311.

Body held that an alternative measure may not be considered reasonably available ‘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 or substantial technical difficulties’.<sup>75</sup>

This position was reaffirmed in *Brazil – Tyres* (2007).<sup>76</sup> The case involved Brazil’s imposition of an import ban against retreaded tyres from the EC. Brazil claimed that the Import Ban was justified for health and environmental reasons under GATT Article XX(b) and (g). Building on *US – Gambling*, the Appellate Body noted that ‘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”’.<sup>77</sup> ‘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.’ It also noted that, in weighing the degree of contribution of a measure to the objective pursued, the measure’s contribution does not have to be ‘immediately observable’ because it may form part of a ‘comprehensive policy comprising a multiplicity of interacting measures... [that] can only be evaluated with the benefit of time’. Thus, the measure must merely be shown to be ‘*apt to* make a material contribution to the achievement of its objective’.<sup>78</sup> The degree of contribution may therefore be shown through either quantitative projections or qualitative reasoning.<sup>79</sup>

However, while these findings generally appear to refine the ‘necessity’ requirements, the Appellate Body emphasized that a measure’s degree of contribution must, at a minimum, be ‘material’. The new ‘material contribution’ requirement has become an important consideration in the ‘necessity’ analysis under GATT Article XX:

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

<sup>75</sup> *Ibid.*, para. 309.

<sup>76</sup> For an analysis of the GATT Article XX jurisprudence see in particular, “The WTO’s efforts to balance economic development and environmental protection: A short review of Appellate Body jurisprudence”, *Latin American Journal of International Trade Law*, Vol. 1 No. 1, p. 291 (2013) (with Julian Wyatt).

<sup>77</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 Dec. 2007) (*‘Brazil – Tyres’*), at para. 171.

<sup>78</sup> *Ibid.*, para. 150 (emphasis added). For a critique of the Appellate Body’s decision in *Brazil – Tyres*, see Chad Bown & Joel P. Trachtman, *Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 (Special Issue 1) *World Trade Rev.* 85 (2009).

<sup>79</sup> *Ibid.*, paras 150–151.

insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, *the contribution of the measure has to be weighed against its trade restrictiveness*, taking into account the importance of the interests or the values underlying the objective pursued by it [and the implementing Member's chosen level of protection].<sup>80</sup> (emphasis added)

The 'material contribution' requirement may be capable of flexing on a case-by-case basis, requiring a lesser contribution from measures that do not greatly restrict trade and a greater contribution from those that greatly restrict trade. This interpretation was confirmed in *China – AV Products*.<sup>81</sup> Thus, the Appellate Body in *Brazil – Tyres* required a measure's trade restrictiveness to be *balanced* by its contribution to the objective pursued, such that there is a 'genuine relationship of ends and means'.<sup>82</sup> This language seems to interrelate Article XX(b) with Article XX(g), which since *US – Shrimp* has required a 'close and genuine relationship of ends and means'.<sup>83</sup>

The meaning of this component of the 'necessity' test under GATT Article XX(b) was more recently explored in *China – Raw Materials*. Recalling *Brazil – Tyres*, the Panel found that, 'neither the measures implementing the export restrictions, nor the contemporaneous laws and regulations, convey in their texts that the export restrictions are contributing to, or form part of, a comprehensive programme for the fulfilment of [China's] stated environmental objective'.<sup>84</sup> Moreover, they neither materially contributed to the environmental objective at the time of the dispute nor were they *apt to* materially contribute in the medium or long term.<sup>85</sup> Finally, China claimed to have already implemented the various less trade restrictive alternatives proposed by the complainants as part of its comprehensive environmental program, leading the Panel to conclude that these alternatives were reasonably available.<sup>86</sup> However, the Panel was not persuaded that China's implementation of these measures was complete. 'China has not been able to justify why less trade restrictive and WTO-consistent alternatives available, as identified by the complainants and acknowledged to exist by China, cannot be used in lieu of applying export restrictions.'<sup>87</sup> China did not appeal the

<sup>80</sup> *Ibid.*, para. 210.

<sup>81</sup> Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (21 Dec. 2009) ('*China – AV Products*'), para. 310.

<sup>82</sup> *Ibid.*

<sup>83</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 Oct. 1998) ('*US – Shrimp*'), at para. 136. 'The WTO's efforts to balance economic development and environmental protection: A short review of Appellate Body jurisprudence', 1 *Latin American J. Intl. Trade L.* 291 (2013) (with Julian Wyatt).

<sup>84</sup> Panel Report, *China – Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (5 Jul. 2011), at para. 7.512.

<sup>85</sup> *Ibid.*, paras 7.538, 7.540, 7.550, and 7.553.

<sup>86</sup> *Ibid.*, para. 7.568.

<sup>87</sup> *Ibid.*, para. 7.590.

Panel's finding that China had not demonstrated that China's export restrictions on raw materials were necessary within the meaning of Article XX(b).<sup>88</sup>

The nature of what must be 'necessary' has also been refined under recent WTO jurisprudence. The text of GATT Article XX clearly indicates that what must be necessary under GATT Article XX (a), (b), or (d) are 'measures' taken for the reasons under those subparagraphs. However, in the recent *Thailand – Cigarettes (Philippines)* case, the Appellate Body found that, in addition to the necessity of the measure itself, 'what must be shown to be "necessary" [to justify an inconsistency with GATT Article III:4] is the *treatment* giving rise to the finding of less favourable treatment'.<sup>89</sup> This decision calls to mind the TBT and SPS Agreements, under which what must be necessary is the trade restrictiveness of a measure, rather than the measure itself. Necessity under the TBT and SPS Agreements is reviewed below.

To some extent, *Korea – Various Measures on Beef* and subsequent cases have introduced a form of balancing test (or proportionality test) into Article XX of GATT.<sup>90</sup> We discuss this development in section 3.8 below.

It is important at this stage to note the similarity between the wording of the necessity tests under Article XX, that of Article 2.2 of the TBT Agreement, and that of Article 5.6 of the SPS Agreement and its footnote (although, of course, Article XX operates as a defence). The necessity discipline on possible justification for inconsistencies has been made into a positive requirement for all TBT and SPS measures. We discuss the possibility for common interpretation below.

### 3.2[a][ii] The Test Under Article XX(g)

The invocation of Article XX(g) against claims of GATT violations can also raise issues in the context of the relationship among the SPS Agreement, the TBT Agreement and GATT, for instance, with respect to some so-called 'green' labelling requirements. In its *US – Gasoline* report, although the parties had both relied on the GATT 'primarily aimed at' test for whether a measure is 'related to' the exhaustion of natural resources, the Appellate Body noted that the threshold of Article XX(g) did not contain a requirement that the measure be 'primarily aimed

<sup>88</sup> *Ibid.*, para. 7.615.

<sup>89</sup> Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* ('*Thailand – Cigarettes (Philippines)*'), WT/DS371/AB/R (17 Jun. 2011), at para. 177, emphasis added. In the earlier *US – Gasoline*, the Appellate Body concluded that the measure itself, and not the violation, was the focus of GATT Article XX. See Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 13–14.

<sup>90</sup> See Neumann & Türk, as *supra* n. 61.

at', but only a requirement that the measure be 'related to'.<sup>91</sup> 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'<sup>92</sup>).

In *US – Shrimp*, the Appellate Body appears to have abandoned the 'primarily aimed at' test and focused on the means–ends relationship<sup>93</sup> between the measure and the goal pursued, 'we must examine the relationship between the general structure and design of the measure here at stake, section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles'.<sup>94</sup> The 'relating to' requirement under Article XX(g) has since been defined as a 'close and genuine relationship of ends and means'.<sup>95</sup> The Appellate Body affirmed the means/ends relationship in *China – Raw Materials*, adding that there was no requirement under Article XX(g) that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption.<sup>96</sup> For the Appellate Body, 'made effective in conjunction with' means that import and export restrictions must 'work together' with domestic restrictions for conservation.<sup>97</sup>

### 3.2[a][iii] The Chapeau of Article XX

In *US – Shrimp*, the Appellate Body stressed the fact that the chapeau of Article XX is a recognition of the need to maintain a balance between the right of a Member to invoke one of the exceptions in Article XX and the substantive rights of other Members under GATT rules. It noted that the task of applying the chapeau is a delicate one of finding and marking out a 'line of equilibrium'<sup>98</sup>

<sup>91</sup> Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 17–22 in particular: '...participants and third parties agree...accordingly we see no need to examine this point further, *save, perhaps, to note 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 XX*' (emphasis added). *Ibid.*, 21–22.

<sup>92</sup> *Ibid.*, 20–22.

<sup>93</sup> See Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, paras 156–160.

<sup>94</sup> See *ibid.*, para. 141: 'In its general design and structure, therefore, Section 609...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.'

<sup>95</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, para. 136.

<sup>96</sup> Appellate Body Report, *China – Raw Materials*, at paras 356 and 361.

<sup>97</sup> *Ibid.*, para. 356.

<sup>98</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at paras 156–160.

between these two sets of rights in such a way that neither will cancel out the other. The various balancing tests arising under different provisions of GATT are discussed in section 3.8 below.

The chapeau of Article XX establishes three standards regarding the application of measures for which justification under Article XX may be sought: first, there must be no 'arbitrary' discrimination between countries where the same conditions prevail; second, there must be no 'unjustifiable' discrimination between countries where the same conditions prevail; and, third, there must be no 'disguised restriction on international trade'.<sup>99</sup> These concepts impart meaning to one another:

'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.<sup>100</sup>

Therefore, a violation of any of these concepts would suffice to disqualify the measure under Article XX.<sup>101</sup> Yet, the standards embodied in the language of the chapeau of Article XX are not only different from the requirements of the remainder of Article XX, but are also different from the standards used for the substantive violations of GATT.<sup>102</sup>

<sup>99</sup> See the Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 21–22; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ('*US – Shrimp (Article 21.5 – Malaysia)*'), WT/DS58/AB/RW, at para. 118; and Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 150.

<sup>100</sup> See the Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 25. See also the Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 184, where after finding that the measure at issue was a means of unjustifiable and arbitrary discrimination the Appellate Body decided that it was not necessary to examine also whether the measure was applied in a manner that constitute a disguised restriction on international trade.

<sup>101</sup> See the Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 184, where after finding that the measure at issue was a means of unjustifiable and arbitrary discrimination the Appellate Body decided that it was not necessary to examine also whether the measure was applied in a manner that constitute a disguised restriction on international trade.

<sup>102</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 150 (citations omitted). It is worth noting the following excerpts on the relationship between Articles III and XX from two reports, first in *US – Gasoline* and then in *EC – Asbestos*, where the Appellate Body seems to have

When the analysis of the chapeau of Article XX took place in the context of the invocation of subparagraph (g), the Appellate Body (faced with a measure benefiting from a provisional justification under Article XX(g)) examined, under the chapeau of Article XX, whether less trade restrictive alternatives were reasonably available to the United States and whether the restrictiveness of the measure was somehow disproportionate, since similar costs were not at all imposed on domestic producers. In other words, even after Article XX(g) itself is satisfied, a least trade restrictive alternative analysis akin to a ‘necessity’ test seems to be performed under the chapeau of Article XX.

In sum, Article XX offers justifications that can lead to exemption from any provision of GATT,<sup>103</sup> in situations where the trade restriction or discrimination is viewed as necessary, or otherwise appropriately and proportionally related to the implementation of the policies listed in Article XX. The Appellate Body in *US – Gasoline* concluded, when discussing a violation of the chapeau of Article XX, that, ‘The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.’<sup>104</sup> Indeed, the reference to ‘unjustifiable discrimination’ in the chapeau of Article XX indicates that some discrimination may otherwise result from measures authorized under Article XX.

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changed position. In *US – Gasoline*, the Appellate Body also stated: ‘The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred’ (p. 23), and ‘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 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’; Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 23; and in *EC – Asbestos*: ‘Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. 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’; Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 115.

<sup>103</sup> See Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 24: ‘The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words ‘nothing in this Agreement’, and Article XX as a whole including its chapeau more easily integrated into the remainder of the General Agreement, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.’

<sup>104</sup> *Ibid.*, 28.

3.2[b] *TBT Agreement*

The exceptional provisions of GATT Article XX only become relevant after a violation of another provision of GATT is found. This is a significant distinction from both the SPS Agreement and the TBT Agreement, which apply requirements of necessity independently. Under GATT, of course, the necessity requirement of Articles XX(a), (b) and (d) is an affirmative defence, with both the burdens of proof and persuasion on the defendant to convince a panel that its measure is 'necessary' and that no less trade restrictive alternatives suggested by the complaining party are reasonably available. Under the SPS and TBT Agreements, on the other hand, the same standard is framed as an obligation of the defendant, with the complainant required to make out an affirmative, *prima facie* case. Thus, whether a specific measure is an SPS measure, a technical regulation under the TBT Agreement, or another type of measure under Article XX (say, a measure adopted for environmental purposes) will determine which Member bears the burden of proof in case of a challenge.<sup>105</sup>

The Appellate Body clearly defined the necessity test under TBT Article 2.2 in the WTO *US – Tuna II* dispute in 2012. Article 2.2 states:

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.

Technical regulations are defined in TBT Annex 1.1 as documents laying down 'product characteristics or their related processes and production methods... with which compliance is mandatory', as opposed to standards, which are voluntary.

The drafters of the TBT Agreement noted in the Agreement's preamble that it is meant to 'further the objectives of GATT 1994'. Article 2.2 has to be interpreted harmoniously with the necessity requirements under GATT Article XX. This is well-reflected in WTO *US – Tuna II* where the Appellate Body noted that, after determining the legitimate objective pursued, the panel must undertake a 'relational analysis' of three factors and, in most cases, a comparison to reasonably available alternatives in order to determine whether or not the technical regulation's trade restrictiveness is 'necessary'. The relational analysis compares the

<sup>105</sup> See Robert Howse & Petros C. Mavroidis, *Europe's Evolving Regulatory Strategy for GMO – the Issue of Consistency with WTO Law: of Kine and Brine*, 24 *Fordham Intl. L. J.* 317, 324 (2000).

measure's degree of contribution to the legitimate objective, the risks that non-fulfilment of the legitimate objective would create, and the overall trade restrictiveness of the measure to potentially available alternatives. As under the GATT jurisprudence, a Member is free to impose technical regulations 'at the levels it considers appropriate', as clearly stated in the TBT preamble.

### *Degree of Contribution*

This interpretation of the necessity requirement under TBT Article 2.2 is closely akin to the reading of 'necessity' under GATT 1994 developed since *Korea – Various Measures on Beef*, as outlined above. The WTO *US – Tuna II* interpretation – subsequently confirmed in *US – COOL* (2012) – reveals a significant amount of cross-fertilization between GATT 1994 and the TBT Agreement. It also appears that, in reading the necessity requirement under GATT Article XX, the Appellate Body since *Korea – Various Measures on Beef* may have taken some guidance from the SPS and TBT Agreements, drafted as they were during the Uruguay Round and after more than fifty years of GATT practice and case law. These harmonious, horizontal interpretations ensure a stronger and more coherent WTO Single Undertaking.<sup>106</sup>

Article 2.2 of the TBT Agreement adds a curious phrase to the necessity test: it provides 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*'.<sup>107</sup> On its face, the italicized language above of Article 2.2 appears non-sequacious: what part of the necessity test – as a search for the least trade restrictive alternative – would consider the risks of non-fulfilment of the regulatory goals? In considering the risks of non-fulfilment, the AB noted that 'the obligation... suggests that the comparison of the challenged measure with a possible alternative measure should be made in light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective'.<sup>108</sup> Article 2.2 states that in this context a panel should consider, *inter alia*, 'available scientific and technical information, related processing technology or intended end-uses of products'. In *US – COOL*, the AB held that the fact that consumers would not pay for the information the COOL measure

<sup>106</sup> See Gabrielle Marceau, *Balance and Coherence by the WTO Appellate Body: Who could do better? in The WTO at 10: The Role of the Dispute Settlement System* 326–347 (G. Sacerdoti, A. Yanovich & J. Bohanes eds., WTO publication 2006).

<sup>107</sup> TBT Agreement, Article 2.2 (emphasis added).

<sup>108</sup> Appellate Body Report, WTO *US – Tuna II*, at para. 321.

sought to provide suggested that the risks of non-fulfilment of the US' legitimate objective were not 'particularly grave'.<sup>109</sup>

We note that, towards the end of the negotiation of the Uruguay Round, there was a footnote temporarily included after the additional sentence in draft Article 2.2 that reads, 'This provision is intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create.'<sup>110</sup> This footnote and the reference to proportionality have since disappeared, but the conclusion of a 1993 Note from the Secretariat is interesting:

Its use [least trade restrictive alternative test] in the context of standards has evolved to mean that those standards which have the least degree of trade restrictiveness should be used. Consideration of the degree of restrictiveness should be proportional to the risk of non-fulfilment of the legitimate objectives in the case of TBT. In the SPS case, because the assessment of risks to health are already reflected in the determination of the appropriate level of protection, contracting parties should use the least restrictive means to achieve this level of protection.<sup>111</sup>

An important distinction between Article 2.2 of the TBT Agreement and Article XX of GATT is that the former does not contain a closed list of policies. Rather, any 'legitimate' policy may be the basis for a TBT regulation. We discuss this issue further in section 4.3 below.

### 3.2[c] *SPS Agreement*

The SPS Agreement also contains a necessity test, subject to a 'reasonable availability' qualification, requiring that sanitary and phytosanitary measures be 'not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility'.<sup>112</sup> The related

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<sup>109</sup> Appellate Body Report, *US – COOL*, at para. 478. Under *Korea – Various Measures on Beef*, 'the risk of non-fulfilment' can also be viewed as part of the analysis of two criteria: the importance of the values and policies protected by the measure and the extent to which a specific measure contributes to the end pursued. If the necessity test is thought of as more of a balancing or cost-benefit analysis test, as suggested by *Korea – Various Measures on Beef* and *EC – Asbestos*, considering the potential costs of regulatory failure as part of its calculus, then this language is more readily understood. In other words, taking account of the risk of non-fulfilment is part of a balancing test, or cost-benefit analysis. Cost-benefit analysis would ordinarily discount a risk by its probability in order to calculate its 'cost'. In addition, if the necessity test under this provision is thought of in the strict sense as proportionality testing, evaluating whether the costs are disproportionate to the benefits, the magnitude and probability of risk become relevant. Note that in *US – COOL*, the AB reversed the panels' reliance on the jurisprudence developed under 5.6 of SPS in the interpretation of 2.2 TBT.

<sup>110</sup> See Document TER/W/16 and corr.1.

<sup>111</sup> *Ibid.*

<sup>112</sup> SPS Agreement, Article 5.6. Footnote 3 thereto states as follows: 'For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the

footnote indicates that this standard disciplines two of the three components of regulatory cost and benefit. First, it asks whether there is a regulatory alternative that is significantly less restrictive to trade. Second, it asks whether that regulatory alternative is reasonably available.

On its face it declines to discipline the extent to which the measure maintains its ability to meet the appropriate level of protection; that is, it does not require any reductions in protection, no matter how costly in trade terms. At the same time, Article 5.4 of the SPS Agreement exhorts (but does not require) WTO Members, ‘when determining the appropriate level of sanitary or phytosanitary protection, [to] take into account the objective of minimizing negative trade effects’. Arguably this is similar to (or even less stringent than) the third variable (impact on trade) of the balancing test developed in *Korea – Various Measures on Beef*.

A Member must first determine its appropriate level of protection (see section 3.3 below); then it must ensure that its appropriate level of protection is consistently applied to the extent required by Article 5.5 of the SPS Agreement. The jurisprudence has confirmed that ‘the level of protection deemed appropriate by the Member establishing a sanitary . . . measure, is a prerogative of the Member concerned’,<sup>113</sup> and that a distinction must be drawn between the appropriate level of protection and the subsequent choice of a specific measure to pursue that appropriate level.<sup>114</sup>

In *Australia – Salmon*, the Appellate Body stated that Article 5.6 clearly provides a three-pronged test to establish a violation. The complaining party must prove that there is a measure that: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member’s appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested:

These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of the elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, or if the alternative measure does not achieve the Member’s appropriate level of sanitary or phytosanitary protection, or if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6.<sup>115</sup>

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appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.’ This is necessity testing subject to a ‘reasonably available’ qualification. See also Article 2.2: ‘Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health ...’.

<sup>113</sup> Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, at para. 199.

<sup>114</sup> This distinction is discussed below.

<sup>115</sup> Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, at para. 194.

Does this assessment differ from the balancing test under Article XX(b) established in *Korea – Various Measures on Beef*? Does it shed light on how the elements of the necessity test under Article XX should be performed? Recall the findings in *EC – Asbestos* where after noting the chosen level of protection by France (a concept parallel to that of ‘an appropriate level of protection’), and the importance of the value at stake, the Appellate Body asked itself ‘the remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition’. These are the same three questions that the *Australia – Salmon* report had identified, with the difference that under Article XX, the Appellate Body insisted on the obligation for Panels to assess the degree of effectiveness of the measure, while in *Australia – Salmon*, it is as if the declared degree of performance of the measure was unchallengeable. Under Article XX(b) the defending Member would have to be able to answer any one of these three questions in the negative, while under the SPS the complaining party would have to be able to answer each of those three questions in the affirmative.

### 3.3 APPROPRIATE LEVEL/SCIENTIFIC BASIS

#### 3.3[a] SPS Agreement

Article 2.2 of the SPS Agreement provides that sanitary and phytosanitary measures must be based on scientific principles and may not be maintained without sufficient scientific evidence, except as permitted under Article 5.7.

Article 2.2 of the SPS Agreement requires Members to ensure that any measure is applied only to the extent necessary to protect human, animal or plant life or health. The interpretive question here relates to the significance of the term ‘applied’. This term appears here, and also in the chapeau of Article XX of GATT. In the *US – Shrimp* and *US – Gasoline* cases,<sup>116</sup> the Appellate Body suggested that the chapeau’s requirements relate, not to the substance of the measure itself, but to the way in which it is *applied*, e.g., whether it is applied in a way that constitutes arbitrary or unjustifiable discrimination.<sup>117</sup> Article 5.6, also imposing a ‘least trade restrictive alternative’ requirement, does not limit itself to the manner in which the measure is applied, but addresses measures themselves. The operation of this distinction – between a measure and its application – is unclear, and its relation to

<sup>116</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 115; Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 22.

<sup>117</sup> See Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 Mich. L. Rev. 7, 2329, 2354 (June 2000), citing John T. Barcelo, *Product Standards to Protect the Local Environment – the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 Cornell Intl. L. J. 3, 755 (1994).

jurisprudence, as in the *US – Section 301*<sup>118</sup> and *US – 1916 Act*<sup>119</sup> cases, holding that measures may violate WTO law even if they are not yet applied in a way that violates a specific provision of WTO law, is also unclear.

The sixth preambular paragraph of the SPS Agreement confirms that Members should not be forced to ‘change their appropriate level of protection of human, animal or plant life or health’. Annex A defines the appropriate level of protection as the level deemed appropriate by a Member. The SPS jurisprudence has determined that usually Members must, first, determine their ‘appropriate’ level of protection for each specific case:

The ‘appropriate level of protection’ established by a Member and the ‘SPS measure’ have to be clearly distinguished. They are not one and the same thing. The first is an objective, the second is an instrument chosen to attain or implement that objective.

It can be deduced from the provisions of the SPS Agreement that the determination by a Member of the ‘appropriate level of protection’ logically precedes the establishment or decision on maintenance of an SPS measure.<sup>120</sup>

The SPS ‘Guidelines to Further The Practical Implementation of Article 5.5’ recognize that determination of the appropriate level of protection is an element in the decision-making process that logically precedes the selection and use of one or more sanitary or phytosanitary measures. The Guidelines encourage Members to express the appropriate level of protection with the use of quantitative terms when feasible and to publish it.<sup>121</sup>

Article 3.3 of the SPS Agreement permits Members to introduce measures that result in a higher level of protection than international standards, if (a) there is

<sup>118</sup> See Panel Report, *United States – Sections 301–310 of the Trade Act of 1974* (‘*US – Section 301 Trade Act*’), WT/DS152/R, adopted 27 Jan. 2000.

<sup>119</sup> Appellate Body Report, *United States – Anti-Dumping Act of 1916* (‘*US – 1916 Act*’), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 Sep. 2000, at para. 89.

<sup>120</sup> Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, at paras 200–20. *Ibid.*, para. 203: ‘... The words of Article 5.6, in particular the terms ‘when establishing or maintaining sanitary protection’, demonstrate that the determination of the level of protection is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case.’

<sup>121</sup> See section B in the Guidelines: ‘The SPS Agreement does not contain explicit provisions, which oblige a Member to determine its appropriate level of protection, although there is an implicit obligation to do so. In practice, and for various reasons, Members are not always able to indicate precisely their appropriate level of protection. In such cases, the appropriate level of protection may be determined on the basis of the level of protection reflected in the sanitary or phytosanitary measures in place.’ In *Korea – Various Measures on Beef*, while examining the application of Article XX, the Appellate Body had to presume of the level of protection chosen by Korea, see Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, para. 178.

scientific justification,<sup>122</sup> or (b) as a consequence of the Member's appropriate level of protection:

Under Article 3.3 of the SPS Agreement, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.<sup>123</sup>

In all cases where a standard other than an international standard is used, the Member imposing an SPS measure must be able to rely on a relevant risk assessment pursuant to Article 5.1–5.4 of the SPS Agreement. These requirements<sup>124</sup> were interpreted in each of the six cases under the SPS Agreement: *EC – Hormones*,<sup>125</sup> *Australia – Salmon*,<sup>126</sup> *Japan – Agricultural Products*,<sup>127</sup> *Australia – Apples*,<sup>128</sup> *EC – Biotech*,<sup>129</sup> and *EC – Continued Suspension*.<sup>130</sup> In addition to the interpretations provided by the Appellate Body, paragraph 4 of Annex A of the SPS Agreement defines two types of 'risk assessment'.<sup>131</sup>

<sup>122</sup> Note 2 to Article 3.3 explains that a scientific justification exists if, on the basis of scientific evidence, the regulating state determines that international standards are insufficient to achieve its appropriate level of protection.

<sup>123</sup> Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)* ('*EC – Hormones*'), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 Feb. 1998, DSR 1998:I, 135, at para. 172.

<sup>124</sup> In *Australia—Salmon*, the Appellate Body stated: 'On the basis of [the] definition [prescribed in the first part of paragraph 4 of Annex A], we consider that, in this case, a risk assessment within the meaning of Article 5.1 must: (1) identify the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases; (2) evaluate the likelihood of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and (3) evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied.' Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, at para. 121.

<sup>125</sup> Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

<sup>126</sup> Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R.

<sup>127</sup> Appellate Body Report, *Japan – Measures Affecting Agricultural Products* ('*Japan – Agricultural Products II*'), WT/DS76/AB/R, adopted 19 Mar. 1999.

<sup>128</sup> Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 Dec. 2010.

<sup>129</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 Nov. 2006.

<sup>130</sup> Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 Nov. 2008.

<sup>131</sup> 'We note that the first type of risk assessment in paragraph 4 of Annex A is substantially different from the second type of risk assessment contained in the same paragraph. While the second requires only the evaluation of the potential for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the likelihood of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences. In view

3.3[b] *TBT Agreement*

The Preamble of the TBT Agreement also makes clear that each Member may determine the level of protection it considers appropriate. The SPS Agreement's 'appropriate level of protection' described above can be viewed as parallel to the chosen level of protection (*EC – Asbestos*) and the right of Members to adopt the level of protection they consider appropriate under the TBT Agreement. This 'appropriate' level will be reflected in the choice of a specific measure that itself is subject to Article 2.2 of the TBT Agreement, concerned with less trade restrictive measures reasonably available to attain the end pursued. The importance of the value and common interest at stake is not explicitly referred to in the balancing of Article 2.2, but may be relevant when 'taking into account the risks non-fulfilment would create'. Nevertheless, the right to impose technical regulations that may cause impediments to trade is recognized.

The TBT Agreement does not explicitly regulate risk assessments or require scientific bases for regulation. While necessity or proportionality or other standards applicable under the TBT Agreement or GATT may implicitly require some scientific basis, such an implicit requirement can be expected to be significantly less rigorous than the explicit requirements of the SPS Agreement.

3.3[c] *The GATT*

In *Korea – Various Measures on Beef*, the Appellate Body stated that, '... it is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations'.<sup>132</sup> A similar general statement was made in *EC – Asbestos*: 'we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'.<sup>133</sup> 'A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.'<sup>134</sup> Relevant to this

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of the very different language used in para. 4 of Annex A for the two types of risk assessment, we do not believe that it is correct to diminish the substantial differences between these two types of risk assessments, as the European Communities seems to suggest when it argues that 'the object, purpose and context of the SPS Agreement indicate that no greater level of probability can have been intended for the first type of risk assessment than for the second type, [as b]oth types can apply both to human life or health and to animal or plant life or health'. (Third participant's submission of the European Communities, para. 7).' Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, at footnote 67 to para. 120.

<sup>132</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 176.

<sup>133</sup> Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 186.

<sup>134</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 178.

regulatory autonomy is the Appellate Body's conclusion in *US – Shrimp*, which affirms that a Member may unilaterally determine its policy within the parameters of Article XX:

It appears to us . . . that 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.<sup>135</sup>

While this right to determine an (appropriate) level of protection is absolute, pursuant to Article XX, the 'measure chosen' to implement the policy (end) pursued and the appropriate level of protection can be challenged and set aside by WTO adjudicating bodies.<sup>136</sup> Moreover, since the specific level of protection is not always clearly stated by a Member, the Appellate Body seems to reserve to the Panel or itself the right to identify the 'authentic' level of protection desired by the concerned Member:

*We think it unlikely that Korea intended to establish a level of protection that totally eliminates fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, we assume that in effect Korea intended to reduce considerably the number of cases of fraud occurring with respect to the origin of beef sold by retailers.*<sup>137</sup> (emphasis added)

Without stating it, the Appellate Body is subjecting to scrutiny the alleged value and common interest at stake, which formed the declared policy basis for Korea's chosen (appropriate) level of protection.

### 3.4 HARMONIZATION; CONFORMITY WITH INTERNATIONAL STANDARDS

One of the core problems facing the WTO is the imbalance between its dispute settlement authority, on the one hand, and its extremely limited legislative capacity, on the other. The legislative capacity of the WTO is limited by virtue of both legal constraints and a network of informal expectations and attitudes. Moreover, there are substantial questions about the subject-matter competence of the WTO – the extent to which the WTO can or should address areas outside of its 'core competency' of international trade. Increasingly, the core of international trade is intertwined within a penumbra of traditionally domestic regulatory prerogatives, such as the environment, health, labour, culture, tax, and so on.

While this article points to certain negative integration powers in WTO dispute settlement that are to be exercised through the application of general

<sup>135</sup> *Ibid.*, para. 121.

<sup>136</sup> *Ibid.*, paras 161–164.

<sup>137</sup> *Ibid.*, para. 178.

standards (i.e., the power of the WTO to strike down domestic regulations), the WTO has much more limited powers of positive integration available to be exercised through the legislation of specific rules (i.e., the power of the WTO to ‘re-regulate’ at a multilateral level). Yet, the law making in the areas covered by the SPS and TBT Agreements is quite unique. Positive integration in these agreements has two primary components: harmonization (international legislation or standardization) and recognition. While these agreements contain no absolute requirements of harmonization, they provide some incentives for states to formulate and conform to international standards developed in other fora.

### 3.4[a] *SPS Agreement*

Interestingly, in the Uruguay Round, in the area of sanitary and phytosanitary measures, certain quasi-legislative authority was referred to certain other functional organizations. That is, the definition of ‘International standards’ contained in Annex A to the SPS Agreement appoints the Codex Alimentarius Commission (Codex), World Organization for Animal Health (WOAH) (formerly the Office International des Epizooties) and International Plant Protection Convention (IPPC) as ‘quasi-legislators’ of these standards in relevant areas. What do we mean by ‘quasi-legislators’?<sup>138</sup>

First, the standards developed by Codex, WOH and IPPC for human, animal and plant health, respectively, are, under the terms of their own constitutive documents, non-binding. However, Article 3.1 of the SPS Agreement provides that ‘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.’ Moreover, Article 3.2 states that SPS measures of WTO Members that are in conformity with international standards, guidelines, or recommendations shall be ‘presumed to be consistent with the relevant provisions of this Agreement’. In its *EC – Hormones* decision, the Appellate Body found that the terms ‘based on’ in Article 3.1 and ‘in conformity with’ in Article 3.2 have different meanings. ‘Based on’ means simply derived from, and provides greater flexibility to Members.<sup>139</sup> However, reversing the Panel, the Appellate Body found that while Article 3.2 was a safe harbour, it did not establish the converse presumption: the Panel erred in presuming that measures that did not conform to international standards were inconsistent with

<sup>138</sup> Note the difference with the TRIPS Agreement where pre-existing norms developed in WIPO treaties are explicitly cross-referenced and made WTO law.

<sup>139</sup> In the *EC – Hormones* decision, the Appellate Body rejected the Panel’s finding that ‘based on’ and ‘conform to’ have the same meaning. See Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 165.

the SPS Agreement. Members can always adopt norms above international standards as long as they comply with the SPS Agreement, including Article 5 on risk assessments.<sup>140</sup> This is true also for Article 2.5 of the TBT Agreement.

This is a refined system of applied subsidiarity,<sup>141</sup> subtly allowing national autonomy subject to certain constraints. Prior to the advent of the SPS Agreement, Codex standards had no particular binding force unless accepted for application by national legislation.<sup>142</sup> Given the quasi-legislative character of standards set by Codex, WOH and IPPC, it is worthwhile to examine how these organizations adopt standards.<sup>143</sup>

Under Rule XII of the Codex Alimentarius Procedural Manual, 21st edition, "The Commission shall make every effort to reach agreement on the adoption or amendment of standards by consensus. Decisions to adopt or amend standards may be taken by voting only if such efforts to reach consensus have failed."<sup>144</sup> Under Rule VIII, when voting occurs, decisions are taken by a majority of the votes cast.

So, while Codex, WOH and IPPC do not by any means legislate in the normal, or full, sense, the norms that they produce have certain force in creating a presumption of WTO/SPS compatibility when such international standards are respected. The SPS Agreement provisions mentioned above provide important incentives for states to base their national standards on, or conform their national standards to, the Codex, WOH and IPPC standards (although compliance with international standards is not required by the SPS or the TBT Agreements). Another important systemic issue is that the WTO Panels and Appellate Body may be obliged to interpret the Codex, WOH and IPPC standards to the extent

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<sup>140</sup> Therefore, Article 3.3 permits States to introduce measures, which result in a higher level of protection than international standards, if (a) there is scientific justification, or (b) as a consequence of Member's appropriate level of protection. Members can always adopt norms above international standards as long as they comply with the SPS Agreement including Article 5 on risk assessments.

<sup>141</sup> Subsidiarity is the principle that action should not be taken at a higher vertical level of organization if the goal can be accomplished satisfactorily at a lower level. The complex constraints of the SPS Agreement, combined with the international standards to which it refers, set up a system for scrutinizing certain types of state actions and supporting certain types of standard-setting at the international level.

<sup>142</sup> See Matthias Herdegen, *Biotechnology and Regulatory Risk Assessment*, in *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (G.A. Bermann, M. Herdegen and P.L. Lindseth eds., Oxford University Press 2001); *The Procedures for the Elaboration of Codex Standards and Related Texts*, available at [www.fao.org](http://www.fao.org). See also the summary of procedures for adoption of certain types of standards in David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. Intl. L. & Pol. 4, 865, 885–95 (2000).

<sup>143</sup> See Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics*, 26 Syracuse J Intl. L. & Com. 27 (1998).

<sup>144</sup> Codex Alimentarius Commission, Procedural Manual, 21st Edition, Rule XII (2013), available at [ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual\\_21e.pdf](http://ftp.fao.org/codex/Publications/ProcManuals/Manual_21e.pdf).

necessary to interpret the WTO provisions and or a Member's compliance with the WTO provisions.

The fact that the 'legislative' act in connection with sanitary and phytosanitary standards takes place outside of the WTO provides some interesting features. First, it may provide the WTO a degree of insulation from criticism. Second, it provides a legislative device that may evade the need for unanimity, or at least consensus, within the WTO. Amendments and decisions within the WTO have varying formal requirements, up to and including effective unanimity for states to be bound by amendments, but these formal requirements form the background for informal consensus-based practices. Codex and other standard-setters may provide opportunities for less rigorous adoption of measures. Third, there is the possibility, subject to the difficulty of changing WTO law, to legislatively override Codex or other outside sources of standards. Fourth, this structure provides an opportunity for subject-matter specialists, as opposed to trade specialists, to take a leading role in formulating the standards.

Article 3.5 of the SPS Agreement requires SPS Committee to monitor international harmonization activities and to co-ordinate with the 'relevant international organizations'. In October 1997, the SPS Committee adopted provisional procedures to monitor the use of international standards.<sup>145</sup> These procedures were reviewed and continued in July 1999 and in 2001.<sup>146</sup> This SPS decision is only a commitment to 'monitor' identified international standards.

The July 2000 decision by the WTO Committee on technical Barriers to Trade (TBT Committee) on 'Principles for the Development of International Standards Guides, Recommendations with relation to Articles 2, 5 and Annex 3 of the TBT',<sup>147</sup> differs and seems to go one step further in identifying criteria to be used in the determination of whether an international standard can be used for TBT compliance purposes: transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and the concerns of developing countries. The purpose of the decision was not to dictate to other international organizations how they should proceed, but rather to encourage the participation of Members in the law-making (standard-setting) bodies to which the TBT seems to have lent certain quasi-legislative authority.

In different legal systems, and in different historical moments, it may be better for legislators or treaty makers to engage in more specific negotiations toward more specific rules, or to engage in more general negotiations toward more general 'standards', for subsequent interpretation by a court. It is possible for a

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<sup>145</sup> See Document G/SPS/11; G/SPS/40.

<sup>146</sup> G/SPS/R/9/Rev.1, para. 21; G/SPS/R/15, section II; G/SPS/18. The procedures can be found in G/SPS/11.

<sup>147</sup> G/TBT/9, Annex 4.

'legislative' act to provide either a broad or a narrow mandate to a court. A narrow mandate will call for less discretion to be exercised by the court, while a broad mandate implicitly delegates greater authority to the court.

Not only do treaty writers delegate authority to dispute resolution tribunals, they also maintain complex relationships with the dispute resolution process, both formal and informal. First, of course, is the possibility of legislative reversal: if the authors of the treaty become discontented with the manner of its application, they may amend the treaty. Furthermore, they may restrain dispute settlement. Second, and relatively unusual in general international law, is a formal 'political filter' device, allowing a political body to prevent a more formal legal decision from being taken. This political filter was much more important prior to the adoption of the WTO Understanding on Rules and Procedures for the Settlement of Disputes (DSU) and its reverse consensus rule, but still exists in some DSB institutional decisions.

Finally, we may consider standard-setting, or positive integration and its relationship to 'adjudicative' scrutiny of national measures, or negative integration. Negative integration provides some incentives for states, including the direct incentive arising from the fact that an international standard may be viewed as the least trade restrictive alternative, or may be privileged under the SPS or TBT Agreement. We have seen this type of effect in connection with the EU's so-called 'new approach to harmonization'. In that context, the EU relied on substantial judicial scrutiny, including judicially required recognition under *Cassis de Dijon* and other precedents,<sup>148</sup> while engaging in 'essential' harmonization to establish the further prerequisites for mutual recognition. Of course, in the trade area, recognition is consistent with complete regulatory market access. Recognition means that the foreign producer has access to the import market on the basis simply of the foreign producer's home country regulation: no additional regulatory requirements are imposed.

### 3.4[b] *TBT Agreement*

Article 2.4 of the TBT Agreement requires Members to use international standards as a basis for their technical regulations, unless the international standards are an inappropriate or ineffective means to achieve legitimate objectives.

The Appellate Body interpreted this provision in the recent WTO *US – Tuna II* case, finding that Members are only required to use international standards if the international standardizing body that produces them is 'open to at least all

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<sup>148</sup> Case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*'), 1979 ECR 649, para. 8; Case C-302/86, *Commission v. Denmark* ('*Danish Bottles*'), 1988 ECR I-4607, para. 9.

Members'.<sup>149</sup> It confirmed the US stance and overturned the Panel's finding that the Agreement on the International Dolphin Conservation Program (AIDCP) was an international standardizing organization for the purposes of the TBT Agreement. Thus, unless membership is a mere 'formality', organizations such as AIDCP that do not automatically accept certain WTO Members cannot produce international standards relevant to Article 2.4.<sup>150</sup>

It is important to note that the definition of an 'international standardizing body', as it occurs in *WTO US – Tuna II*, derives from the drafting of the TBT Agreement itself, as well as from the subsequent TBT Committee Decision that further clarified Members' intentions in this regard. This decision could have an important effect on the harmonization potential of TBT Article 2.4. It is thus for WTO Members themselves to further define their intentions with regard to this important provision.<sup>151</sup>

The Appellate Body in *EC – Sardines* had determined that Codex Stan 94 was a relevant international standard for the purposes of the TBT Agreement. However, it noted that, 'there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other' and 'something cannot be considered a "basis" for something else if the two are contradictory'.<sup>152</sup> The Appellate Body found that the EC had not used Codex Stan 94 'as a basis for' its challenged regulation.<sup>153</sup> Moreover, it found that Peru

<sup>149</sup> On appeal, the US had challenged the Panel's finding that the AIDCP was an 'international standardizing organization' for the purposes of TBT Article 2.4. The Appellate Body noted that the term 'international standard' is not defined in the TBT Agreement, but the terms 'standard' and 'international body' are. Relying in part on ISO/IEC Guide 2 and the TBT Committee Decision (which the Appellate Body recognized as relevant legal context for the purposes of the Vienna Convention), the Appellate Body determined that TBT Article 2.4 required Members to follow relevant international standards approved by an international standardizing body that is open to at least all Members.

<sup>150</sup> The Appellate Body in *WTO US – Tuna II* said that a body could still be open even if an invitation is required for accession, but only if the invitation is indeed a 'formality', as Mexico argued. In other words, the invitation had to be given automatically once a WTO Member has expressed interest in joining. Given that the AIDCP requires consensus to issue a new invitation, the Appellate Body found that the invitation did not occur automatically, that it was not just a 'formality', and hence that the AIDCP was not 'open' for purposes of the TBT Agreement. See paras 398–399.

<sup>151</sup> Note also the difference with the parallel presumption in Article 3.3 of the SPS Agreement that favour three identified sets of international standards, none of which is open to at least all WTO Members.

<sup>152</sup> Appellate Body Report, *European Communities – Trade Description Of Sardines ('EC – Sardines')*, WT/DS231/AB/R (26 Sep. 2002), at paras 245 and 248.

<sup>153</sup> The European Communities argued that the EC regulation at issue was based on Codex Stan 94 because it adopted the portion of Codex Stan 94 that reserves the term 'sardines' exclusively for *sardina pilchardus*. The Appellate Body rejected the European Communities' arguments, recalling its decision in *EC – Hormones*, which addressed the meaning of 'based on' in Article 3.1 of the SPS Agreement. The Appellate Body determined that the relevant parts of Codex Stan 94 are those relating to the use of the term 'sardines' to identify fish products, and not only those portions that reserve the term 'sardines' alone for *sardina pilchardus*. The Appellate Body found that the EC

had provided sufficient evidence to conclude that the standard was not ‘ineffective or insufficient’. The Appellate Body thereby effectively shifted the burden of proof from the defendant (the EC) to the complainant (Peru) to establish that the standard was effective and appropriate to fulfil the EC’s legitimate objectives.

An important issue in the context of *EC – Sardines* is the role of consensus in establishing international standards under the TBT Agreement. The panel had determined that Codex Stan 94 was a ‘relevant international standard’ within the meaning of Article 2.4. The European Communities (EC) argued that only standards adopted by *consensus* may qualify as ‘relevant international standards’, and that the panel failed to determine whether Codex Stan 94 was indeed adopted by consensus. This argument related to the interpretation of the definition of ‘standard’ contained in Annex 1.2 of the TBT Agreement. This definition simply refers to documents ‘approved by a recognized body’, without specifying ‘consensus’. In addition, an ‘explanatory note’ to this definition adds the following two sentences: ‘Standards prepared by the international standardization community are based on consensus. This TBT Agreement covers also documents that are not based on consensus.’ The Appellate Body accepted the panel’s interpretation to the effect that the latter sentence serves to include within ‘standard’ documents that do not achieve consensus.<sup>154</sup>

It is worth noting that this conclusion has ramifications for international governance and democratic accountability. That is, states may find that standards that they did not accept – that they in fact rejected – are required to be taken into account and have other legal significance under Article 2.4 of the TBT Agreement. In *WTO US – Tuna II*, the Panel seems to have disagreed with the Appellate Body’s decision in *EC – Sardines*, citing the definition of ‘standard’ in ISO/IEC Guide 2 as a ‘document, established by consensus and approved by a recognized body...’<sup>155</sup> The Appellate Body diverged from the Panel by applying the definition of ‘standard’ provided in the TBT Agreement, which as noted above does not mention ‘consensus’ outside the Explanatory Note. In addition, the TBT Committee Decision does envision that international standards may be adopted by consensus.<sup>156</sup> While the Panel in *EC – Sardines* dismissed the TBT Committee Decision – and the Appellate Body in that case chose not to mention it – the

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Regulation contradicts the portion of Codex Stan 94 that *permits* the use of the term ‘sardines’ in combination with, *inter alia*, the name of the country of origin. *Ibid.*, paras 241, 251, 257.

<sup>154</sup> *Ibid.*, para. 222.

<sup>155</sup> Panel Report, *WTO US – Tuna II*, WT/DS381/R (15 Sep. 2011), at paras 7.671–7.672.

<sup>156</sup> Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, in WTO document G/TBT/1/Rev.9, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 Jan. 1995, 8 Sep. 2008, 37–39; and WTO document G/TBT/1/Rev.10, 9 Jun. 2011, 46–48.

Appellate Body in WTO *US – Tuna II* determined that the Decision could constitute a ‘subsequent agreement’. The Appellate Body was not called on to make a decisive interpretation of this requirement in WTO *US – Tuna II*, but the issue is likely to recur in future cases.

### 3.4[c] *The GATT*

The GATT does not specifically require the use of international standards at all, although the a less trade restrictive alternative requirements under the sub-paragraphs of Article XX and or the good faith requirement under the chapeau of Article XX may include a requirement to attempt to create or follow an international or regional standard before applying a unilateral one:

Clearly, and ‘as far as possible’, a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding ‘arbitrary or unjustifiable discrimination’ under the chapeau of Article XX. We see, in this case, no such requirement.<sup>157</sup> (emphasis added)

Reliance on international or even regional standards may provide a de facto presumption of good faith as required by Article XX.<sup>158</sup>

### 3.5 (MUTUAL) RECOGNITION AND EQUIVALENCE

Article 2.3 of the SPS Agreement and Article 2.1 of the TBT Agreement provide similar MFN obligations. Interestingly, both Article 4 of the SPS Agreement and Article 6.3 of the TBT Agreement encourage ‘mutual recognition’ agreements. Mutual Recognition Agreements (MRAs), of course, reduce barriers to imports of goods from beneficiary states, but they may provide inferior treatment to imports of goods from non-beneficiary states. This could arguably violate the MFN obligation.<sup>159</sup> This will depend on the ‘architecture’ and functioning of the specific

<sup>157</sup> See Appellate Body Report, *US – Shrimp (Article 21.5 DSU)*, at para. 124.

<sup>158</sup> See *ibid.*, paras 130–131. For an elaboration of this suggestion that compliance with an MEA may provide, in certain circumstances, a de jure or de facto presumption of compatibility with Article XX, see Gabrielle Marceau, *A Call for Coherence in International Law*, 33 *J.W.T.* 5, 128–134 (October 1999). See also the Panel and Appellate Body Report in *US – Shrimp (21.5 DSU)*.

<sup>159</sup> See Joel P. Trachtman, *Toward Open Recognition? Standardization and Regional Integration under Article XXIV of GATT*, 6 *J. Intl. Econ. L.* 459 (2003); William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of ‘Like Product*, in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* 23–24 (Thomas Cottier, Petros C. Mavroidis & Patrick Blatter eds., University of Michigan Press 2000), evaluating mutual recognition agreements under the MFN principle: ‘On the one hand, such agreements offer an effective means of facilitating

MRA. MRAs are part of the positive integration exercise, along with harmonization discussed hereafter.

### 3.5[a] *SPS Agreement*

Article 4.1 of the SPS Agreement requires recognition of other states' regulations:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.

On 25 October 2001, the SPS Committee adopted a decision on the implementation of Article 4 on equivalence to 'make operational the provisions of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures'.<sup>160</sup> It sets up the possibility for other states to serve as 'regulatory laboratories' to come up with alternate means to achieve the same regulatory goals. It imposes an obligation on an importing Member, upon the request of the exporting Member, to explain the objective and rationale of the SPS measure, to identify clearly the risks that the relevant measure is intended to address, and to indicate the appropriate level of protection that its SPS measure is designed to achieve.<sup>161</sup> In addition, the exporting Member must provide reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence. Such requests should proceed rapidly, especially with traditional imports, and should not in themselves disrupt or suspend on-going imports.<sup>162</sup>

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trade. On the other hand, they also have an impact on the competitive strength of non-participating countries. This is why two WTO agreements (TBT and SPS) encourage Members to negotiate MRAs but at the same time require that they do so in a transparent and open way.' See also Petros C. Mavroidis, *Transatlantic Regulatory Cooperation: Exclusive Club or 'Open Regionalism*, in *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* 263, 266 (George A. Bermann, Matthias Herdegan & Peter L. Lindseth eds., Oxford University Press 2001): 'any interpretation of the WTO agreements that the MFN principle precludes MRAs must be rejected, because it runs counter to the principle of 'effective interpretation' of the treaties as laid down in the Vienna Convention on the Law of treaties.'

<sup>160</sup> See document G/SPS/19 and G/SPS/19/Rev.2.

<sup>161</sup> It adds that in doing so, Members should take into account the *Guidelines to Further the Practical Implementation of Article 5.5* adopted by the Committee on Sanitary and Phytosanitary Measures at its meeting of 21–22 Jun. 2000 (document G/SPS/15, dated 18 Jul. 2000).

<sup>162</sup> An interesting issue concerns the legal value of this SPS Decision: If this decision is considered 'secondary legislation' (*droit dérivé*), its violation may be invoked in WTO dispute settlement proceeding as being part of the 'WTO applicable law' binding on all Members. Arguably, the fact that the SPS Committee was given, in Article 12.1, the power to adopt decisions by consensus for the 'implementation' of the provisions of the agreement, renders it secondary legislation in this sense. Therefore, it is arguable that the SPS Committee may adopt decisions that cannot conflict

3.5[b] *TBT Agreement*

The requirement of the SPS Agreement is stronger than the more hortatory obligation of Article 2.7 of the TBT Agreement, which simply requires Members to give positive consideration to accepting foreign regulation as equivalent, if the foreign regulation fulfils the importing state's objectives. In the Second Triennial Review, the TBT Committee considered that 'Members may find it useful to further explore equivalency of standards as an interim measure to facilitate trade in the absence of relevant international standards.'<sup>163</sup>

Since Article XX requires that Members maintain an appropriate level of flexibility in the administration of their regulatory distinctions,<sup>164</sup> it is probable that Article 2.7 (or Article 2.2 in a manner parallel to Article XX) will be interpreted as requiring sufficient flexibility in normative determinations and good faith consideration of the alternative and equivalent standards suggested by the exporting country.

3.5[c] *The GATT*

GATT contains no explicit equivalence requirement or facility of recognition. However, it is possible that necessity requirements under Article XX(a), (b) or (d) could require recognition. In addition, the Appellate Body in *US – Shrimp (Article 21.5)* seems to have identified such an embryonic requirement in the chapeau of Article XX. An approach based on whether a measure requires 'essentially the same regulatory programme . . . as that adopted by the importing

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with or contradict the SPS treaty provisions but that may 'implement' them. Many WTO Members believe that the only binding WTO obligations (i.e., those which can be the basis of a claim before WTO courts) are those that are listed in the WTO treaty itself and that they have accepted. For this latter group, the decisions adopted by Members are nothing but gentlemen's agreements. In dispute settlement, the question would arise whether this secondary legislation is a binding part of WTO law. Panels and the Appellate Body may have to decide the WTO nature of such a decision and its compatibility with WTO law. This is a form of indirect judicial control. Most experts would agree that such a decision could also be viewed as 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' pursuant to Article 31.3(b) of the Vienna Convention, or at least a rule of international law applicable to the relations between the parties pursuant to Article 31.3(c), which therefore shall be taken into account in the interpretation of the SPS Agreement. Finally decisions by WTO bodies build on 'practice' of the organization and/or state practice, relevant in the interpretation of the WTO treaty, must also be taken into account in the interpretation of WTO provisions. On the issue of secondary legislation, see K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, 25 *Netherlands Y.B. Intl. L.* 3 (1994).

<sup>163</sup> Taking into account the obligation of Members under Article 2.6, the Committee emphasized that the possible use of this approach must not hinder the process of development of international standards, guides and recommendations. *TBT Triennial Review*, para. 23, G/TBT/9.

<sup>164</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 165; and Appellate Body Report, *US – Shrimp (Article 21.5)*, WT/DS58/AB/RW, at paras 135–152.

Member . . . [does] not meet the requirements of the chapeau of Article XX'. A measure requiring United States and foreign regulatory programmes to be 'comparable in effectiveness', as opposed to being 'essentially the same', would comply with the prohibition against a disguised restriction on trade.<sup>165</sup> This appears to function as a 'soft' equivalency requirement.

### 3.6 INTERNAL INCONSISTENCIES

#### 3.6[a] SPS Agreement

Article 5.5 of the SPS Agreement addresses an interesting behavioural issue: why do people accept greater risk in some circumstances than in others? Article 5.5 requires a regulating state to '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'. This provision adds a specific route to be followed to demonstrate discrimination generally prohibited by Article 2.3 SPS.

In *EC – Hormones*, the Appellate Body stated that:

the goal set [by Article 5.5] is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided.<sup>166</sup>

It identified three elements which cumulatively must be demonstrated for a violation of Article 5.5 and pointed to 'warning signals':

214. The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those levels of protection exhibit arbitrary or unjustifiable differences ('distinctions' in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. We understand the last element to be referring to the measure

<sup>165</sup> Appellate Body Report *US – Shrimp*, WT/DS58/AB/R, at para. 144: 'In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'.

<sup>166</sup> Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 213.

embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade. . . .

215. We consider the above three elements of Article 5.5 to be cumulative in nature; all of them must be demonstrated to be present if violation of Article 5.5 is to be found. In particular, both the second and third elements must be found. The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in discrimination or a disguised restriction on international trade. The presence of the second element – the arbitrary or unjustifiable character of differences in levels of protection considered by a Member as appropriate in differing situations – may in practical effect operate as a ‘warning’ signal that the implementing measure in its application might be a discriminatory measure or might be a restriction on international trade disguised as an SPS measure for the protection of human life or health.<sup>167</sup>

The Appellate Body report in the *Australia – Salmon* decision<sup>168</sup> found that an unexplained distinction in the levels of protection imposed by Australia (‘internal inconsistency’) resulted in a disguised restriction on international trade, in violation of Article 5.5 of the SPS Agreement, and by implication, Article 2.3. Interestingly, in that report, the Appellate Body did not adopt the kind of balancing test it had used in the *US – Shrimp* decision<sup>169</sup> to determine whether the US measure in that case constituted arbitrary or unjustifiable discrimination pursuant to the chapeau of Article XX. In that context, in *EC – Hormones*, the Appellate Body also refused the automatic incorporation into Article 5.5 of the SPS Agreement of the legal test developed in *US – Gasoline* for the chapeau of Article XX.<sup>170</sup>

With a view to clarifying the practical implications of the requirements of Article 5.5, Members adopted on 18 July 2000 ‘Guidelines To Further the Practical Implementation of Article 5.5.’<sup>171</sup> The decision on Guidelines has to some extent built on the SPS jurisprudence and the practice of Members and has added

<sup>167</sup> *Ibid.*, paras 214–215.

<sup>168</sup> Appellate Body Report in *Australia – Salmon*, WT/DS18/AB/R, at para. 240. See also Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes*, 2 J. Intl. Econ. L. 4 (December 1999), 641.

<sup>169</sup> See sections 3.2[a] and 3.8 of this article.

<sup>170</sup> ‘However, we disagree with the Panel on two points. First, in view of the structural differences between the standards of the chapeau of Article XX of the GATT 1994 and the elements of Article 5.5 of the SPS Agreement, the reasoning in our Report in *US – Gasoline*, quoted by Panel, cannot be casually imported into a case involving Article 5.5 of the SPS Agreement. Second, in our view, it is similarly unjustified to assume applicability of the reasoning of the Appellate Body in *Japan – Alcoholic Beverages* about the inference that may be drawn from the sheer size of a tax differential for the application of Article III:2, second sentence, of the GATT 1994, to the quite different question of whether arbitrary or unjustifiable differences in levels of protection against risks for human life or health, ‘result in discrimination or a disguised restriction on international trade’. Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 239.

<sup>171</sup> See Doc. G/SPS/15, adopted on 18 Jul. 2000.

variables to be used for the operationalization of Article 5.5, keeping in mind the different type of risk assessment for the protection of human life or health.<sup>172</sup> They then identify ‘warning signals’ along the lines of those identified by the Appellate Body in the *EC – Hormones* decision.

With regard to SPS measures dealing with human, animal, or plant life or health, qualitative and quantitative assessments of risk are encouraged and quantification is favoured:<sup>173</sup>

Risk in the context of the SPS Agreement refers to the likelihood that an adverse event (pest or disease) will occur and the magnitude of the associated potential consequences on plant or animal life or health of the adverse event, or to the potential for adverse effects on human or animal life or health from food-borne risks. Accordingly, categorizing risks as ‘similar’ must include a comparison of both the relevant likelihood and the corresponding consequences.

Faced with differences noted in this comparison, Members are explicitly invited to review their appropriate level of protection: ‘the proposed level may need to be modified, or the level of protection previously determined may need to be revised in light of the Member’s current views on its appropriate level of protection, or a combination of the two’. The Guidelines also call on Members to develop common risk assessment and evaluation procedures, especially with respect to risks affecting human life or health, a common approach for consideration of risks to animal life or health, and a common approach for risks to plant life or health.

The test under Article 5.5 of the SPS is definitely more sophisticated than that under the chapeau of Article XX. Members have a right to take SPS measures, but

<sup>172</sup> ‘In the case of protection of plant or animal life or health from pests or disease, situations might be compared if they involve either the risk of entry, establishment or spread of the same or a similar disease, or the risk of the same or similar associated potential biological and economic consequences. In the case of protection of human life or health from specific risks, i.e. food-borne risks, or of animal life or health from risks arising from feedstuffs, situations involving the same type of substance or pathogen, and/or the same type of adverse health effect, could be compared to one another.’ See Doc. G/SPS/15, adopted on 18 Jul. 2000.

<sup>173</sup> Donna Roberts argues that the SPS Agreement does not permit consideration of the benefits of imports. The SPS authorizes Member States to set the ALOP, based on the Member State determination, which may or may not include benefits of the relevant goods. Roberts is right in her (implicit) assertion that Member States would not necessarily include in their calculus the benefits of imported, as opposed to domestic goods. Part of the problem is the relationship between risk assessment and the appropriate level of protection. Risk assessment, by definition, considers only risks. The appropriate level of protection might consider benefits. Risk assessment determines the level of risk; appropriate level of protection determines how much risk is acceptable, presumably taking benefits into account. Roberts makes an extremely interesting point that Article 5.5 seems potentially inconsistent with this kind of cost-benefits analysis, where differential benefits of imports result in different appropriate levels of protection. However, since the purpose of the SPS is to promote imports, it is quite probable that Article 5.5 would not be interpreted as a prohibition against considering the benefits of imports. Donna Roberts, *The integration of economics into SPS risk management policies: issue and challenges*, in *Economics of Quarantine and SPS Agreement* 9 (K. Anderson, C. McRae & D. Wilson eds., CIES 2001).

it is a conditional right and the conditions are stringent. Under Article XX, Members have an exceptional right to take measures based on policies therein listed. The conditions attached are less stringent but this right has to be balanced against the market access rights of other WTO Members.

### 3.6[b] *The GATT*

Although there is no formal requirement of consistency contained in the necessity tests under Article XX(a), (b) or (d),<sup>174</sup> the Appellate Body in *Korea – Various Measures on Beef* seems to have read some soft consistency requirement into it, or at least considered that the absence of consistency may be evidence of the lack of objective necessity of the measure:

The application by a Member of WTO-compatible enforcement measures to the same kind of illegal behaviour – the passing off of one product for another – for like or at least similar products, provides a suggestive indication that an alternative measure which could ‘reasonably be expected’ to be employed may well be available. The application of such measures for the control of the same illegal behaviour for like, or at least similar, products raises doubts with respect to the objective necessity of a different, much stricter, and WTO-inconsistent enforcement measure.<sup>175</sup>

### 3.6[c] *TBT Agreement*

The TBT does not contain any explicit consistency requirement. However, as discussed above, the GATT Article XX necessity test appears to contain a soft consistency requirement that, arguably, could be developed in the operationalization of the Article 2.2 necessity test. On this premise, internal consistency could be a requirement under the trade restrictiveness considerations of the TBT necessity test. Alternatively, an internal inconsistency could suggest that a less trade restrictive alternative is reasonably available.<sup>176</sup>

<sup>174</sup> See Appellate Body Report *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 170: ‘Examining enforcement measures applicable to the same illegal behaviour relating to like, or at least similar, products does not necessarily imply the introduction of a ‘consistency’ requirement into the ‘necessary’ concept of Article XX(d). Examining such enforcement measures may provide useful input in the course of determining whether an alternative measure which could ‘reasonably be expected’ to be utilized, is available or not.’

<sup>175</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 172.

<sup>176</sup> Refer to discussion of necessity under the TBT Agreement at section 3.2[b], above.

## 3.7 PRECAUTIONARY ACTION

## 3.7[a] SPS Agreement

The precautionary principle, of course, has been the subject of extensive debate, which cannot be replicated here.<sup>177</sup> However, it is worth pointing out that the precautionary principle is stated in a very specific, and limited, form in Article 5.7 of the SPS Agreement.<sup>178</sup> It is available to allow provisional measures where scientific evidence is insufficient, where the Member acts on the basis of available information, and where the Member seeks to obtain the additional information needed for a more objective assessment of risk within a reasonable period of time. In *EC – Hormones* the Appellate Body did not reach any conclusion whether the ‘precautionary principle’ had indeed crystallized to become a general principle of law.<sup>179</sup> For the Appellate Body, various elements, including the right of Members to determine the level of protection they want, confirmed that aspects of the precautionary principle were already reflected in different provisions of the SPS Agreement:

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

<sup>177</sup> On the state of the precautionary principle see, for instance, *Reinterpreting the Precautionary Principle* (T. O’Riordan, J. Cameron, & A. Jordan eds., Cameron & May 2001); Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. Rev. 114 (2000); Gabrielle Marceau, ‘Le principe de précaution et les règles de l’Organisation mondiale du commerce’ dans *Le principe de précaution et le droit international*, under the direction of Charles Leben et Joe Verhoeven (Paris: Editions Panthéon-Assas, 2001), 131.

<sup>178</sup> It is reported that Article 5.7 of the SPS Agreement was initially drafted to be used in emergency situations where, for example, the spread of a disease had to be stopped urgently before it may be feasible to complete a risk assessment. Discussion with Gretchen Stanton, Secretary of the SPS Committee.

<sup>179</sup> The Appellate Body in *EC – Hormones* stated, ‘The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges... 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.’ Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 123.

governments commonly act from *perspectives of prudence and precaution* where risks of irreversible, e.g. life-terminating, damage to human health are concerned (emphasis added).

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.

The WTO adjudicating bodies do not have the capacity to determine rights and duties under non-WTO rules.<sup>180</sup> Therefore, the precautionary principle cannot be applied per se in WTO dispute settlement, even if it crystallizes into a general principle of law. However, such a general principle of law would be taken into account in the interpretation of the relevant WTO provisions (pursuant to Article 31.3(c) of the Vienna Convention). Having recognized the limited jurisdiction of WTO adjudicating bodies, it should also be noted that WTO Members are bound to respect all their obligations simultaneously ('the' or 'a' precautionary principle would be of equal hierarchical value to the treaty provisions of the WTO). Under international law, WTO Members would be under an obligation to comply with both their WTO obligations and any general principle of law regarding the precautionary principle. Although such a general principle could not be given direct effect by WTO adjudicating bodies, they could recognize its existence and appreciate its impact on WTO law. Most often it will be possible for States to respect both their WTO rights and obligations and the rights and obligations entailed by the precautionary principle.

If the right of Members to determine their appropriate level of protection is an indication or a component of the precautionary principle, one may say that similar 'expressions' of the precautionary principle exist in the TBT Agreement and in Article XX of GATT. Indeed, the rights of Members to determine the level of protection they want<sup>181</sup> and to act with prudence on the basis of minority opinion<sup>182</sup> were recognized by the Appellate Body in its interpretation of Article XX.

<sup>180</sup> Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, adopted 24 Mar. 2006. On this issue, see Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard Intl. L. J.* (1999), 333; Marceau, *supra* n. 176; Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 35 *J.W.T.* 6, 1081 (December 2001). For a contrary view see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can we Go?* 95 *Am. J. Intl. L.* 595 (July 2001); Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 *J.W.T.* 3, 499 (June 2001); Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for reform*, 47 *Intl. & Comp. L. Q.* 647 (2000); David Palmeter and Petros Mavroidis, *The WTO Legal System: Sources of Law*, 92 *Am. J. Intl. L.* 3, 398 (July 1998).

<sup>181</sup> '... we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.' Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 168.

<sup>182</sup> See Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 178: 'In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that 'responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources' (emphasis added). In

In *Japan – Agricultural Products II*,<sup>183</sup> the Appellate Body found that Article 5.7 is available subject to the satisfaction of four cumulative requirements: (i) relevant scientific evidence is insufficient, (ii) the measure is adopted on the basis of available pertinent information, (iii) the Member seeks to obtain the additional information necessary for a more objective assessment of risk, and (iv) the Member reviews the measure accordingly within a reasonable period of time. In the instant case, the panel made a finding only as to the insufficiency of relevant scientific evidence, determining that there was indeed sufficient scientific evidence on the issues at hand.

In *Japan-Apples II*, the Appellate Body found that the standard of sufficiency under the first prong of this test refers to the measure of information necessary to perform an adequate assessment of risks as required under Article 5.1.<sup>184</sup> The Appellate Body insisted that the application of Article 5.7 is triggered ‘*not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence*’ and ‘the two concepts are not interchangeable’.<sup>185</sup>

There is a continuum of application of Articles 5.1 and 5.7, determining the alternative necessary to be met in connection with SPS measures.<sup>186</sup> The application of Article 5.1 or 5.7 is based on the determination of whether there is sufficient evidence necessary to support a risk assessment under Article 5.1.<sup>187</sup>

In the *Hormones – Continued Suspension* case, the EC argued before the Panel that the relevant SCVPH (EU Scientific Committee on Veterinary Measures Relating to Public Health) Opinions and supporting studies provided the available pertinent information’ within the meaning of Article 5.7 on the basis of which the provisional ban on the relevant hormones had been enacted.<sup>188</sup> The Panel found that the EC’s provisional ban under Directive 2003/74/EC failed to comply with Article 5.7 of the SPS Agreement because the relevant scientific evidence was not insufficient within the meaning of that provision.<sup>189</sup>

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justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.’

<sup>183</sup> Appellate Body Report, *Japan – Agricultural Products II*, WT/DS76/AB/R, para. 89.

<sup>184</sup> Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December, at para. 179.

<sup>185</sup> *Ibid.*, para. 184 (emphasis added).

<sup>186</sup> Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 Nov. 2008, para. 674.

<sup>187</sup> *Ibid.*, para. 702, citing Appellate Body Report, *Japan – Apples*, para. 179.

<sup>188</sup> Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, adopted 14 Nov. 2008, as modified by Appellate Body Report WT/DS320/AB/R, para. 7.581. The five hormones were progesterone, testosterone, zeranol, trenbolone acetate, and MGA.

<sup>189</sup> Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, para. 621.

The Appellate Body disagreed with the Panel's finding that 'the determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk must be disconnected from the intended level of protection'. The fact that there was patently sufficient scientific evidence for the establishment of an international standard is not determinative. Rather, 'the fact that the WTO Member has chosen to set a higher level of protection may require it to perform certain research as part of its risk assessment that is different from the parameters considered and the research carried out in the risk assessment underlying the international standard'.<sup>190</sup>

One question that arose in this case has to do with the dynamic nature of science, by virtue of which a body of evidence deemed sufficient at a particular moment to support an international standard might later become insufficient. Here, the Appellate Body rejected the Panel's finding that, where international standards exist, 'there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient' within the meaning of Article 5.7.<sup>191</sup> Rather, 'it suffices that new scientific developments call into question whether the body of scientific evidence still permits of a sufficiently objective assessment of risk'.<sup>192</sup>

In the light of the above, the Appellate Body reversed the Panel's finding that 'it has not been demonstrated that relevant scientific evidence was insufficient, within the meaning of Article 5.7 of the *SPS Agreement*, in relation to any of the five hormones with respect to which the European Communities applies a provisional ban'.<sup>193</sup>

### 3.7[b] *TBT Agreement*

Under the TBT Agreement, there is no requirement of any form of specific evidence and no provision for situations where scientific evidence would be insufficient to justify a norm. Yet, Article 2.2, in requiring that measures be no more restrictive than necessary, will call for some demonstration that some objective necessity exists. Since the provision states that, in assessing the risks of non-fulfilment, 'relevant elements of consideration are, *inter alia*: available scientific and technical information related processing technology or intended end-uses of products', scientific evidence is relevant.

<sup>190</sup> *Ibid.*, paras 685–88.

<sup>191</sup> *Ibid.*, para. 712, quoting Panel Report, US – Continued Suspension, para. 7.648.

<sup>192</sup> *Ibid.*, para. 725.

<sup>193</sup> *Ibid.*, para. 734, quoting Panel Report, US – Continued Suspension, para. 7.835.

Situations where the scientific evidence is insufficient or not available may occur and, in these situations, the analysis would be similar to that described above with respect to the SPS Agreement.

### 3.7[c] *The GATT*

If Members' rights to determine the level of protection they want, to be prudent and to rely on minority opinion, are expressions or indications of the precautionary principle – as the Appellate Body seems to have established – one may argue that the interpretation of Article XX has already taken into account aspects of a precautionary principle. As with the SPS Agreement, the crystallization of the precautionary principle would not reduce the requirements contained in Article XX nor could it be enforced autonomously before a WTO adjudicating body. However, it could be used in the interpretation of WTO provisions.

For the Appellate Body, Article XX (and 11 of the DSU) had to be interpreted in light of this right of democratic government to be responsible and prudent:

In the context of the SPS Agreement, we have said previously, in *European Communities – Hormones*, that responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.<sup>194</sup>

The *EC – Asbestos* Panel had also stated: '... to make the adoption of health measures concerning a definite risk depend upon establishing *with certainty* a risk . . . would have the effect of preventing any possibility of legislating in the field of public health' (emphasis added).<sup>195</sup>

### 3.8 BALANCING

To many commentators, the idea of balancing tests in contexts where domestic regulation is subject to international scrutiny has been anathema to judicial restraint and national sovereignty. There are two likely reasons. First, balancing tests seem to some to accord too much power to courts. However, it is not unusual for

<sup>194</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 178. (footnote omitted).

<sup>195</sup> Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ('*EC – Asbestos*'), WT/DS135/R and Add. 1, adopted 5 Apr. 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, at para. 8.221.

courts to be assigned the task of balancing, explicitly or implicitly, under specified circumstances. Under the Appellate Body's opinion in *EC – Asbestos*, even the determination of violation of national treatment obligations under Article III may be understood as requiring a type of balancing to determine whether imports are subject to 'less favourable treatment'. Second, balancing tests seem to intervene too greatly in national regulatory autonomy.<sup>196</sup> This intervention is not considered excessive because it might strike down domestic regulation, but because it might involve an international tribunal in too extensive an inquiry into the costs and benefits of domestic regulation. In other words, it is not the intervention of a court under this second concern that is troubling, but the intervention of an international court.

Recently, Appellate Body jurisprudence has appeared to accept balancing as an inherent part of the WTO Agreement. In the *China – Raw Materials* dispute, it held that 'we understand the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns'.<sup>197</sup> The Appellate Body then applied this understanding in *US – Clove Cigarettes*, *WTO US – Tuna II* and *US – COOL* to achieve a GATT-like balance under Article 2.1 of the TBT Agreement, as noted above.<sup>198</sup>

### 3.8[a] *The GATT*

The GATT has no specific language authorizing a balancing test. The SPS Agreement and the TBT Agreement, while providing for least trade restrictive alternative analysis, also avoid specific reference to balancing tests. However, since the *Korea – Various Measures on Beef* decision in 2000, the Appellate Body has increasingly called for balancing tests in the application of GATT provisions in at least three areas: the 'necessity' test under GATT Article XX(a), (b), and (d), the chapeau test under GATT Article XX, and within the 'less favourable treatment' obligation of GATT Article III. These developments are discussed below. Note that a least trade restrictive alternative test, at least as earlier conceived, avoids evaluation of the value of the goal sought to be achieved by the relevant domestic regulation, as well as a comparison between that value and the detriment to international trade caused by the domestic regulation.<sup>199</sup> As further discussed below, the

<sup>196</sup> For a more extensive analysis of the objections to balancing tests, see Trachtman, *supra* n. 60.

<sup>197</sup> Appellate Body Report, *China – Raw Materials*, at para. 306.

<sup>198</sup> Appellate Body Report, *US – Clove Cigarettes*, at para. 96; Appellate Body Report, *WTO US – Tuna II*, at para. 215; Appellate Body Report, *US – COOL*, at para. 271.

<sup>199</sup> See Trachtman, as *supra* n. 50. See also Axel Desmedt, *Proportionality in WTO Law*, 4 J. Intl. Econ. L. 441 (2001).

Appellate Body in *Korea – Various Measures on Beef* has introduced the reference to the importance of the value or policy protected.

### 3.8[a][i] Balancing Under the Necessity Test (GATT Article XX(a), (b) and (d))

Since its decision in *Korea – Various Measures on Beef* (2000), the Appellate Body has recognized the importance of balancing in its evaluations of the ‘necessity’ test. Prior to that decision, ‘necessity’ consisted mainly of a less trade restrictive alternative test, without ‘weighing and balancing’ various characteristics of the chosen measure. As outlined above under our investigation of necessity and proportionality, *EC – Asbestos* (2001) and later cases confirmed that both a ‘weighing and balancing’ and a less trade restrictive alternatives test are required for a determination of ‘necessity’ under GATT Article XX(a), (b), and (d).

The Appellate Body’s decision in *Korea – Various Measures on Beef* refined the classic ‘necessity’ test by going beyond less trade restrictive alternatives. The Appellate Body first examined the definition of ‘necessity’ under Article XX(d) of GATT, finding that it could comprise something less than absolute indispensability. Interestingly, the Appellate Body stated that ‘a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect’.<sup>200</sup> This statement would involve the Appellate Body in assessing the importance of national goals to a degree not seen, at least explicitly, before.<sup>201</sup>

Indeed, the Appellate Body sets up, rather explicitly, a balancing test between the challenged measure’s degree of contribution to the end pursued, the weight of the interests or values pursued (i.e., in the language of the SPS and TBT Agreements, the risks of non-fulfilment), and the measure’s trade restrictiveness: ‘[T]he greater the contribution, the more easily a measure might be considered to be “necessary”’.<sup>202</sup> This statement constitutes a significant shift toward a greater role for the WTO adjudicating bodies in weighing regulatory values against trade values. It appears to speak beyond the Article XX(d) context to all necessity testing, including that under Article XX(a) and (b) and, presumably, the SPS and TBT Agreements.

<sup>200</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at paras 162, 163.

<sup>201</sup> See Trachtman, *supra* n. 60.

<sup>202</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 163.

The Appellate Body found that the Panel was justified in examining enforcement measures in similar circumstances, without, as Korea complained, imposing a formal ‘consistency’ requirement. ‘Examining such enforcement measures may provide useful input in the course of determining whether an alternative measure which could “reasonably be expected” to be utilized, is available or not.’<sup>203</sup> The application of WTO-compatible measures to the same kind of behaviour suggested to the Appellate Body that a reasonably available alternative measure might exist.<sup>204</sup> The Appellate Body confirmed the Panel’s conclusion that Korea failed to demonstrate that alternative measures were not reasonably available. This burden of proof issue was going to evolve with *US – Gambling* and *Brazil – Tyres* discussed hereafter. In its decision in *Korea – Various Measures on Beef*, the Appellate Body focused on the role of less trade restrictive alternatives in the ‘weighing and balancing’ test. It found that, in determining whether another alternative method is reasonably available, it is appropriate to consider the extent to which the alternative measure ‘contributes to the realization of the end pursued’.<sup>205</sup> The conventional understanding of ‘reasonably available’ alternatives considered the costs of the alternative regulation, but not the degree of contribution to the end (as the test under Article 5.6 of the SPS seems to announce). This suggested a limitation on the extent to which a state might expect to achieve its appropriate level of protection, which might have seemed inviolable. Indeed, the Appellate Body acknowledged that ‘WTO Members have the right to determine the level of protection... that they consider appropriate in a given situation.’<sup>206</sup> Thus, in order to be reasonably available, an alternative measure must achieve the Member’s chosen level of protection.<sup>207</sup>

The balancing test for determining ‘necessity’ under Article XX(a), (b) and (d) developed in these reports has changed the WTO’s role in evaluating Members’ regulatory measures. On the one hand, it is less deferential to national regulatory goals by purporting to ‘weigh and balance’ the measure’s degree of contribution to the objective pursued, and the importance of the interests or values at stake, against the measure’s trade restrictiveness and that of reasonably available alternatives. On the other hand, Appellate Body jurisprudence remains deferential to the Members’ right to choose their own level of protection. Less trade restrictive alternatives suggested by the complaining parties will not be found to be reasonably available if

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<sup>203</sup> *Ibid.*, para. 170.

<sup>204</sup> *Ibid.*, para. 172.

<sup>205</sup> See Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 172 (citing its report in *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at paras 161–164).

<sup>206</sup> *Ibid.*, para. 168.

<sup>207</sup> *Ibid.*, para. 174.

they do not meet the implementing Member's chosen level of protection or if they are overly costly or burdensome to implement.

### 3.8[a][ii] Balancing Under the Chapeau of Article XX

When one of the sub-paragraphs of Article XX has been satisfied, a form of balancing test is performed under the chapeau of Article XX.<sup>208</sup> But a broader balancing of rights and obligations is called for by the chapeau of Article XX.<sup>209</sup> In *US – Shrimp*, the Appellate Body stated that the chapeau of Article XX, 'embodies the recognition of the . . . need to maintain a balance of rights and obligations' between the right of a Member to invoke the exceptions of Article XX on the one hand and the rights of the other Members under the GATT 1994, on the other hand. This interpretation and application of Article XX requires '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'. 'The location of the line of equilibrium 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.'<sup>210</sup>

This line of equilibrium must find expression in the respective scope of application of Articles III:4 and XX. In *US – Gasoline*, the Appellate Body stated that Article XX(g) cannot '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'. But, in *EC – Asbestos*, the Appellate Body also said – in justifying its decision that health risks ought to be taken into account in assessing the competitive relationship between imports and domestic like goods:

<sup>208</sup> The operation of the chapeau of Article XX seems to vary whether it follows the invocation of subparagraphs (g) or (b) and (d). On four occasions the Appellate Body had to examine the application of the chapeau of Article XX. Three times (in *US – Gasoline*, *US – Shrimp* and *US – Shrimp (21.5 DSU)*), it was done in the context of a measure that was considered to have 'passed' (provisional justification) under subparagraph (g) of Article XX, which contains fairly lenient requirements. In *EC – Asbestos*, although the Panel had reached conclusions on the application of the chapeau of Article XX, and even if both the application of sub-paragraph (b) and the chapeau of XX was appealed, the Appellate Body did not mention the chapeau of Article XX and simply concluded that the measure was necessary pursuant to Article XX(b) without any reference to the appeal of the findings on the chapeau of XX. With the components of the necessity test developed by the Appellate Body (with soft consistency and flexibility and non-discrimination requirements), it is difficult to conceive what additional analysis could be performed under the chapeau of Article XX.

<sup>209</sup> The chapeau requires that measures exempted under Article XX must not be 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 . . .'.

<sup>210</sup> See Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, at para. 158.

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.’<sup>211</sup>

### 3.8[b] *TBT Agreement*

It seems reasonable to expect that the interpretation of the positive requirements of Article 2.2 for a measure not more trade restrictive than necessary will be parallel to that developed under the necessity test of Article XX. There has been an important cross-fertilization between the SPS jurisprudence and the interpretation of Article XX. For instance, when the Appellate Body was discussing Article XX, it was making use of systemic considerations, such as the balance between market access obligations and the right of Members to pursue policies other than trade. This balance of rights and obligation finds explicit expression in the TBT and SPS Agreements, which, however, articulate and operate them differently. Ultimately, similar variables are balanced for a search to capture protectionist measures not otherwise justified by what WTO Members consider legitimate policies.

An important issue in this regard arising out of the *US – Clove Cigarettes* dispute is the interaction between the non-discrimination requirements of Article 2.1 and the necessity requirements of Article 2.2. While Article 2.1 clearly contains language akin to GATT Articles I and III, including both a like products determination and an assessment of less favourable treatment, it has been interpreted as requiring a ‘legitimate regulatory distinction’ and ‘even-handedness’ in its design and application. In *US – COOL*, the Appellate Body found that ‘where a regulatory distinction is not designed and applied in an even-handed manner . . . that distinction cannot be considered “legitimate”’ under Article 2.1.<sup>212</sup> For this reason, it has been suggested that Article 2.1 may ultimately operate as a check against arbitrary or unjustifiable discrimination or disguised

<sup>211</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 115.

<sup>212</sup> Appellate Body Report, *US – COOL*, at para. 171.

restrictions on trade guaranteed both under the chapeau of GATT Article XX and in the TBT preamble.<sup>213</sup>

### 3.8[c] SPS Agreement

The criteria identified by the SPS jurisprudence seem to call for a necessity/balancing test under Article 5.6 of the SPS Agreement fairly similar to that developed in *Korea – Various Measures on Beef* and *EC – Asbestos*, discussed above. Yet, contrary to Article XX, the test under Article 5.6 SPS does not appear to call for an assessment of the degree of the measure's contribution to the end. In *Australia – Apples*, the Appellate Body confirmed that a violation of Article 5.6 requires proof by the complainant that 'a proposed alternative measure to the measure at issue: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (iii) is significantly less restrictive to trade than the contested SPS measure'.<sup>214</sup>

Importantly, it is for the panel to 'identify both the level of protection that the importing Member has set as its appropriate level, and the level of protection that would be achieved by the alternative measure put forth by the complainant'.<sup>215</sup>

### 3.9 PRODUCT/PROCESS ISSUES AND THE TERRITORIAL–EXTRATERRITORIALITY DIVIDE

Finally, an area of importance is the territorial scope of application of the national measures: that is, to what extent can a state take action under its domestic law to protect health or other 'domestic' regulatory values outside its own territory? This issue has arisen explicitly in connection with the application of Article XX(b) and (g), but has also arisen implicitly, in the form of the product-process distinction, the PPM issue.<sup>216</sup>

<sup>213</sup> Petros Mavroidis, 'Drifftin' Too Far From Shore', 12 *World Trade Review* 509–531 (2013).

<sup>214</sup> Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 Dec. 2010, para. 368.

<sup>215</sup> *Ibid.*, para. 344, citing Appellate Body Report, *Australia – Salmon*, para. 208.

<sup>216</sup> For discussions of the product/process distinction, see Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (Marco Bronckers & Reinhard Quick eds., Kluwer Law International 2000); Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 *E.J.I.L.* 249 (2000), and the cogent response to the Howse/Regan article from John Jackson at 11 *E.J.I.L.* (2000), 303.

3.9[a] *The GATT*

The legal issue relating to PPM is whether GATT/WTO law authorizes Members to maintain regulatory distinctions based on process and production methods (PPMs) of imported products. In particular, the debate has focused on whether products that comply with specified PPM criteria and those that do not are 'like' for the purpose of the national treatment obligations of Article III.

GATT case law did not seem to accept any PPMs consideration as a *prima facie* basis for regulatory distinctions. For example, in *US – Measures Affecting Alcoholic and Malt Beverages*,<sup>217</sup> a Minnesota tax credit for micro-breweries was invalidated, even though it was available to foreign as well as domestic brewers, because the beer, though produced by a different method, was deemed like, and the discriminatory tax treatment was therefore an Article III violation. The *Tuna* Panel took the following line: Under a GATT Article III analysis, regulation of production processes, which implicitly takes place in the exporting state, is not 'subject to' Article III, fails the strict scrutiny test of Article XI and is therefore an illegal quantitative restriction, unless an exception applies under Article XX. Under the WTO Agreement, the *US – Shrimp* dispute presented similar facts and was analysed at the Panel level in a similar manner, but the Article XI violation found by the Panel was not challenged by the United States and therefore the Appellate Body did not have an opportunity to consider whether PPMs should be analysed under Article III.

The advantage of this approach is that the product-process distinction serves as a clear and simple rule on territorial–extraterritorial regulatory distinctions in the main GATT market access rules: production processes occur in the exporting Member. Policies effected in the other Members are not under the jurisdiction of the importing Member. Products coming into the territory of the importing state are. This way, a certain territorial vision of the regulatory autonomy of both the importing and exporting Members would be maintained. Physical characteristics of products can be regulated by the importing Member but not non-product related policies. Some extraterritorial policy considerations may be available under the exceptional provisions of Article XX.<sup>218</sup>

Another view is that Article III covers all internal regulations, even when based on PPM or on extraterritorial considerations not reflected in the physical characteristics of the products as such. GATT, one of the agreements of Annex 1A of the WTO Agreement, is concerned with disciplines on products and thus

<sup>217</sup> GATT Panel Report, *US – Malt Beverages*, adopted 19 Jun. 1992, BISD 39S/206.

<sup>218</sup> See also Lorand Bartels, *Article XX of GATT and the rules of public international law on extraterritorial jurisdiction: the case of trade measures for the protection of human rights*, 36 *Journal of World Trade* 353 (2002).

disciplines on regulations broadly affecting trade in goods. For them, the issue would rather be whether – based on the criteria established by the jurisprudence – the products complying with the PPM requirements are competing with those that do not, and whether the challenged regulation affects the latter group negatively (if they are imported). According to this view, Article III applies to PPM regulations but the operationalization of Article III will generally lead to the conclusion that PPM and non-PPM based products are like products<sup>219</sup> because they compete and are substitutable and should not be prima facie the target of regulatory distinctions restricting market access. Article XX could, however, be invoked to justify the use of such a PPM regulatory distinction, as it was recognized in *US – Shrimp*. Finally, the fact that under the TBT Agreement, as noted below, the Appellate Body implicitly found PPMs to be an inherent part of technical regulations raises questions about how this interpretation could influence future jurisprudence on the application of GATT Article III to PPMs.<sup>220</sup>

To summarize, if Article III does not cover PPM type regulations, then, under *ad* Article III, PPM regulations will be viewed as border import restrictions (a ban of products not respecting the PPM prescriptions) controlled by Article XI. If Article III covers PPM type regulations, the Appellate Body's application of a competition-based test in *EC – Asbestos* suggests that in most cases, different PPMs would be insufficient to make products 'un-like'. The test under Article III would then prohibit treating like products differently on the basis of PPM considerations. In this sense the product/process distinction may often serve as a proxy to control the extraterritorial application of national measures. Having said that, such PPM Article III inconsistent regulation may benefit from the policy justifications set forth in Article XX.

### 3.9[b] TBT Agreement

Annex 1 of the TBT Agreement defines 'technical regulation' as a 'document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions with which compliance is mandatory'. In the early draft of the first Standards Code, regulations based on process rather than products were explicitly excluded from the coverage

<sup>219</sup> It is, however, conceivable that faced with a PPM distinction referring to human rights violations or other very serious concerns, consumers preferences be so strong as to reverse the prima facie evidence that goods that are physically similar be nonetheless considered unlike, pursuant to the Appellate Body statement in para. 118 of its *EC – Asbestos* Report. This type of situation may also constitute a justification under Article XX. The point is that if consumer preferences are strong enough to make them unlike, there is little need for regulation. This argument holds if the persons protected by the regulation are the consumers, rather than third parties.

<sup>220</sup> Appellate Body Report, *US – Clove Cigarettes*, at para. 169.

of the TBT Agreement.<sup>221</sup> Article 14.25 of the Tokyo Standards Code<sup>222</sup> seemed to allow explicitly dispute settlement proceedings under the TBT for allegations that process methods were used in technical regulations as a means to circumvent the obligations of the Code. This is curious. If dispute settlement against PPMs is expressly authorized, then the TBT Agreement covers or applies to PPMs, even if it is only to invalidate them. Early debates during the Uruguay Round about the definition of technical barriers to trade were motivated by a desire to include processes and production methods within the disciplines of the TBT Agreement, in order to prevent them from becoming barriers to trade.<sup>223</sup>

In the recent *US – Clove Cigarettes* case, the Appellate Body found that, ‘... technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods’.<sup>224</sup> Thus, it would seem accepted that technical regulations *may* create distinctions based on differences between process and production methods, so long as the trade impediments they create are based on legitimate objectives. What is less clear is whether this provisions is limited to product-based PPMs or whether it also includes non-product based PPMs.

On the issue of extraterritoriality, the fact that the US regulation covered the method of fishing tuna outside the United States, that is, a non-product related PPM, was not challenged by the Appellate Body in *US – Tuna II* is telling. Note however that Mexico did not appeal the Panel’s finding that exerting ‘pressure’ on other Members or their legal persons (e.g., the Mexican fleet) was permissible, but could be relevant to a determination of ‘less favourable treatment’ under Article 2.1.<sup>225</sup> Mexico did appeal the ‘coercive’ use of the US market under

<sup>221</sup> The first drafts stated that ‘Standards includes, where applicable, testing, packaging, marking or labelling specifications and codes of practice, to the extent that they should have affected *products rather than process*’ (emphasis added) (see, for instance, Spec (72)3, 20 Jan. 1972). In June 1976 the United States proposed to add ‘For the purpose of this Code ‘technical specifications’ include processes and productions methods in so far as they are necessary to achieve the final product’ (MTN/NTM/W/50, 2). In the draft of May 1977 (Draft Document MTN/NTM/W/94, 20 May 1977), the reference to product rather than process was deleted from the definition of a technical regulation.

<sup>222</sup> Article 14.25 read as follows: ‘The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being ‘circumvented’ by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.’

<sup>223</sup> See Note by WTO Secretariat, 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, WT/CTE/W/10; G/TBT/W/11 (29 Aug. 1995).

<sup>224</sup> Appellate Body Report, *US – Clove Cigarettes*, at para. 169; repeated in Appellate Body Report, *WTO US – Tuna II*, at para. 211, and recalled in Appellate Body Report, *US – COOL*, at para. 268.

<sup>225</sup> Appellate Body Report, *WTO US – Tuna II*, at para. 226. See also, Simon Lester, ‘Anti-Coercion in ‘Tuna’’, 29 May 2012, at: <http://worldtradelaw.typepad.com/ielpblog/2012/05/anti-coercion-jurisprudence.html>.

TBT Article 2.2 stating that protecting dolphins using the weight of one's market size could not be a legitimate objective. The Appellate Body rejected this argument, finding that Mexico did not take issue with the objective of protecting dolphins itself.<sup>226</sup>

### 3.9[c] SPS Agreement

Annex A to the SPS Agreement contains a definition of 'sanitary and phytosanitary measures' that includes only measures that protect health within the territory of the regulating Member. It therefore excludes from its coverage measures addressing health outside the regulating Member's territory. This leaves importing state regulation seeking to regulate processes and production methods in the exporting state, with the goal of protecting health outside the territory of the importing state, outside the coverage of the SPS Agreement, but potentially subject to GATT or the TBT Agreement. Importantly, it includes measures of importing states regulating PPMs outside of their territory, where the goal is to protect health within the territory; for example, regulation of foreign slaughterhouse practices may be considered SPS measures. Most SPS PPMs will be product-related since they focus on the health risk of imported food products. Yet it is worth noting that Annex A includes in the definition of 'SPS measures' regulations concerned with 'relevant requirements associated with transport of animals and plants'.

### 3.10 CONCLUSION

The purpose of this section has been to outline certain critical rules applicable under GATT, the SPS Agreement, and the TBT Agreement, in order to motivate the following analysis of the relative coverage of these agreements and the norms contained therein. This section has already raised several of the issues of scope of application.

This section has shown that GATT appears to be more *laissez-régler* than the SPS Agreement and TBT Agreement, at least for most purposes. Its primary discipline in connection with domestic regulation is non-discrimination. Article XX is only invoked after a finding of violation of, for example, Article III or Article XI. Furthermore, the TBT Agreement is generally less strict in its scrutiny of domestic regulation than the SPS Agreement. For example, the TBT Agreement lacks an explicit requirement on risk assessment. Finally, the jurisprudence seems to have read into Article XX of GATT, albeit in softer terms, some of the more explicit norms of the TBT and SPS Agreements.

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<sup>226</sup> *Ibid.*, para. 337.

Now, how do these different provisions work together? This is the object of the next section.

#### 4 INVOKING THE DISCIPLINES OF SPS, TBT AND THE GATT

It has been necessary to describe the disciplines provided by the SPS Agreement, TBT Agreement and GATT, prior to describing the way in which these sources of norms interact with one another. Now we may proceed to analyse the relationships among these disciplines. The scope of application of these agreements may determine their effect on Members' behaviour. We begin with the general principle that all of these treaty norms hold equally binding force and, of course, were entered into at the same time, so among them there are no issues relating to *jus cogens* or *lex posterior*.

There are two junctures at which to consider the invocation of the disciplines of the SPS Agreement, the TBT Agreement and GATT.<sup>227</sup> First is the question of the conditions of application of each agreement individually.

Second is the question of what happens when more than one agreement on its face applies to a particular national measure: does the application of one discipline result in deference by another, and under what circumstances? The Uruguay Round brought a number of new subjects within the GATT/WTO legal system. It may not have been completely anticipated that the treatment of some of these new subjects in one agreement would overlap with another agreement. For example, where there are alleged barriers to the distribution of goods, issues may arise under both the GATT, relating to goods, and the General Agreement on Trade in Services (GATS), relating to services. Indeed, this occurred in the *EC – Bananas III* litigation.<sup>228</sup> In its decision on *EC – Bananas III*, the Appellate Body made clear that the scopes of application of the GATT and the GATS are each independent, and may well overlap.<sup>229</sup> In this article, we discuss thereafter the relationship between the GATT, SPS and TBT Agreements.

##### 4.1 CONDITIONS OF APPLICATION: APPLICABLE LAW

###### 4.1[a] *The GATT*

GATT generally applies to all trade in goods. We discuss above the PPM issue, but it is important to note that the PPM issue does not influence the scope of

<sup>227</sup> On the issue of the relationship between GATT 1994 and other WTO multilateral trade agreements, see Elisabetta Montaguti and Maurits Lugard, *The GATT 1994 and other Annex 1A Agreements: Four different relationships?* 3 J.I.E.L. 3, 473 (September 2000).

<sup>228</sup> See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas III*), WT/DS27/AB/R, adopted 25 Sep. 1997.

<sup>229</sup> *Ibid.*, paras 221–222.

application of GATT, but only the relative scope of application among Articles I, III, XI, XIII and XX thereof. The issue is whether the PPM measure is an internal regulation (imposed at the border) subject to Article III or a border import restriction subject to Article XI? Does Article III impose disciplines on PPM type regulation and thus 'apply' to them or are PPMs 'not covered', and therefore 'not regulated' by Article III, leaving them to the application of Article XI? In any event, as discussed above, it appears that Article XX would justify some PPMs.

#### 4.1[b] *TBT Agreement*

The TBT Agreement applies both to voluntary standards and to mandatory technical regulations relating to all products and their process and production methods, including industrial and agricultural products.<sup>230</sup>

In WTO *US – Tuna II*, the Appellate Body determined that a US labelling measure on tuna products for dolphin protection 'not only sets out conditions for the use of the label' (195), which could be permitted, but establishes 'a single and legally mandated definition... [that] disallows the use of other labels'.<sup>231</sup> Thus, even though imports were not required to affix the label, and it was in that sense voluntary, because an exporter is required to use this *and only this* label and comply with its conditions in order to make any reference to dolphin safety, the Appellate Body found the label to be mandatory and thus a technical regulation under the TBT Agreement.

In the *EC – Asbestos* case, the Panel and Appellate Body also had occasion to consider the scope of application of the TBT Agreement. The Panel found that the TBT Agreement did not apply to the part of France's measure setting out the prohibition on goods containing asbestos. The Appellate Body overturned this decision, emphasizing that the measure laid down product characteristics on an identifiable product. It also found that the measure was a technical regulation falling under the TBT Agreement, but it did not pursue its analysis and instead proceeded under GATT alone. The Appellate Body found that the core of the definition of 'technical regulation' is the laying down of one or more product characteristics, in either positive or negative form: that is, as a requirement or as a prohibition. The Appellate Body emphasized, however, that this does not mean that all internal measures covered by Article III:4 of GATT are necessarily 'technical regulations'.

In *EC – Sardines*, the Appellate Body revised the definition of 'technical regulation'. The European Communities argued that the EC Regulation was not a

<sup>230</sup> Article 1.3 of the TBT Agreement.

<sup>231</sup> Appellate Body Report, WTO *US – Tuna II*, at paras 195–199.

technical regulation in respect of *Sardina pilchardus Walbaum* and not in respect of *Sardinops sagax*. Here, the Appellate Body agreed with the panel, to the effect that, under the *EC – Asbestos* jurisprudence, the products covered need only be identified, and may be addressed in either a positive or negative way, to be included within a technical regulation.<sup>232</sup> The Appellate Body rejected the European Communities' argument that the EC Regulation did not identify *Sardinops sagax* as irrelevant to the question of whether the EC Regulation negatively regulated *Sardinops sagax* by prohibiting its labelling as sardines.

#### 4.1[c] SPS Agreement

As noted above in connection with our discussion of PPMs, the SPS Agreement's scope of application is limited to sanitary and phytosanitary measures that may affect international trade.<sup>233</sup> Sanitary or phytosanitary measures are defined by reference to their purpose,<sup>234</sup> and include measures 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.<sup>235</sup>

We can summarize these parameters as including measures designed to protect against pests and diseases, as well as food-borne dangers. As noted above, while PPMs may be included as sanitary or phytosanitary measures, they are only covered to the extent that they are 'applied' or 'have effects' to protect animal, plant or human life within the territory of the Member taking the measure. Therefore, the SPS Agreement would not cover extraterritorially-motivated PPMs.<sup>236</sup>

<sup>232</sup> Appellate Body Report, *EC – Sardines*, at paras 183–186.

<sup>233</sup> Article 1.1 of the SPS Agreement.

<sup>234</sup> Contrary to TBT regulation defined by reference to, arguably, more objective criteria based on products' characteristics.

<sup>235</sup> SPS Agreement, Annex A.

<sup>236</sup> It is possible that a PPM would have a mixed territorial and extraterritorial motivation, for example, where the goal is to comply with an international effort to eradicate a particular disease that might not yet pose a threat in the state implementing the measure at issue. Under these

Another issue relates to circumstances where pests, diseases and food-borne dangers are not the only purpose of a measure. If a measure is only partially motivated by sanitary or phytosanitary purposes, is it still covered by the SPS Agreement?<sup>237</sup> Based on the concept of cumulative obligations under the WTO Agreements, a measure might be only partially motivated by health concerns, and still be subject to the SPS Agreement. So, a measure might be partly an SPS measure and partly a TBT measure, and subject to both agreements. The Panel in *EC – Biotech* ruled that measures can be ‘split’ between SPS and TBT.<sup>238</sup>

Finally, in the *EC – Hormones* case, it was decided that the SPS Agreement applies to all measures in force, including measures initially taken prior to the time the SPS Agreement entered into force (1 January 1995).<sup>239</sup>

#### 4.2 CUMULATIVE APPLICATION AND THE PRINCIPLE OF HARMONIOUS AND EFFECTIVE INTERPRETATION

The *EC – Bananas III* and *Canada – Periodicals*<sup>240</sup> decisions of the Appellate Body, in connection with the relationship between the GATT and the GATS, suggest that the rights and obligations under these agreements are cumulative. This conclusion is supported in the context of the relationship between GATT Article III, the TRIMS Agreement, and the SCM Agreement (*Indonesia – Automobiles*<sup>241</sup>), between GATT Article XIII and the Agreement on Agriculture (*EC – Bananas III*), between GATT Article XIII and the Safeguards Agreement (*US – Line Pipe*<sup>242</sup>), between the SCM Agreement and the Agreement on Agriculture (*US – Upland Cotton*<sup>243</sup>), and between the Agreement on Safeguards and GATT Article XIX (*Korea – Dairy Safeguards*):

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circumstances, there would be a factual question whether the measure is sufficiently intended to protect life or health within the territory of the relevant state.

<sup>237</sup> See Pauwelyn, *supra* n. 179, at 643–444.

<sup>238</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*EC – Biotech*), WT/DS291/R, WT/DS292/R, WT/DS293/R (29 Sep. 2006), at para. 7.165.

<sup>239</sup> Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 128. The interpretation of the relevant provision of the SPS Agreement on measures ‘applied’ was supported by an additional reference to Article 28 of the Vienna Convention. The parallel provision of the TBT on measures prepared, adopted and applied, would also be interpreted along similar line.

<sup>240</sup> Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* (*Canada – Periodicals*), WT/DS31/AB/R, adopted 30 Jul. 1997, DSR 1997:I, 449.

<sup>241</sup> Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* (*Indonesia – Autos*), WT/DS54/R and Corr.1,2,3,4, WT/DS55/R and Corr.1,2,3,4, WT/DS59/R and Corr.1,2,3,4, WT/DS64/R and Corr.1,2,3,4, adopted 23 Jul. 1998, DSR 1998:VI, 2201.

<sup>242</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (*US – Line Pipe*), WT/DS202/R, adopted 8 Mar. 2002.

<sup>243</sup> Appellate Body Report, *United States – Subsidies on Upland Cotton* (*US – Upland Cotton*), WT/DS267/AB/R (3 Mar. 2005), at para. 549.

We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously<sup>244</sup> ...

In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'.<sup>245</sup> An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.<sup>246,247</sup>

This was a simple application of the principle of effective interpretation in the context of the WTO Single Undertaking. The fact that all provisions of a treaty must have an effective meaning and must be interpreted so as to ensure that no other provision is made a 'nullity' is expressed in the principle for 'effective interpretation'.

The principle of effective interpretation within the WTO Single Undertaking calls for the harmonious interpretation and application of all WTO provisions. In *US – Gasoline*, the Appellate Body insisted that Article XX provides rights and other provisions of the GATT should not be interpreted and applied so as to nullify the exercise of such rights.<sup>248</sup> In *Brazil – Desiccated Coconut*, the Appellate Body upheld the Panel that the transitional rights given in the SCM Agreement could not be nullified by an interpretation of Article VI of GATT 1994.<sup>249</sup> The Panel in *Turkey – Textiles* suggested that, since the WTO Members have a right under Article XXIV to form regional trade agreements, the interpretation of the

<sup>244</sup> Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Some Dairy Products Dairy*, (*Korea – Dairy*), WT/DS98/AB/R, adopted 12 Jan. 2000, para. 74.

<sup>245</sup> [Original Footnote] We have emphasized this in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear ('Argentina – Footwear (EC)')*, WT/DS121/AB/R, adopted 12 Jan. 2000, at para. 81. See also Appellate Body Report, *United States – Gasoline*, WT/DS2/AB/R, at 23; Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 12; and Appellate Body Report, *India – Patents*, para. 45.

<sup>246</sup> [Original Footnote] The duty to interpret a treaty as a whole has been clarified by the Permanent Court of International Justice in *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ, Series B, Nos. 2 and 3, p. 23. This approach has been followed by the International Court of Justice in *Ambatielos (Greece v. United Kingdom)* 1953 I.C.J. 10 (19 May); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 I.C.J. 15 (28 May); and *Rights of Nationals of the United States of America in Morocco (France v. United States)* 1952 I.C.J. 196, 196–199 (27 August). See also I. Brownlie, *Principles of Public International Law* 634 (5th ed., Clarendon Press 1998); G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–1954: Treaty Interpretation and Other Treaty Points*, 33 Brit. Y.B. Intl. L. 211, 220 (1957); A. McNair, *The Law of Treaties* 381–382 (Clarendon Press 1961); I. Sinclair, *The Vienna Convention on the Law of Treaties* 127–129 (Manchester University Press 1984); M.O. Hudson, *La Cour Permanente de Justice Internationale* 654–659 (1936); and L.A. Podesta Costa & J.M. Ruda, *Derecho Internacional Público*, Vol. 2, 105 (Editora Argentina 1985).

<sup>247</sup> Appellate Body Report, *Korea – Dairy*, WT/DS98/AB/R, para. 81.

<sup>248</sup> Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, at 22–23.

<sup>249</sup> Appellate Body Report on *Brazil – Measures Affecting Desiccated Coconut ('Brazil – Desiccated Coconut')*, WT/DS22/AB/R, adopted 20 Mar. 1997, at 17.

other WTO provisions should be such as to ensure that this right does not become a 'redundancy or a nullity'.<sup>250</sup>

In case of inconsistencies within a treaty between two obligations or between obligations and rights, international rules have been developed to identify how to deal with such situations and include the presumption against conflicts, the *lex posterior* principle, the *lex specialis* principle and the inviolability of *jus cogens*. Since there is no issue of *jus cogens* here, and all WTO provisions were adopted at the same time, the WTO's obligations and rights must apply cumulatively and harmoniously unless set aside because of a conflict with another provision, or because another provision is *lex specialis*.<sup>251</sup>

#### 4.3 RELATIONSHIP BETWEEN SPS, TBT AND GATT

As stated above, all WTO provisions are cumulatively and simultaneously applicable within the WTO Agreement. Sometimes, the relationship between the agreements is explicit. For example, Article 1.5 of the TBT Agreement provides that technical regulations are not governed by the SPS Agreement and Article 1.6 of the SPS Agreement excludes the application of the TBT Agreement. The relationship between GATT and the SPS with respect to phytosanitary measures is explicit, but not the relationship between GATT and the TBT Agreement.

##### 4.3[a] SPS Versus TBT

Article 1.5 of the TBT Agreement provides that the TBT Agreement does not apply to sanitary or phytosanitary measures, as defined in the SPS Agreement. The TBT Agreement covers all technical regulations other than those that are sanitary or phytosanitary measures, as defined in the SPS Agreement. This means that the purpose of a measure – whether or not it is applied to protect against pests and diseases, as well as food-borne dangers<sup>252</sup> – is central to the division of jurisdiction between the TBT Agreement and the SPS Agreement.

However, there are measures, such as some extraterritorial measures, that would not be included as sanitary or phytosanitary measures by virtue of their

<sup>250</sup> Panel Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products* ('*Turkey – Textiles*'), WT/DS33/R, adopted 19 Nov. 1999, at paras 9.96 and 9.103, recalling the Appellate Body's wording in *US – Gasoline*.

<sup>251</sup> See, for instance, the statement of the Appellate Body in *EC – Bananas III*: 'Therefore the provisions of the GATT 1994, including Article XIII, apply to market-access commitments concerning agriculture products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter'. Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, at para. 155. On this issue, see Marceau, *supra* n. 179.

<sup>252</sup> See the definition of 'sanitary or phytosanitary measure' in Annex A to the SPS Agreement.

extraterritorial protective purpose, but which are intended to protect health. If the TBT covers PPMs or extraterritorial considerations, some of these measures may be covered by the TBT Agreement even if the SPS does not apply to them. The possibility depends on whether ‘technical regulations’ include measures intended to protect extraterritorial human, animal or plant life that specify ‘product characteristics or their related processes and production methods’. This of course depends on how these words are interpreted.

The same reasoning applies to ‘labelling’ requirements. The SPS Agreement defines SPS measures as including ‘packaging and labelling requirements directly relating to food safety’. To the extent that the object of the PPM label was the protection of people, animals or plants in the territory of the importing country, such a label would be covered by the SPS Agreement. If such a label is not directly related to food or its object is the protection of the environment generally (say, the planet’s biodiversity), then the label may not be covered by the SPS Agreement and may call for the application of the TBT Agreement or the GATT. Under the TBT Agreement, technical regulations include ‘packaging marking or labelling requirements as they apply to a product, process or production method’. Note that there is no reference to ‘their related’ process and production methods, so non-product related PPM labelling requirements would be covered by the TBT Agreement (WTO US – Tuna II). It seems that the TBT Agreement would cover PPM labels, with less or no risk of contradictory analysis under GATT Articles III/XI and XX.

Article 1.4 of the SPS Agreement provides that nothing in the SPS Agreement affects rights under the TBT Agreement, with respect to measures not covered by SPS. Article 1.5 of the TBT Agreement provides that the TBT Agreement does not apply to SPS measures. Thus, where the SPS Agreement applies by its terms, the TBT Agreement would be inapplicable and vice versa. It is however possible that aspects or components of a specific measure could be covered by the SPS Agreement while others would be covered by the TBT or GATT, depending on how one defines the measure.

#### 4.3[b] *GATT versus SPS*

Article 2.4 of the SPS Agreement provides that:

Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be 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).

This provision has two conditions: first, it addresses sanitary or phytosanitary measures, and second, those measures must not violate the SPS Agreement.<sup>253</sup> If these conditions are met, this provision establishes a presumption that the relevant measures comply with GATT.

This presumption is probably best understood as rebuttable.<sup>254</sup> As a presumption, it would operate in the same way as Article 3.2 of the SPS Agreement, as interpreted by the Appellate Body in the *EC – Hormones* case, shifting the burden of proof to the complaining party, but not providing any substantive support to the defending party. It is possible to imagine circumstances where a difficult question arises. For example, the SPS Agreement would apply to PPM regulations that are intended to safeguard health in the importing state. If a Panel or the Appellate Body were to hold that such measures conform to the SPS Agreement, this provision would raise a presumption that they also conform to GATT. If the analysis is continued under Article XX, the challenged Member would carry the benefits of this presumption in its GATT Article XX analysis (as a factual matter) and its measure would be presumed to be justified under Article XX. It would be for the challenging Member to reverse this presumption and demonstrate that less trade restrictive alternatives were reasonably available to the importing country to ensure the same reasonable level of protection. It is doubtful that a Member that did not succeed in demonstrating the existence of such less trade restrictive alternatives in its SPS claim would manage to do so to rebut the application of Article XX GATT.

So long as the necessity tests in Article 5.6 SPS and Article XX GATT are similar (or at least so long as Article XX is not more stringent), and the two disputing parties have exactly the same evidence for both legal analyses, a Member who managed to avoid a violation under the SPS Agreement should not be caught

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<sup>253</sup> There may certainly be circumstances governed by Article XX(b) of GATT that are not covered by the SPS Agreement. For example, the French measure that comprised the subject matter of the Asbestos decision was not a sanitary or phytosanitary measure, as it did not relate to pests or disease or food, but was certainly subject to Article XX(b). See Hans-Joachim Priess & Christian Pitschas, *Protection of Public Health and the Role of the Precautionary Principle under WTO Law: a Trojan Horse Before Geneva's Walls?* 24 *Fordham Intl. L. J.* 519 (2000).

<sup>254</sup> If the intent were to deem such measures to comply with GATT, the treaty could have said so, or could have stated that the presumption is irrebuttable. In any event, the plain language of 'presumption' will likely be taken to mean nothing more. See Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 170 (terming the unqualified presumption in Article 3.2 of the SPS Agreement 'rebuttable'). However, see Article 3.8 of the Dispute Settlement Understanding, clearly stating that the presumption there is rebuttable. On the parallel application of the TBT Agreement and GATT, see Robert Howse & Elizabeth Türk, *The WTO Impact on Internal Regulations – a Case Study of the Canada–EC Asbestos dispute*, in *The EU and the WTO: Legal and Constitutional Aspects* (Gráinne de Búrca & Joanne Scott eds., Hart Publishing 2001).

under Article XX.<sup>255</sup> It may, however, be concluded that the new test under Article XX calls for an actual balancing of the degree to which the challenged measure contributes to the end pursued, while Article 5.6 of the SPS Agreement does not. If this were the case, is it possible that an SPS measure that passes Article 5.6 could be found inconsistent with Article XX?. Of course, a measure would only be required to comply with Article XX if it violates another provision of GATT.

What about the reverse presumption: would sanitary or phytosanitary measures that violate the SPS Agreement necessarily also violate GATT? In the *EC – Hormones* case, again dealing with the presumption under Article 3.2 of the SPS Agreement, the Appellate Body found that a presumption that ‘if  $x$  then presume  $y$ ’ (where  $x$  is conformity with international standards and  $y$  is consistency with the SPS Agreement and GATT) cannot be interpreted as indicating also the converse: ‘if not  $x$  then presume not  $y$ ’.<sup>256</sup> If similar reasoning applies to the presumption under Article 2.4, then non-compliance with the SPS Agreement cannot serve as a basis for a presumption of non-compliance with GATT.

At the same time, according to the eighth preambular paragraph of the SPS Agreement, that Agreement is intended 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)’.<sup>257</sup> Under Article 31.2 of the Vienna Convention, this preambular language would be ‘taken into account’ in interpreting the SPS Agreement, and so a Panel or the Appellate Body might interpret ambiguous provisions of the SPS Agreement to accord with GATT. This appears to presume that the SPS Agreement is more stringent than Article XX.

#### 4.3[c] *GATT versus TBT*

The TBT Agreement lacks an explicit provision relating it to GATT, although its general relationship may be similar to that of the SPS Agreement. The TBT provisions often add to those of Article III:

We observe that, although the TBT Agreement is intended to ‘further the objectives of GATT 1994’, it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on

<sup>255</sup> Recall however that Articles III/XX have a broader coverage than the SPS so a single regulation may be the object of a partial overlap between the SPS and GATT.

<sup>256</sup> Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at paras 101–102.

<sup>257</sup> (Footnote omitted).

Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.<sup>258</sup>

The Appellate Body, while seemingly announcing the TBT as a *lex specialis* regime (as a specialized legal regime for a limited class of measures) and stating that it was ‘applicable law’,<sup>259</sup> did not take the next step to implement this view (since it declined to pursue its analysis under the TBT Agreement) and went on to apply Articles III and XX of GATT to the French measure.

Any reading of the TBT Agreement and GATT must not be such as to discourage compliance or reduce incentives to comply with the more stringent requirements of the TBT Agreement. As with the SPS Agreement, it would be best if compliance with the TBT Agreement gave rise to a presumption of compliance with GATT. In addition, compliance with an international standard (Articles 2.4 and 2.5 TBT) should lead to a presumption of compliance with Article 2.2 of the TBT Agreement, and not simply the presumption of necessity provided by Article 2.5. The use of such international standards should also de facto lead to the conclusion that the domestic TBT measure is necessary for the purpose of Article XX. The same should generally be true for any measure that complies with Article 2.2 of the TBT Agreement. Since the TBT Agreement adds different obligations to those of the GATT (WTO US – Tuna II) does it mean that a single measure may be in violation of the TBT while compatible with GATT? Is a technical regulation that complies with Articles 2.1 and 2.2 of the TBT Agreement necessarily compatible with Articles III and XX?

It is conceivable that a measure based on a policy not listed in Article XX (say, the protection of the French language) could be considered not more restrictive than necessary pursuant to Article 2.2 TBT, while not being able to find any provisional justification under any of the subparagraphs of Article XX of GATT. In WTO US – Tuna II, the Appellate Body refused to recognize that a measure inconsistent with 2.1 of TBT did not need to be assessed under GATT Article III.

#### 4.4 CONFLICTS

##### 4.4[a] *General Interpretative Note to Annex 1A*

The General Interpretative Note to Annex 1A to the WTO Charter (the ‘General Interpretative Note’) provides that:

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<sup>258</sup> *Ibid.*, para. 80 (emphasis added).

<sup>259</sup> *Ibid.*, paras 77 and 78.

[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization (referred to in the agreements in Annex 1A as the 'WTO Agreement'), the provision of the other agreement shall prevail to the extent of the conflict.

The other agreements in Annex 1A include, *inter alia*, the SPS Agreement and the TBT Agreement. Thus, the latter prevail over GATT in the event of conflict. The section does not deal with issues related to conflicts between the TBT and the SPS Agreements.

#### 4.4[b] *Definition of a Conflict in WTO Law*

In international law, a conflict<sup>260</sup> is a rather specific and narrow concept:

[T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. . . . Not every such divergence constitutes a conflict, however. . . . Incompatibility of contents is an essential condition of conflict.<sup>261</sup>

The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary.<sup>262</sup>

In the WTO context, this narrow definition of a conflict was initially confirmed in *Guatemala – Cement*,<sup>263</sup> when the Appellate Body stated that, 'A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them.' Recently, in *US – Hot Rolled Steel from Japan*, the Appellate Body supported again a narrow definition

<sup>260</sup> For a thorough discussion on the concept of conflict, see Joost Pauwelyn, *The Issue of Conflict in WTO Law*, PhD thesis, University of Neuchâtel (2001).

<sup>261</sup> *Encyclopedia of Public International Law* 468 (Elsevier Science 1984). See also Wilfred Jenks, *The Conflict of Law-Making Treaties*, 29 *Brit. Y.B. Intl. L.* 425ff (1953). For in such a case, it is possible for a state which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with each other, failing any evidence to the contrary. See also E.W. Vierdag, *The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 64 *Brit. Y.B. Intl. L.* 100 (1988); *Oppenheim's International Law* Vol. 1, Parts 2–4, 1280 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed., Longman 1992); Fitzmaurice, *supra* n. 245, at 237; and Sinclair, *supra* n. 245, at 97.

<sup>262</sup> Wilfred Jenks, *The Conflict of Law-Making Treaties*, 29 *Brit. Y.B. Intl. L.* (1953).

<sup>263</sup> Appellate Body Report, *Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico* ('*Guatemala – Cement*'), WT/DS60/AB/R, adopted 25 Nov. 1998, at para. 65. The same narrow definition was also used in Panel Report, *Indonesia – Autos* WT/DS54/R and Corr.1,2,3,4, WT/DS55/R and Corr.1,2,3,4, WT/DS59/R and Corr.1,2,3,4, WT/DS64/R and Corr.1,2,3,4, at paras 14.29–14.36 and 14.97–14.99.

of ‘conflict’ and stated that ‘there is no conflict between Article 17.6(i) of the Anti-dumping Agreement and Article 11 of the DSU’<sup>264</sup> and ‘... we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular’.<sup>265</sup> The strict conflict approach was also followed by the *Indonesia – Autos* Panel, requiring, as a matter of general public international law, outside the context of the General Interpretative Note, ‘mutually exclusive obligations’.<sup>266</sup>

In *US – Upland Cotton*, the Appellate Body expanded the definition of conflicts in listing at least three potential conflicts between the Agreement on Agriculture and the SCM Agreement, wherein the Agreement on Agriculture would prevail under Article 21.1 of that agreement. These included an explicit carveout from the SCM Agreement, a situation wherein a Member could not comply with obligations under both agreements simultaneously, and when the Agreement on Agriculture expressly authorized a measure prohibited under the SCM Agreement.<sup>267</sup> For example, with respect to the SCM Article 3.1(b) prohibition against local content subsidies, the provisions of the Agreement on Agriculture cited by the US were found not to specifically exclude the application of the SCM prohibition. Therefore, no conflict existed between the provisions of the two agreements, both applied cumulatively as part of the same treaty, and the SCM Agreement’s prohibition applied to the US measure at issue.<sup>268</sup>

### *Lex Specialis*

Another relevant principle in the context of overlapping treaty provisions is that of *lex specialis derogat generali*: the special law derogates from the general law. While this principle does not appear in the Vienna Convention, it has been recognized and applied in a number of cases by the International Court of Justice and is recognized by a number of learned commentators.<sup>269</sup>

<sup>264</sup> Appellate Body Report, *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* (‘*US – Hot Rolled Steel*’), WT/DS 184/AB/R, adopted 23 Aug. 2001, at para. 55.

<sup>265</sup> *Ibid.*, para. 62.

<sup>266</sup> Panel Report, *Indonesia – Autos*, WT/DS54/R and Corr.1,2,3,4, WT/DS55/R and Corr.1,2,3,4, WT/DS59/R and Corr.1,2,3,4, WT/DS64/R and Corr.1,2,3,4, at footnote 649. For further discussion on the conflicts within the WTO and conflicts between WTO provisions and provisions of treaties or customs, see Gabrielle Marceau, *The WTO Dispute Settlement and Human Rights*, 13 *E.J.I.L.* 753 (2002); and Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003).

<sup>267</sup> Appellate Body Report, *US – Upland Cotton*, WT/DS267/AB/R (3 Mar. 2005), at para. 532.

<sup>268</sup> *Ibid.*, paras 546, 549–550.

<sup>269</sup> For instance, see *Encyclopedia of Public International Law* 468 (Elsevier 1984). V. Lowe refers to B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals* (1953) [rep., Cambridge 1987]; Fitzmaurice, *supra* n. 209. A. McNair, *The Law of Treaties* 219 (Clarendon Press 1961); Sir R. Jennings & Sir A. Watts, *Oppenheim’s International Law* 1280 (9th ed., Longman 1992); D.P. O’Connell, *International Law* 12–13 (2d ed., Stevens & Sons Ltd 1970).

The object of such a rule is that when a subject-matter is dealt with in specific terms by a (set of) provision(s), the general rule, if it cannot be read harmoniously with the specific one, is set aside and the matter is governed by the specific one(s).<sup>270</sup> For some, the *lex specialis* is an exception to the *lex posterior* rule, which cancels out, supersedes or abrogates the general clause if it provides for a special regime of rules.<sup>271</sup> For others, the *lex specialis* is only a principle of interpretation according to which a matter governed by a specific provision is thereby taken out of the scope of a general provision – the *lex specialis*, and the *lex generalis* do not deal with the same subject-matter, therefore do not conflict.<sup>272</sup> When a specific right or an exception is provided for against a general prohibition, the *lex specialis* rule may find application.

In WTO dispute settlement, it is clear that the customary rules of interpretation of general international law are applicable.<sup>273</sup> One of these customary rules of interpretation is *lex specialis*,<sup>274</sup> even if it is not listed in the VCLT. This principle of interpretation would lead to identifying the more specific WTO obligation(s). The Appellate Body Report in *EC – Bananas III* did not go so far as to say that the specific controls the general: it stated that whenever GATT and another agreement in Annex 1A to the WTO Agreement appear to apply to a measure, this measure should be examined on the basis of the agreement that ‘deals specifically, and in detail’, with measures of this kind.<sup>275</sup>

Assuming a *lex specialis* rule, it would appear likely that the TBT and SPS Agreements would generally be *lex specialis* relative to the GATT, with the consequence that the TBT and SPS Agreements that are more specific

<sup>270</sup> For a recent example of a *lex specialis* regime that was allowed to govern a dispute to the detriment of the general system, see *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures* (2000) Intl. Trib. L. of Sea Case Nos. 3 and 4 (4 August), available at <http://www.itlos.org>.

<sup>271</sup> H. Aufricht, *Supersession of Treaties in International Law*, 37 Cornell L.Q. 655, 698 (1952).

<sup>272</sup> The *lex specialis derogat generali* principle ‘which [is] inseparably linked with the question of conflict’. See the discussion by Gaetan Verhoosel on the *Gabcikovo-Nagymaros Case, Gabcikovo-Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court*, 6 E.E.L.R. 252 (1997). See also Jenks, *supra* n. 261, at 469; *Encyclopedia of Public International Law* 468 (1984), and Fitzmaurice, *supra* n. 209.

<sup>273</sup> See Article 3(2) of the DSU.

<sup>274</sup> Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by Japan* (‘US – 1916 Act (Japan)’), WT/DS162/R and Add. 1, adopted 26 Sep. 2000, as upheld by Appellate Body Report, WT/DS162/AB/R, at para. 675, citing the Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, at para. 204, and the PCIJ decision in *Serbian Loans* (1929), where the PCIJ stated that ‘the special words, according to elementary principles of interpretation, control the general expression’ (PCIJ, Series A, No. 20/21, at 30). But see Robert Howse and Petros C. Mavroidis, *Europe’s Evolving Regulatory Strategy for GMOs – the issue of Consistency with WTO Law: of Kine and Brine*, 24 *Fordham Intl. L.J.* 317, 322–323 (2000), (suggesting that *lex specialis* is not part of customary international law).

<sup>275</sup> Appellate Body Report on *EC – Bananas III*, WT/DS27/AB/R, at paras 155 and 204.

should/could control the parallel provisions of GATT that are more general. But, so far, the wording of Article 2.4 of the SPS Agreement seems to exclude the possibility of a strict *lex specialis* regime that prohibits the application of GATT 1994.

With regard to the TBT Agreement, the jurisprudence has not always considered the Agreement as an exclusive *lex specialis* to GATT. In WTO *US – Tuna II*, the Appellate Body found that a TBT-consistent measure could not automatically be considered GATT-consistent, underlining the fact that consistency with the TBT Agreement cannot ‘cure’ a GATT inconsistency. In *EC – Asbestos*, after noting the application of the TBT Agreement, the Appellate Body continued its analysis under Articles III and XX, as it had done similarly in *US – Gasoline*. Indeed, the Appellate Body clearly stated that, ‘the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994’.<sup>276</sup> Therefore, the TBT and GATT obligations were both applicable to the French measure.<sup>277</sup> In *US – Gasoline*, notwithstanding the claims of TBT violations, the Panel and the Appellate Body also concentrated exclusively on the claims and defences under GATT.

The uncertainty of the relationship between GATT 1994 and the TBT Agreement leaves several questions open for interpretation. A GATT-inconsistent measure cannot, as noted above, be cured by TBT-consistency. Can a GATT-consistent measure violate the TBT Agreement? Does a TBT-inconsistent measure automatically obviate any subsequent analysis under the GATT, as the Panel concluded (and the Appellate Body had no chance to address) in *US – COOL*? It could be true that, while a TBT-consistent measure nevertheless requires analysis under the GATT, a TBT-inconsistent measure may well be also in violation of GATT and therefore requires no further analysis.

#### 4.5 WHICH PROVISIONS OF WHICH AGREEMENTS SHOULD BE EXAMINED FIRST?

An additional consideration follows from the decision in *US – COOL* where the Appellate Body reviewed the legitimacy of the US’ objective to provide consumers information on origin. This goal (consumer information on origin) falls within the scope of the legitimate objectives of the TBT Agreement, but does not seem to fall easily under any of the closed list of exceptions in Article XX of GATT. Does the Appellate Body therefore accept that in a situation of conflict because of an explicit authorization under the TBT (for a policy objective not listed in Article

<sup>276</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 80.

<sup>277</sup> *Ibid.*, para. 76.

XX) the more specialized provisions of the TBT should prevail pursuant to the Note to GATT 1994?

So far, in the WTO context, the term *lex specialis* has been used as a principle of interpretation, to help in the identification of the set of provisions that are more specific and must be examined first. The other general WTO rules continue to apply and may be examined after the completion of the analysis under the more specific rules, when need be – as discussed in this section.

Given an understanding that the obligations reflected in the SPS Agreement are cumulative in relation to the obligations in GATT, it is necessary to decide the order in which these claims must be evaluated. The decision on order is made on the basis of logic and judicial economy. The *Australia – Salmon* Panel and *EC – Hormones* Panels each found it appropriate to examine the SPS Agreement first, and the GATT subsequently.<sup>278</sup> This is because the SPS Agreement is more specific, and, due to the operation of Article 3.2 of the SPS Agreement, it might not be necessary to examine the GATT if the measure were found to comply with the SPS Agreement. Moreover, the Article 3.2 presumption does not run the other way, so even if the measure were found to comply with GATT, it would still be necessary to examine it under the SPS Agreement.

In the recent three AB reports involving GATT and TBT claims, those under the TBT were examined first by panels and by the AB.

#### 4.6 WOULD A PANEL OR THE APPELLATE BODY CONTINUE THEIR ANALYSIS AFTER A FINDING OF

##### 4.6[a] *Violation of the SPS Agreement?*

Would a Panel or the Appellate Body examine the claim of violation of Articles III/XI (and XX) if it had reached the conclusion that the measure violated the SPS Agreement? The answer is probably no. Panels are requested to address:

those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings ‘in order to ensure effective resolution of disputes to the benefit of all Members’.<sup>279</sup>

<sup>278</sup> Panel Report, *Australia – Measures Affecting Importation of Salmon* (*Australia – Salmon*), WT/DS18/R and Corr. 1, adopted 6 Nov. 1998, as modified by Appellate Body Report, WT/DS18/AB/R, at para. 8.39; see also Panel Report, *EC – Measures Concerning Meat and Meat Products (Hormones) – Complaint by Canada* (*EC – Hormones (Canada)*), WT/DS48/R/CAN, at para. 8.45; and Panel Report, *EC – Hormones (US)*, WT/DS26/R/USA, at para. 8.42.

<sup>279</sup> Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R, at para. 223.

It is doubtful that the application of the general provision of Article XX may bring additional indications for an effective implementation of the Panel's SPS recommendations. Yet, as suggested before, if the necessity test under Article 5.6 appears somehow less stringent than that of for example Article III combined with Article XX of GATT (i.e., Article 5.6 calling for less incursion into the degree of effectiveness of the challenged measure for instance), one may conceive of incongruous results under SPS and GATT. The difficulty of comparing the two is increased by the fact that the test under Article 5.5 is necessarily more stringent and more sophisticated than that of the chapeau of Article XX. How the addition of those variables would actually work (an Article 5.5 more stringent and an Article 5.6 less stringent than Article XX of GATT) is difficult to say in the abstract.

There is at least one important question left open. If a measure violates Article III of GATT, but is permitted under Article XX(b), or under the SPS Agreement, is an action for non-violation nullification or impairment available to the complainant? The *EC – Asbestos* decision of the Appellate Body suggests that it may be.<sup>280</sup>

#### 4.6[b] *Violation of the TBT Agreement?*

The TBT Agreement does not have any provision similar to Article 2.4 of the SPS Agreement, explicitly setting forth its relationship with GATT. A Member could therefore not benefit from a presumption of compatibility with GATT if it were to be considered to have complied with the TBT requirements. Also, to the extent that the TBT Agreement contains different and additional obligations to those of the GATT, a prior examination of the GATT may not exhaust the need to examine claims under the TBT Agreement. A Panel may therefore decide that as a matter of efficiency, it will examine claims under the TBT Agreement first. This appears to be the preferred approach following the recent decisions in *WTO US – Tuna II* and *US – COOL*. Recall, however, that in both *US – Gasoline* and *EC – Asbestos* the claims under GATT were addressed first and the identification of GATT rights and obligations was considered sufficient to settle the dispute (TBT claims were never examined).

As with the SPS Agreement, judicial economy does not reduce the need to provide the losing Member with sufficient remedial information so as to ensure efficient compliance. It is difficult to foresee – albeit possible – circumstances in which a finding under Articles III or XX would add to findings under Articles 2.1 and 2.2 of the TBT Agreement, unless the terms 'like products', 'less favourable

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<sup>280</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, at para. 187.

treatment' and the 'necessity tests' have different meanings and the application is more stringent under the GATT. As noted above, the panel in *US – COOL* exercised judicial economy after finding a violation of Article 2.1, but the Appellate Body was not called on to make a decisive review of this decision.

## 5 CONCLUSION

The most intractable type of non-tariff barrier is a regulatory measure or tax that either discriminates against imported goods or that otherwise disproportionately burdens commerce. Domestic regulatory autonomy can be used to restrict trade, and therefore there will be circumstances in which international legal restrictions on domestic regulatory autonomy will make sense. But much more nuance is required than in addressing tariff barriers.

From a social welfare perspective, national product regulations are measures that can be justified as instruments to deal with specific market failures.<sup>281</sup> Possible rationales for product regulation include imperfect information, uncertainty, market power, and other sources of externalities in production or consumption. Although product regulation can improve welfare if it succeeds in internalizing spillovers at acceptable transaction costs (i.e., improves allocative efficiency), this need not be the purpose or outcome. The intervention may also allow incumbent firms in an industry to exploit market power. Regulation may reduce the contestability of a market, because potential entrants find it less attractive to compete or to enter. The greater are the barriers to entry created by the regulation for foreign firms, the greater will be the beneficial profit-shifting effect of the product regulation measure for the domestic firms or industry, all other things equal. Thus, regulation can be employed strategically to shift rents.

In general, given differences in circumstances, social preferences and risk attitudes across countries, product regulation will need to differ. It is in practice very difficult to identify what constitutes an efficient regulation, and international cooperation can induce regulating states to take into account the costs imposed on foreign persons. This suggests that international cooperation can be beneficial by increasing information and scrutiny of the effects, efficacy and equivalence of specific product regulations.<sup>282</sup>

However, absent agreement that countries will accept products that meet certain minimum standards, the fact that governments are free to adopt

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<sup>281</sup> For a more complete discussion, see Bernard Hoekman & Joel P. Trachtman, *Continued Suspense: WTO Discipline of Domestic Regulation and the Relationship Between Non-Discrimination and Risk Assessment*, 9 (1) World Trade Rev. 151 (2010).

<sup>282</sup> See Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 Mich. L. Rev. 2329 (2000).

idiosyncratic norms will always bring with it differential trade effects, as firms will confront differences in market-specific costs of contesting different foreign markets. Absent a willingness to agree to abide by international norms or to accept mutual recognition (both of which may result in inefficiency at the local level), the challenge confronting trading states is to ensure that national norms indeed are directed towards dealing efficiently with national consumption externalities, while taking into account effects on foreign persons.

Although the SPS Agreement, TBT Agreement and the GATT share the same goal, they provide norms with subtle but important variations. It is thus necessary to evaluate these variations, and to determine the applicability of these norms. This article has attempted to do so. This analysis provides both a 'map' through the highways and byways of the WTO law of domestic regulation of goods, and a basis for considering greater harmonization or unification among these agreements. While some of the distinctions are curious artefacts of the negotiation dynamics, and others may be the result of infelicitous drafting, the general goal has been to require that importing states take into account the interests of exporting states in formulating their regulation and taxes.

It is clear that the GATT has concentrated on negative integration (the power of the GATT Panels to find domestic regulations inconsistent with the prohibition against discrimination, etc.), and its negative integration norms remain applicable, and are supplemented in some cases by the SPS Agreement and the TBT Agreement. However, the SPS Agreement and TBT Agreement add greater support for positive integration, through strengthened incentives for adoption of international standards and promotion of recognition and harmonization.

Non-tariff barriers and regulations can be expected to continue to increase in light of the expanding globalization and multi-layered efforts to engage in global governance. These WTO disciplines will only gain importance. There are instances of difference in the substantive obligations under these three agreements. Some of this difference results in varying concerns for protectionism and for domestic regulatory autonomy. Perhaps in future negotiations, there will be discussion of greater convergence. It is also possible that the interpretative process of dispute settlement will yield a degree of convergence. Already, the jurisprudence seems to read into GATT provisions, and in particular Article XX, criteria, behaviour and requirements that are specifically dealt with in the TBT and SPS Agreements. The Appellate Body has also found in the *US – Clove Cigarettes* case a unity of purpose between the TBT Agreement and the GATT, another expression of the WTO Single Undertaking.