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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

Gabrielle MARCEAU and Joel P. TRACHTMAN*

I. 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 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 difficult to make.

The search for the right balance between disciplining protectionist measures¹ and allowing Member States to maintain regulatory autonomy has characterized the evolution 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),² and the Sanitary and Phytosanitary Measures Agreement (SPS).³ This article compares the disciplines on domestic regulation contained in each of these agreements,

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¹ 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 September 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).

² *Agreement on Technical Barriers to Trade*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization* (hereinafter WTO Agreement), Annex 1A, *Legal Instruments—Results of the Uruguay Round*, vol. 31, at p. 138 (hereinafter TBT Agreement).

³ *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, WTO Agreement, Annex 1A, *Legal Instruments—Results of the Uruguay Round*, at p. 69 (hereinafter SPS Agreement).

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 15 different working groups,⁴ 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"⁵ was agreed and governments decided to annex the resulting text from each working group to the Marrakesh Agreement Establishing the WTO.⁶ Although some efforts of legal co-ordination must have been made, the late action of the Legal Drafting Group,⁷ 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 the relationship between Articles III, XI and XX of GATT, the TBT Agreement, and the SPS Agreement, all of which impose different regulatory constraints on government actions relating to standards, technical and sanitary regulations, etc. ... We have therefore identified discipline—inherent and common to each set of provisions and often specifically addressed in the TBT or SPS

⁴ Ministerial Declaration on the Uruguay Round of 20 September 1986, BISD 33S/19.

⁵ 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).

⁶ The Marrakesh Agreement Establishing the World Trade Organization together with its Annexes form 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, until recently a 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 December 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 M. Bronckers and R. Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2001), at p. 135.

⁷ 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. Id.

Agreements—compared them, 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 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 coherence. For example, the jurisprudence seems to have read into Article XX of GATT important components of the new more technical provisions of the TBT and the SPS Agreements. Some aspects of this jurisprudence are now addressed in decisions of the 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 to 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 regulations and the regulatory process, and the way that they incorporate by reference 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.

II. 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.⁸ 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 1994, since they now form part of a single treaty, which must be interpreted as a whole.

⁸ 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 paragraph 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 November 1979.

After the Kennedy Round, contracting parties' concerns over multiple and divergent national standards increased. A first general notification exercise⁹ 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".¹⁰ Harmonization of standards and the co-operation of states in the formulation of international standards¹¹ 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".¹²

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 43 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".¹³ Furthermore, of course, 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.¹⁴ Of course, enforcement of the original Standards Code was weakened by the existence of a general requirement of consensus to establish a Panel and to adopt a Panel report. The Uruguay Round's Dispute Settlement Understanding remedied this weakness.¹⁵

⁹ 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 February 1974. See also COM.TD/W/191.

¹⁰ Spec (71) 143, 30 September 1971, Section III, Article 1(a).

¹¹ Spec (71) 143, Section III, Article 1(c).

¹² 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.

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

¹⁴ Id.

¹⁵ 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.

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.”¹⁶

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 hormones.¹⁷ 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” agreements¹⁸ or extensions of GATT obligations.¹⁹

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)²⁰ 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 General Agreement on Tariffs and Trade 1994: they are co-equal sources of WTO law.²¹

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 or 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.

¹⁶ Roberts, as note 14 above, 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.

¹⁷ 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. Environmental L.J. 3 (2000), 624–625.

¹⁸ See, for instance, the GATT 1994 Understandings.

¹⁹ See, for instance, the Multilateral Trade Agreements of Annex 1A.

²⁰ 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 September 1997.

²¹ 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.

III. 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/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 divide²²

To some extent these 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. They represent different aspects of the WTO disciplines on the domestic normative autonomy of Members. These disciplines work in varying 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).²³ But in grouping various treaty provisions under the umbrella of a single WTO Agreement, negotiators may not have envisaged all possible situations of overlap.

A. NON-DISCRIMINATION: NATIONAL TREATMENT AND MOST-FAVOURLED-NATION

Obligations of non-discrimination in internal regulation, including the application of internal regulation at the border,²⁴ occupy a primary position in the GATT, and in the SPS and TBT Agreements. Discrimination between products and

²² This last parameter is addressed both in Section C and in Section D, below, relating to the scope of application of these agreements.

²³ See Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea—Dairy"), WT/DS98/AB/R, adopted 12 January 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).

²⁴ See Article III, General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194 (hereinafter GATT).

between situations is condemned. In this section we examine mainly the obligation of non-discrimination as between domestic and imported products: national treatment.

GATT

(a) GATT Article III:4—national treatment obligation

It is appropriate to begin with Articles III:1 and 4 of the 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 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”,²⁵ 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.²⁶ It refused to see any issue of the subjective intent of the Member state in Article III determination:

“it 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

²⁵ “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 November 1996, at p. 16.

²⁶ See Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p. 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* (1998), 619.

protection to domestic production. *This is an issue of how the measure in question is applied.*²⁷ (emphasis added)

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”²⁸. 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”²⁹.

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”;³⁰ 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.³¹

(i) 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,

²⁷ See Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p. 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 August 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 August 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 February 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.

²⁸ See Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p. 29.

²⁹ Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (“EC—Asbestos”)*, WT/DS135/AB/R, adopted 5 April 2001, at para. 98.

³⁰ 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.

³¹ 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 January 2001, at para. 133.

“fundamentally, a determination about the nature and extent of a competitive relationship between and among products”.³² 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 classification³³—are to be used as tools in the determination of this competitive relationship between products. These criteria do not exhaust inquiry.³⁴

The competitive relationship between imports and domestic goods is the determinant of likeness. “If there is—or could be—no competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production”.³⁵

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.³⁶ 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.³⁷ 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 *Korea—Various Measures on Beef*³⁸ and

³² 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.

³³ Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97

³⁴ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 101.

³⁵ *Id.*, at para. 117.

³⁶ 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 p. 26, or in Appellate Body Report, *Korea—Taxes on Alcoholic Beverages* (“*Korea—Alcoholic Beverages*”), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 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 November 2001, paras 89–102.

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

³⁸ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, paras 135–144.

described more precisely in paragraph 100 of the *EC—Asbestos* decision, discussed hereafter, is important.

(ii) Less favourable treatment

The less favourable treatment criterion involves 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”.³⁹

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 which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, “so as to afford protection to like domestic production”.⁴⁰ This decision established 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’.”⁴¹

And as it 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

³⁹ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 137.

⁴⁰ 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.’”

⁴¹ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 100.

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.⁴² Thus a violation would only occur if after respecting the legitimate categories, the measure is still found less favourably treated.

As the Appellate Body applies this principle in future cases, we may be able to determine whether a regulation allowing for distinctions (different treatment) based on non-protectionist goals and considerations is captured by the less favourable treatment provision and therefore condemned by the application of Article III just because it affects negatively market opportunities for imports. It may be that the less favourable treatment criterion only condemns protectionist or other illegitimate regulatory distinctions. It is worth noting that a similar consideration motivated the aims and effects test.⁴³ It is also possible that “less favourable treatment” could be interpreted broadly so as to include any market distortion favouring domestic products, even if the goal, object and purpose of the measure are not protectionist. In such case reliance on Article XX to justify such measure would remain possible.

(b) *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.

Mutual recognition agreement

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

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

⁴³ See Hudec, as note 27, above; and Frieder Roessler, “Diverging Domestic Policies and Multilateral Trade Integration”, in Robert E. Hudec and Jagdish Bhagwati (eds), *Fair Trade and Harmonization, Pre-requisite for Free-Trade*, Vol. II (Cambridge, MA: MIT Press, 1996).

from non-beneficiary states. This could arguably violate the MFN obligation.⁴⁴ This will depend on the “architecture” and functioning of the specific MRA. These MRAs are part of the positive integration exercise, along with harmonization discussed in Section D below.

(c) *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, it is worth noting that the TBT Agreement has no equivalent of Article XX, providing an exemption under certain circumstances.

Problems may occur if the scope of the term “like products” is the same as that under Article III:4, while justifications under Article XX are not available to violations of Article 2.1 TBT. It is conceivable that the “accordion” of like products⁴⁵ may allow a distinction between “like” products of GATT Article III (or I) and that of 2.1 TBT. The sixth preambular paragraph of the TBT Agreement,⁴⁶ combined with the necessity requirement of Article 2.2, may suggest that a narrow interpretation of “like products” is appropriate in the context of Article 2.1. The emphasis of the Appellate Body on the “no less favourable” language may serve as a less strained defence for non-protectionist domestic regulation and therefore reduce the need to invoke Article XX to justify measures based on listed non-protectionist policy goals. Otherwise we would be faced with an incongruous situation where for instance many of the environment-based technical regulations could be inconsistent with Article 2.1 while the same

⁴⁴ See William J. Davey and 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 Thomas Cottier, Petros C. Mavroidis and Patrick Blatter (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (Ann Arbor, MI: University of Michigan Press, 2000), pp. 23–24, evaluating mutual recognition agreements under the MFN principle: “On the one hand, such agreements offer an effective means of facilitating 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 George A. Bermann, Matthias Herdegen and Peter L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford: Oxford University Press, 2001), pp. 263, 266: “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.”

⁴⁵ 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 p. 23.

⁴⁶ “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.”

regulations would be authorized by Article XX (after a prior determination that it was *prima facie* inconsistent with Article III:4 of GATT).

The negotiators of the Tokyo Round Standards Code seem to have wanted to maintain States' rights to take measures for the protection of health and the environment and for security reasons; these concerns are reflected in the preamble of the Uruguay Round TBT Agreement. Since Article 2.2 of the Uruguay Round TBT Agreement allows Members to base their TBT regulations on any "legitimate" policy, Members do not need to invoke Article XX of the GATT to justify action based on the policy considerations listed there. Therefore (and adding to this the fact that Article XX of GATT is contained in a different agreement), it is doubtful whether Article XX (or Article XXI) was expected to be available to be invoked as a defence to a claim of violation of Article 2.2.

(d) *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, and 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.⁴⁷

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 sub-section 3. 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

⁴⁷ 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 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 February 1998 as modified by the Appellate Body Report, WT/DS26/AB/R, DSR 1998:III, p. 699.

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 seem to have adapted their operative language from the chapeau of Article XX of GATT,⁴⁸ 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.⁴⁹ 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"⁵⁰ to proving the discrimination prohibited by Article 2.3. Article 5.5, which imposes a form of internal consistency requirement, and the Guidelines on Article 5.5 adopted by the SPS Committee, are further discussed in sub-section F below on "Internal Consistency".

The test under the SPS is different from that of Articles III, XI and XX of GATT; there is no like products analysis or product-process distinction *per se* (as with Article III of GATT) in the SPS Agreement. The focus of the analysis is the justification for discrimination between situations under the SPS prohibition itself.

B. NECESSITY AND PROPORTIONALITY TESTS

One important general discipline on domestic regulation in WTO law is the necessity test, which, until the recent *EC—Asbestos* and *Korea—Various Measures on Beef* decisions of the Appellate Body, was generally interpreted as requiring the domestic regulation to be the least trade restrictive method of achieving the desired goal. The TBT and SPS Agreements have made it a "positive requirement" on all

⁴⁸ 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 ...".

⁴⁹ 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 March 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".

⁵⁰ 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 November 1998, DSR 1998:VIII, 3327, at para. 252.

relevant regulations while the GATT keeps it, under Article XX, as a “justification” for restrictions found to violate other provisions, including basic market access rights.

A broader “proportionality” requirement may include least-trade-restrictive-alternative analysis. While proportionality is a general concept of international law,⁵¹ as it relates to retorsion and other international legal remedies, it has already emerged as a principle of EC law.⁵² In the EC context, proportionality *stricto sensu*⁵³ 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 trade restrictive alternative test, and (iii) proportionality *stricto sensu*.⁵⁴ A means–ends rationality test, or suitability test, simply inquires as to whether the measure is a rational or suitable means, among many others, to achieve the purported goal. It is a weak test that is generally easy to satisfy. Thus, we focus on two components of proportionality: proportionality *stricto sensu*, which is similar to a balancing test, and a least trade restrictive alternative test.

1. *The Necessity Test in the GATT*

Since its inception, the GATT has always recognized that legitimate government policies may justify measures contrary to basic GATT market access rules. Traditionally in GATT, the exceptional provisions of Article XX(b) and (d) are available to justify measures—otherwise incompatible with other GATT provisions—if they are “necessary”. This has been interpreted to require that the country invoking these exceptions demonstrates 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.”⁵⁵

⁵¹ See J. Delbruck, “Proportionality”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (Amsterdam: Elsevier Science, 1997), p. 1140.

⁵² Case 11/70, *Internationale Handelsgesellschaft*, [1970] E.C.R. 1125, 1135.

⁵³ Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* 6 (London: Kluwer Law International, 1996). See also Joel Trachtman, *Trade and ... Problems*, 9 E.J.I.L. 1 (1998), 32, 74–76.

⁵⁴ For an explication of these tests as they have been developed in the EC context, see Jan Neumann and Elisabeth Türk, *Necessity Revisited—Proportionality in WTO Law After EC—Asbestos* (2002) (forthcoming).

⁵⁵ See GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930* (“US—Section 337”), adopted 7 November 1989, BISD 36S/345, at para. 5.26; GATT Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages (US—Malt Beverages)*, adopted 19 June 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 November 1990, BISD 37S/200, at para. 223.

The “necessity” qualifications contained in Articles XX(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?⁵⁶ 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. This necessity test thus would truncate cost-benefit analysis by not examining the benefits of the regulatory measure, or compare those benefits with the trade restriction.⁵⁷

The WTO jurisprudence has 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 sub-paragraphs 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 unjustifiably to frustrate the legal obligations owed to other Member States under the GATT.⁵⁸

(a) *The necessity test under Article XX(b) and (d)*

The Article XX necessity test was 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.”⁵⁹

After reiterating that WTO Members have the right to determine for themselves the level of enforcement of their domestic laws⁶⁰ (a concept close to the “appropriate

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline* (“*US—Gasoline*”), WT/DS2/AB/R, adopted 20 May 1996, at p. 22.

⁵⁹ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 164.

⁶⁰ *Id.*, at para. 177.

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 instrument”;⁶¹ “The greater the contribution [to the realization of the end pursued], the more easily a measure might be considered to be ‘necessary’;⁶² or “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.”⁶³

It is not clear how these variables affect each other, nor is it clear how their balancing would affect the final determination that a measure qualifies under Article XX and how this new test relates to the traditional “least trade restrictive alternative reasonably available” test. Yet 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)).⁶⁴ 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,⁶⁵ 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”.⁶⁶

It is not yet clear what the impact of such a policy of the highest importance has had on the rest of the determination. But it seems that Panels and the Appellate Body are asked to assess the reasonableness and importance of the values at the basis of the challenged measure (“The more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’.”⁶⁷) In *Korea—Various Measures on Beef* the possibility of an unreasonable or inauthentic policy goal was raised:

“... 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.”⁶⁸

⁶¹ *Id.*, at para. 162.

⁶² *Id.*, at para. 163.

⁶³ *Id.*

⁶⁴ 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.”

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 162.

⁶⁸ *Id.*, at para. 172.

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."⁶⁹ (emphasis added)

To some extent, the *EC—Asbestos* and *Korea—Various Measures on Beef* cases have introduced a form of balancing test or proportionality test into Article XX of GATT.⁷⁰ We discuss this development in Section H 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. We discuss the possibility for common interpretation below.

(b) *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 between the SPS Agreement and the TBT Agreement, and GATT, for instance with respect to some of the so-called "green" labelling requirements. In its *US—Gasoline* report, although parties had both relied on the GATT "primarily aimed at" test, the Appellate Body noted that the threshold of Article XX(g) did not contain a requirement that the measure be "primarily aimed at", but only a requirement that the measure be "related to".⁷¹ 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"⁷²).

In *US—Shrimp*, the Appellate Body appears to have abandoned the "primarily aimed at" test and focused on the means-ends relationship⁷³ 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".⁷⁴

⁶⁹ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 178.

⁷⁰ See Neumann & Türk, as note 55, above.

⁷¹ Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, at pp. 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). *Id.*, at pp. 21–22.

⁷² *Id.*, at pp. 20–22.

⁷³ See Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, paras 156–160.

⁷⁴ See *Id.*, at 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."

(c) *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”⁷⁵ 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 H 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”.⁷⁶ 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.⁷⁷

Therefore a violation of either of these concepts would suffice to disqualify the measure under Article XX.⁷⁸ Yet the standards embodied in the language of the

⁷⁵ Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, at paras 156–160.

⁷⁶ See the Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, at pp. 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.

⁷⁷ See the Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, at p. 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 constitutes a disguised restriction on international trade.

⁷⁸ 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 constitutes a disguised restriction on international trade.

chapeau of Article XX are not only different from the requirements of Article XX(g) but are also different from the standards used for the substantive violations of GATT.⁷⁹

When the analysis of the chapeau of Article XX took place in the context of the invocation of sub-paragraph (g) thereof, the Appellate Body (faced with a measure benefiting from a provisional justification under Article XX(g)) examined, under the chapeau of 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, some form of a necessity test (least trade restrictive alternative analysis) seems to be performed under the chapeau of Article XX.

In sum, Article XX offers justifications that can lead to rebuttal of the *prima facie* conclusion of inconsistency with any provision of GATT,⁸⁰ 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 the application of the chapeau of Article XX that, "The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable."⁸¹ 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. This necessity discipline on possible justification for inconsistencies has been made into a positive requirement for all TBT and SPS measures.

⁷⁹ 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 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 p. 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.

⁸⁰ See Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, at p. 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."

⁸¹ *Id.*, at p.27.

2. 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 least trade restrictiveness independently. Under GATT, of course, the least trade restrictive alternative requirement of Articles XX(b) and (d) is an affirmative defence, with both the burdens of persuasion and proof on the defendant. 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 case. Thus, whether a specific measure is an SPS regulation or rather 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.⁸²

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 fulfill a legitimate objective, taking account of the risks non-fulfilment would create”.⁸³

On its face, the 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?

If one refers to the new balancing test developed in *Korea—Various Measures on Beef*, “the risk of non-fulfilment” can also be viewed as part of the analysis of two of the 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 may make sense. 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 as proportionality testing, in the strict sense, which would evaluate whether the costs are disproportionate to the benefits, the magnitude and probability of risk become relevant.

We note that, towards the end of the negotiation of the Uruguay Round, there was a footnote 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.”⁸⁴

⁸² See Robert Howse and Petros C. Mavroidis, *Europe's Evolving Regulatory Strategy for GMO—the Issue of Consistency with WTO Law: of Kine and Brine*, 24 *Fordham Int'l L.J.* (2000) 317, 324.

⁸³ TBT Agreement, Article 2.2 (emphasis added).

⁸⁴ See Document TER/W/16 and corr.1

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."⁸⁵

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 that may be the basis for a TBT regulation. We discuss this issue further in Section IV.C below.

3. 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".⁸⁶ The related 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 C 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

⁸⁵ Id.

⁸⁶ 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 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..."

Member establishing a sanitary ... measure, is a prerogative of the Member concerned",⁸⁷ 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.⁸⁸

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."⁸⁹

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, where 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.

The impact and reference to the GATT "importance of the value at stake"—absent in the SPS Agreement balancing under Article 5.6—is not clear. Perhaps the SPS Agreement assumes that there is no compromising of authentic health values under the SPS Agreement.

⁸⁷ Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, at para. 199.

⁸⁸ This distinction is discussed below.

⁸⁹ Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, at para. 194.

C. APPROPRIATE LEVEL/SCIENTIFIC BASIS

1. 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,⁹⁰ 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.⁹¹ 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 jurisprudence, as in the *US—Section 301*⁹² and *US—1916 Act*⁹³ 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.

⁹⁰ Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, at para. 115; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, at p. 22.

⁹¹ See Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 Mich. L. Rev. 7 (June 2000), 2329, 2354, citing John T. Barcelo, *Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 Cornell Int’l L.J. 3 (1994), 755.

⁹² See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974 (“US—Section 301 Trade Act”)*, WT/DS152/R, adopted 27 January 2000.

⁹³ Appellate Body Report, *United States—Anti-Dumping Act of 1916 (“US—1916 Act”)*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, at para. 89.

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."⁹⁴

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.⁹⁵

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 scientific justification,⁹⁶ 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."⁹⁷

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 to 5.4 of the SPS Agreement. These requirements⁹⁸ were interpreted in each of the three cases under the SPS Agreement: *EC—Hormones*,⁹⁹

⁹⁴ Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, at paras 200–20. Id., at 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."

⁹⁵ 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 levels 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.

⁹⁶ 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 appropriate levels of protection.

⁹⁷ Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)* ("EC—Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:1, 135, at para. 172.

⁹⁸ 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.

⁹⁹ Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

intertwined with a penumbra of traditionally domestic regulatory prerogatives, such as the environment, health, labour, culture, tax, etc.

While this article points to certain negative integration powers (the power of the WTO to strike down domestic regulations) available in WTO dispute settlement, to be exercised through the application of general standards, the WTO has much more limited powers of positive integration (the power of the WTO to “re-regulate” at a multilateral level) available to be exercised through the legislation of specific rules. Yet the law making in the areas covered by the SPS and TBT Agreements is quite unique. Positive integration has two main potential components: harmonization (international legislation or standardization) and recognition. While these agreements contain no requirements of harmonization, they provide some incentives for states to formulate and conform to international standards developed in other fora.

1. *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), International Office of Epizootics (OIE) and International Plant Protection Convention (IPPC) as “quasi-legislators” of these standards in relevant areas. What do we mean by “quasi-legislators”?¹⁰⁹

First, the standards developed by Codex, OIE 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.¹¹⁰ 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 the SPS Agreement. Members can always adopt

¹⁰⁹ Note the difference with the TRIPs Agreement where pre-existing norms developed in WIPO treaties are explicitly cross-referenced and made WTO law.

¹¹⁰ 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.

norms above international standards as long as they comply with the SPS Agreement, including Article 5 on risk assessments.¹¹¹ This is true also for Article 2.5 of the TBT Agreement.

This is a refined system of applied subsidiarity,¹¹² 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.¹¹³ Given the quasi-legislative character of standards set by Codex, OIE and IPPC (and other organizations), it is worthwhile to examine how these organizations adopt standards.¹¹⁴ It may be that the SPS Agreement will give rise to modified legislative procedures.¹¹⁵ Therefore, it is worthwhile to examine how these organizations adopt standards.¹¹⁶

The Codex Commission makes “every effort to reach agreement on the adoption of standards by consensus”.¹¹⁷ However, in instances in which “efforts to reach a consensus have failed”,¹¹⁸ voting does occur, and decisions of the Commission are “taken by a majority of the votes cast”.¹¹⁹

So, while Codex, OIE 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, OIE and IPPC standards (although compliance with international standards is not required by

¹¹¹ 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.

¹¹² 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.

¹¹³ See Matthias Herdegen, “Biotechnology and Regulatory Risk Assessment”, in G.A. Bermann, M. Herdegen and P.L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford: Oxford University Press, 2001); *The Procedures for the Elaboration of Codex Standards and Related Texts*, available at <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. Int'l L. & Pol. 4 (2000), 865, 885–95.

¹¹⁴ See Terence P. Stewart and 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 Int'l L & Com. (1998), 27.

¹¹⁵ Codex standards are generally adopted by consensus. Although the Codex Rules of Procedure provide for voting, it is generally not used. In the event of a vote, decision is by majority of states present at the particular Session. Compliance with Codex standards is voluntary. E-mail from Ellen Y. Matten, Staff Officer, US Codex Office, to Joel P. Trachtman (8 August 2001) (on file with author). Furthermore, under the Statements of Principle Concerning the Role of Science in the Codex Decision-Making Process and the Extent to which Other Factors are Taken Into Account, “When the situation arises that members of Codex agree on the necessary level of protection of public health but hold differing views about other considerations, members may abstain from acceptance of the relevant standard without necessarily preventing the decision by Codex”.

¹¹⁶ See Stewart and Johanson, as note 115 above.

¹¹⁷ *CODEX Alimentarius and CODEX Commission*, Ontario Ministry of Agriculture, Food and Rural Affairs, at <<http://www.gov.on.ca/OMAFRA/english/food/inspection/codex.htm>>.

¹¹⁸ *Id.*

¹¹⁹ Food and Agriculture Organization and World Health Organization, *Rules of Procedure of the Codex Alimentarius Commission: Procedural Manual Rule VI.2*, 11th edn (Geneva: WHO, 2000).

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, OIE and IPPC standards to the extent 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 the WTO Committee on Sanitary and Phytosanitary Measures (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.¹²⁰ These procedures were reviewed and continued in July 1999 and in 2001.¹²¹ This SPS decision is only a commitment to "monitor" identified international standards.

The July 2000 decision by the TBT Committee on "Principles for the Development of International Standards Guides, Recommendations with relation to Articles 2, 5 and Annex 3 of the TBT",¹²² 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

¹²⁰ See Document G/SPS/11. At its meeting of 8 July 1999, the Committee adopted the First Annual Report on the monitoring procedure; see document G/SPS/13.

¹²¹ 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.

¹²² G/TBT/9, Annex 4.

“standards”, for subsequent interpretation by a court. It is possible for a “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), but still exists in an attenuated form.

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,¹²³ 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.

2. 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; so deviations from international standards are discouraged. Based on this proviso, we would expect that Article 2.4 would be interpreted similarly to Article 3.3 of the SPS Agreement (recognizing the right of Members to adopt levels of protection superior or different from those of international standards), although the fact that this specific language is excluded might raise doubts. This requirement appears, however, less complex, and less subtle, than that under the SPS Agreement.

¹²³ 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.

Does this provision prevent Members from adopting standards below international standards? The last sentence of Article 2.5 only provides for a “rebuttable” presumption that compliance with international standards does not create unnecessary obstacles to international trade (does not violate Article 2.2 of the TBT Agreement therefore). In *EC—Hormones*, the Appellate Body refused to read into Article 3.2 of the SPS Agreement a reverse presumption that non-compliance with an international standard gives rise to an inference of non-compliance with the SPS Agreement. Technical regulations may go above or below international standards. If participation in international standards body setting and reliance on their work as basis is encouraged, deviations from international standards is not prohibited.

3. *The GATT*

The GATT does not specifically require the use of international standards at all, although the least trade restrictive alternative requirements under Article XX and or the good faith requirement under the chapeau of Article XX may include a requirement to attempt to create 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.”¹²⁴ (emphasis added)

Reliance on international or even regional standards may provide a *de facto* presumption of good faith as required by Article XX.¹²⁵

E. (MUTUAL) RECOGNITION AND EQUIVALENCE

1. *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.”

¹²⁴ See Appellate Body Report, *US—Shrimp (Article 21.5 DSU)*, at para. 124.

¹²⁵ See *id.*, at 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 (October 1999), 128–134. See also the Panel and Appellate Body Report in *US—Shrimp (21.5 DSU)*.

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”.¹²⁶ It sets up the possibility for other states to serve as “regulatory laboratories” to come up with alternative 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, which its SPS measure is designed to achieve.¹²⁷ 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.¹²⁸

2. 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”.¹²⁹

¹²⁶ See document G/SPS/19.

¹²⁷ 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 June 2000 (document G/SPS/15, dated 18 July 2000).

¹²⁸ 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 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 which cannot conflict with or contradict the SPS treaty provisions but which 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 which 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 Yearbook Int’l L.* (1994), p. 3.

¹²⁹ 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.

Since Article XX requires that Members maintain an appropriate level of flexibility in the administration of their regulatory distinctions,¹³⁰ 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. *The GATT*

GATT contains no explicit equivalency requirement or facility of recognition. However, it is possible that necessity requirements under Article XX (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 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.¹³¹ This appears to function as a “soft” equivalency requirement.

F. INTERNAL CONSISTENCY

1. *SPS Agreement*

Article 5.5 of the SPS Agreement addresses an interesting theoretical 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.

¹³⁰ 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.

¹³¹ 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’.”

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.”¹³²

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 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.”¹³³

The Appellate Body report in the *Australia—Salmon* decision¹³⁴ 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* decision¹³⁵ 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

¹³² Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at para. 213.

¹³³ *Id.*, paras 214–215.

¹³⁴ 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. Int'l Econ. L. 4 (December 1999), 641.

¹³⁵ See Sections III.B.1 and III.H of this Article.

automatic incorporation into Article 5.5 of the SPS Agreement of the legal test developed in *US—Gasoline* for the chapeau of Article XX.¹³⁶

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”.¹³⁷ The decision on Guidelines has to some extent built on the SPS jurisprudence and the practice of Members and has added 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.¹³⁸ They then identify “warning signals” along the lines of those identified by the Appellate Body in the *EC—Hormones* decision.

With regard to a SPS measure dealing with human, animal, or plant life or health, qualitative and quantitative assessments are encouraged and quantification is favoured.¹³⁹

“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

¹³⁶ “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.

¹³⁷ See Doc. G/SPS/15, adopted on 18 July 2000.

¹³⁸ “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 July 2000.

¹³⁹ 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 K. Anderson, C. McRae and D. Wilson (eds), *Economics of Quarantine and SPS Agreement* 9 (Adelaide: CIES, 2001), p. 9.

light of the Member's current views on its appropriate level of protection, or a combination of the two". The Guidelines also call on Member States 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 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.

2. *TBT Agreement*

The TBT does not contain any explicit consistency requirement but, as discussed hereafter, the GATT Article XX necessity test appears to contain a soft consistency requirement. A similar requirement could thus exist in the operationalization of the Article 2.2 necessity test.

3. *The GATT*

Although there is no formal consistency requirement in Article XX(d),¹⁴⁰ 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."¹⁴¹

¹⁴⁰ 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."

¹⁴¹ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 172.

G. PERMISSION FOR PRECAUTIONARY ACTION

1. SPS Agreement

The precautionary principle, of course, has been the subject of extensive debate, which cannot be replicated here.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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 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.”

¹⁴² On the state of the precautionary principle see, for instance, T. O’Riordan, J. Cameron, and A. Jordan (eds), *Reinterpreting the Precautionary Principle* (London: Cameron & May, 2001); Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. Rev. (2000), 114; 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), p. 131.

¹⁴³ 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.

¹⁴⁴ 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.

The WTO adjudicating bodies do not have the capacity to enforce non-WTO rules that would add to or diminish WTO obligations and rights.¹⁴⁵ The crystallization of the precautionary principle into an authentic general principle of law could not add to or diminish the rights and obligations under the covered agreements and thus, could not set aside the WTO treaty provisions. 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,¹⁴⁶ 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 as such by WTO adjudicating bodies who would 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 want¹⁴⁷ and to act with prudence on the basis of minority opinion¹⁴⁸ were recognized by the Appellate Body in its interpretation of Article XX.

2. 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

¹⁴⁵ On this issue, see Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard Int'l LJ* (1999), 333; Marceau, as note 126, above; Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 35 *J.W.T.* 6 (December 2001), 1081. For a contrary view see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 *Am. J. Int'l L.* (July 2001), 595; Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 *J.W.T.* 3 (June 2001), 499; Thomas J. Schoenbaum, “WTO Dispute Settlement: Praise and Suggestions for reform”, 47 *Int'l & Comp. L.Q.* (2000), 647; David Palmeter and Petros Mavroidis, “The WTO Legal System: Sources of Law”, 92 *Am. J. Int'l L.* 3 (July 1998), 398.

¹⁴⁶ See Trachtman, *ibid.*; Marceau, as note 126, above; and Marceau, *Conflicts of Norms*, as note 146, above.

¹⁴⁷ “... 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.

¹⁴⁸ 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 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.”

restrictive than necessary, will call for some demonstration that some objective necessity exists. Scientific evidence may be called for.

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

3. *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, 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."¹⁴⁹

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).¹⁵⁰

H. 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, as expressed in the following sentences. There are two likely reasons. First, balancing tests seem to some to accord too much power to courts. However, it is not unusual for courts to be assigned the task of balancing, explicitly or implicitly, under specified circumstances. Under the Appellate Body's opinion in

¹⁴⁹ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 178 (footnote omitted).

¹⁵⁰ Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* ("EC—Asbestos"), WT/DS135/R and Add. 1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, at para. 8.221.

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.¹⁵¹ 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.

1. *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. 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.¹⁵² As further discussed below, the Appellate Body in *Korea—Various Measures on Beef* has added an additional element to search for a less trade restrictive alternative: the importance of the value or interest at stake.

(a) *Balancing under the necessity test (Article XX(b) and (d))*

The classic “least trade restrictive alternative” test has been challenged by the Appellate Body’s recent decisions in *Korea—Various Measures on Beef* and *EC—Asbestos*. In *Korea—Various Measures on Beef*, 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”.¹⁵³ This statement would involve the Appellate Body in assessing the importance of national goals to a degree not seen, at least explicitly, before.¹⁵⁴

¹⁵¹ For a more extensive analysis of the objections to balancing tests, see Trachtman, *Trade and ... Problems supra* note 54.

¹⁵² See Trachtman, as note 54, above. See also Axel Desmedt, *Proportionality in WTO Law*, 4 J. Int'l Econ. L. (2001), 441.

¹⁵³ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at paras 162, 163.

¹⁵⁴ See Trachtman, as note 54, above.

It is interesting that the Appellate Body refers to "common interests or values". Does this require, or prefer, a degree of homogeneity of purpose? Must the interest be common to all people, or only the Member State imposing the measure? In practice it may be difficult to reconcile the right of Members to determine their appropriate level of protection (even in abstract terms) and the balancing of the importance of the value at stake in the necessity assessment of Article XX. In other words, a Member has a right to choose any appropriate level of protection, but if it chooses a silly one relative to the value at stake as evidence of its chosen measure, its relative importance will be discounted in the balancing test.¹⁵⁵

Indeed, the Appellate Body sets up, rather explicitly, a balancing test. It considers the degree to which the measure contributes to the realization of the end pursued: "the greater the contribution, the more easily a measure might be considered to be 'necessary'."¹⁵⁶ It would also consider the "extent to which the compliance measure produces restrictive effects on international commerce".¹⁵⁷ The Appellate Body's statement will be breathtaking to some:

"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."¹⁵⁸

This statement constitutes a significant shift toward a greater role of the WTO adjudicating bodies in weighing regulatory values against trade values. It appears to be intended to speak beyond the Article XX(d) context to all necessity testing, including that under Article XX(b), and presumably, the SPS Agreement and TBT Agreement.

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."¹⁵⁹ 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.¹⁶⁰ The Appellate Body confirmed the Panel's conclusion that Korea failed to demonstrate that alternative measures were not reasonably available.

¹⁵⁵ Under the SPS Guidelines on 5.5, the conclusion by a Member (after the comparison called for under Article 5.5 SPS) should lead to a change of appropriate level of protection.

¹⁵⁶ Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R, at para. 163.

¹⁵⁷ *Id.* (citation omitted).

¹⁵⁸ *Id.*, at para. 164.

¹⁵⁹ *Id.*, at para. 170.

¹⁶⁰ *Id.*, at para. 172.

Interestingly, in its decision regarding *EC—Asbestos*, the Appellate Body referred to its decision in *Korea—Various Measures on Beef* to the effect 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”.¹⁶¹ This discussion suggests an incursion on the degree to which a state may expect to achieve its appropriate level of protection. This is a significant departure from the conventional understanding of “reasonably available”, which would consider the costs of the alternative regulation but not the degree of its contribution to the end (as the test under Article 5.6 of the SPS seems to announce). In fact, the degree of contribution to the end seemed before to be inviolable. This is not the ordinarily understood meaning of necessity as a search for the least trade-restrictive alternative reasonably available: that formulation would not ordinarily involve an evaluation, or any compromise, of the end pursued.¹⁶² Furthermore, the Appellate Body referred to *Korea—Various Measures on Beef* for the proposition that the more important the common interests or values pursued, the easier it would be to accept the national measure as necessary.¹⁶³

The balancing test for determining “necessity” under Article XX(b) and (d) developed in these reports will stimulate much discussion, and controversy. It is less deferential to national regulatory goals than a test that would simply seek to confirm whether those goals are met, rather than assessing the degree to which they are met. It actually purports to examine the importance of those national goals. These are to be balanced against the impact on trade.

(b) *Balancing under the chapeau of Article XX*

When Article XX(g) has been satisfied, a form of “necessity” test (thus a balancing) is still performed under the chapeau of Article XX.¹⁶⁴ But there is also a broader balancing of rights and obligations, which is called for by the chapeau of Article XX.¹⁶⁵ In *US—Shrimp*, the Appellate Body stated that the chapeau of Article XX, “embodies

¹⁶¹ 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).

¹⁶² See Trachtman, as note 54, above.

¹⁶³ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 172.

¹⁶⁴ 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.

¹⁶⁵ 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 ...”.

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.”¹⁶⁶

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—“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’ ”.¹⁶⁷

(c) *Balancing under Article III*

In its *EC—Asbestos* decision, the Appellate Body may have recognized that its competition-based interpretation of “like products” would result in a relatively broad scope of application of Article III:4. In order to avoid a commensurately broad scope of invalidation of national law, the Appellate Body emphasized the second element required under Article III:4:

“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’ ”.¹⁶⁸

¹⁶⁶ See Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, at para. 158.

¹⁶⁷ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 115.

¹⁶⁸ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 100 (emphasis in original).

In *Korea—Various Measures on Beef*, the Appellate Body had already insisted that “A formal difference in treatment between like imported and 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. In *EC—Asbestos*, it clarified that foreign like products as a class must be treated differently from, and less favourably than, domestic like products. Thus, it may be argued that it is not enough to find a single foreign like product that is treated differently from a single domestic like product. Rather, the class of foreign like products must be treated less favourably than the class of domestic like products. The area left for Panel or Appellate Body discretion is in determining, in cases of *de facto* and unintentional disparate regulatory treatment, whether there is a violation of the national treatment requirement.¹⁶⁹

While the exercise of this discretion is not balancing *per se*, it is worthwhile to speculate as to how Panels or the Appellate Body would exercise this discretion. They would presumably examine, explicitly or implicitly, whether the less favourable treatment is justified by an appropriate regulatory goal. This exercise would be done either under Articles III or XX. The examination would presumably involve a degree of balancing.

2. 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.

¹⁶⁹ See Joel P. Trachtman, *Decision of the Appellate Body of the World Trade Organization: European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, 12 Eur. J. Int'l L. (2001), 793, available at <<http://www.ejil.org/journal/curdevs/sr13.html>>; Lothar Ehring, *De Facto Discrimination in WTO Law: National and Most-Favoured-Nation Treatment—or Equal Treatment?*, Jean Monnet Working Paper No.12/01, available at <<http://www.jeanmonnetprogram.org/papers/01/013201.html>>, last visited 1 June 2002. See our prior discussion. It is also possible that “less favourable treatment” be interpreted broadly so as to include any market distortion favouring domestic products, even if the goal, object and purpose of the measure are not protectionist. In such case reliance on Article XX to justify such measure would remain possible.

3. 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. As with the classic least trade restrictive alternative "reasonably available", the degree of contribution to the end seemed before to be inviolable: states were entitled to complete accomplishment of the end reflected in their regulation.

I. PRODUCT/PROCESS ISSUES AND THE TERRITORIAL–EXTRATERRITORIALITY DIVIDE

Finally, an area of great 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.¹⁷⁰

1. *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*,¹⁷¹ 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 processes implicitly take 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,

¹⁷⁰ For discussions of the product/process distinction, see Robert E. Hudec, "The Product-Process Doctrine in GATT/WTO Jurisprudence", in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000); Robert Howse and Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining Unilateralism in Trade Policy*, 11 E.J.I.L. (2000), 249, and the cogent response to the Howse/Regan article from John Jackson at 11 E.J.I.L. (2000), 303.

¹⁷¹ GATT Panel Report, *US—Malt Beverages*, adopted 19 June 1992, BISD 39S/206.

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.

Various elements support the view that Article III does not “apply” to regulatory distinctions based on extra-territorial policy considerations not affecting the products. Article III refers to measures affecting “internal sales”; Article III’s concern is the internal market of the importing Member. The wording of Articles I, II, III and XI of GATT only refer to “products”. Annex 1A covers rules applicable to trade in goods. Moreover the Appellate Body has recognized that when determining whether two products are directly competitive or substitutable for the purpose of Article III GATT, Article 4 of the Agreement on Safeguards or Article 6.1 of the Agreement on Textiles and Clothing, it is looking at the “product characteristics”:¹⁷²

“A plain reading of the phrase ‘domestic industry producing like and/or directly competitive products’ shows clearly that the terms ‘like’ and ‘directly competitive’ are characteristics attached to the domestic products that are to be compared with the imported product. We are, therefore, of the view that the definition of the domestic industry must be product-oriented and not producer-oriented, and that the definition must be based on the products¹⁷³ produced by the domestic industry which are to be compared with the imported product in terms of their being like or directly competitive.¹⁷⁴

... a careful reading of our Report [in *Korea—Alcoholic Beverages*] would show we used the terms ‘directly competitive’ and ‘directly substitutable’ without implying any distinction between them in assessing the competitive relationship between products.¹⁷⁵ We do not consider that the mere absence of the word ‘substitutable’ in Article 6.2 of the ATC renders our interpretation of the term ‘directly competitive’ under Article III:2 of the GATT 1994 irrelevant in terms of its contextual significance for the interpretation of that term under Article 6.2 of the ATC.¹⁷⁶

The criteria of ‘like’ and ‘directly competitive’ are characteristics attached to the domestic product in order to ensure that the domestic industry is the appropriate industry in relation to the imported product.¹⁷⁷

‘Competitive’ is a characteristic attached to a product and denotes the capacity of a product to compete both in a current or a future situation.”¹⁷⁸

As we have indicated, under the Agreement on Safeguards, the determination of the “domestic industry” is based on the “producers ... of the like or directly competitive products”. The focus must, therefore, be on the identification of the

¹⁷² Note that if the competitive behaviour of a product is considered to be a characteristic of the product, then the product characteristic referred to in the definition of the TBT Agreement may not be limited to the physical characteristics of the product.

¹⁷³ [Original footnote] “In *United States—Lamb Safeguard*, we also found that the *product* defines the scope of the definition of the domestic industry under the Agreement on Safeguards. In that case, the ‘like’ product at issue was lamb meat (Appellate Body Report, as note 41, above, paras 84, 86–88 and 95).”

¹⁷⁴ Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US—Cotton Yarn)*, (WT/DS192/AB/R), adopted 5 November 2001, at para. 86.

¹⁷⁵ Original footnote referring to *Korea—Alcoholic Beverages* at paras 114–116.

¹⁷⁶ See Appellate Body in *US—Cotton Yarn*, para. 94

¹⁷⁷ *Id.*, at para. 95

¹⁷⁸ *Id.*, at paras 92 and 96.

products, and their “like or directly competitive” relationship, and not on the processes by which those products are produced.¹⁷⁹

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 extra-territorial policy considerations may be available under the exceptional provisions of Article XX.¹⁸⁰

Others may argue that Article III covers all internal regulations, even when based on extra-territorial 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 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 products¹⁸¹ and should not be *prima facie* the target of regulatory distinctions restricting market access.

Some have suggested that Members should be authorized to use PPM type regulations in order to make distinctions between two otherwise similar goods and consider them “unlike” for the purpose of Article III. For some of them,¹⁸² in

¹⁷⁹ Appellate Body report in *United States—Safeguard Measures in Imports of Fresh, Chilled and Frozen Lamb Meat From New Zealand and Australia*, (WT/DS 177, 178/AB/R) (US—Lamb), adopted on 16 May 2001, para. 94.

¹⁸⁰ 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 J.W.T. 2 (June 2002).

¹⁸¹ 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.

¹⁸² For instance Howse and Regan, however, argue that analysing PPMs under Article XI does not make sense, because PPMs which are enforced internally, even as against foreign products, will not be caught by quota-restrictions or border measure disciplines (Articles II or XI of GATT) and will therefore be undisciplined. Robert Howse and Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining “Unilateralism” in Trade Policy*, 11 E.J.I.L. 2 (2000), 249. If, as Howse and Regan suggest, PPMs ought to be evaluated under Article III, then the like products test comes into play. They argue that the likeness test should be interpreted as looking for the existence of differences between products that justify different regulation. Recently Howse and Türk have elsewhere suggested that the *EC—Asbestos* decision opens the door to consider distinctions based on PPMs in the context of the like products test. Robert Howse and Elizabeth Türk, *The WTO Impact on Internal Regulations—a Case Study of the Canada—EC Asbestos dispute*, in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (London: Hart Publishing, 2001).

EC—Asbestos, the Appellate Body has opened up the likeness test to insist on the need to consider consumers' preferences relating to PPMs. The determination of likeness requires consideration of any evidence that indicates whether the products are in a competitive relationship in the marketplace.¹⁸³ For the Appellate Body, evidence relating to health risks¹⁸⁴ (carcinogenicity, or toxicity) associated with the product can be examined under the existing *Border Tax Adjustment* report categories of physical properties and, consumer tastes and habits and products' end-use;¹⁸⁵ this fuelled the argument that consumer preference could legitimate PPM distinctions under the Article III like product test.

In determining whether this competitive relationship actually exists, the Appellate Body¹⁸⁶ seems to have focused a good deal on the physical characteristics of the products, namely their carcinogenicity or toxicity. Although it stated that all of four criteria must each time be examined,¹⁸⁷ and that these four criteria are not a closed set, despite the possibility of conflicting evidence from those criteria,¹⁸⁸ it arguably gave a heavier weight to physical characteristics, or at least differences in physical characteristics, when it wrote:

"In such cases, in order to overcome this indication that products are not 'like', a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that all of the evidence, taken together, demonstrates that the products are 'like' under Article III:4 of the GATT 1994."¹⁸⁹

A contrario, if goods are physically similar, it will not be easy to prove that they are not otherwise competing with each other.¹⁹⁰ While consumers may at times distinguish based on production processes, and some competitive effect is quite possible, it is difficult to envision a circumstance where the effect would be great enough to render physically similar products un-like.

To summarize, the WTO jurisprudence has not yet clarified whether Article III "applies" to or covers PPM-type regulatory distinctions. 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

¹⁸³ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at paras 97–99.

¹⁸⁴ Note the inconsistency between this perspective and the economic theory of regulation, which assumes that the reason for regulatory intervention is because the health risks are not sufficiently reflected in the market place.

¹⁸⁵ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 117.

¹⁸⁶ And even more so the dissenting member of the Appellate Body for whom the particularly different physical characteristics—toxicity—of the products at issue was irrefutable evidence against their "likeness"; *Id.*, at paras 151–153.

¹⁸⁷ *Id.*, at paras 102, 109, 111, 113, 139 and 140.

¹⁸⁸ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 120.

¹⁸⁹ It also added, "Furthermore, in a case such as this, where the fibres are physically very different, a panel cannot conclude that they are 'like products' if it does not examine evidence relating to consumers' tastes and habits." *Id.*, at para. 121.

¹⁹⁰ *Id.*, at paras 117 and 118.

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 extra-territorial application of national measures which extra-territorial application is perhaps exceptionally permitted under the circumstances set forth in Article XX.

However, it is possible that the Appellate Body's focus on whether the difference in treatment is "less favourable" could provide a basis for finding that a particular PPM regulation does not violate Article III, if the treatment offered to the non-PPM product were to be considered "different" but not less favourable (or protectionist). Furthermore, the Appellate Body has left open the possibility that Article XX of GATT can authorize exceptional extra-territorial policy or PPM considerations if they comply with the requirements of the relevant sub-paragraph as well as those of the chapeau of Article XX.

2. *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 of the TBT Agreement.¹⁹¹ Article 14.25 of the Tokyo Standards Code¹⁹² 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.¹⁹³

¹⁹¹ 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 January 1972). In June 1976 the United States proposed to add "For the purpose of this Code 'technical specifications' include processes and production methods in so far as they are necessary to achieve the final product" (MTN/NTM/W/50, p. 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.

¹⁹² 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."

¹⁹³ See Note by WTO Secretariat, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, WT/CTE/W/10; G/TBT/W/11 (29 August 1995).

Many developing countries have argued that the TBT Agreement does not “cover” PPM regulations and have politically challenged notifications of labelling requirements based on social considerations¹⁹⁴ and timber process¹⁹⁵ not having any physical impact on the product traded. It is important to note that the non-application of the TBT Agreement to PPM type regulations would not make such PPM regulations incompatible with WTO law. If the TBT Agreement does not cover or apply to PPM regulations, such regulations will be examined under Articles III/XI of GATT and may find justification under Article XX. To remove PPM type regulations from the coverage of the TBT Agreement would exempt them from the other requirements of the same TBT Agreement, including those on notification, harmonization and mutual recognition. Furthermore, as noted below, unlike the case of the SPS Agreement, the TBT Agreement contains no presumption of compliance with GATT. It would be curious if non-PPM technical regulations were subject to the more stringent requirements of the TBT Agreement, while the less transparent PPM type technical regulations, possibly justified under Article XX of GATT, were not. It would be even more curious since PPM labels appear to be covered by the TBT Agreement.

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” PPMs. It seems that the TBT Agreement would cover PPM labels, with less or no risk of contradictory analysis under Articles III/XI and XX of GATT.¹⁹⁶ Yet some Members are of the view that only product-related PPM labels are covered by the definition of technical regulation. It may be in that context that Members called for a notification of all technical regulations independently of the kind of information contained in the label:

“In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not.”¹⁹⁷

Whether PPMs regulations generally are included in the definition of technical regulations depends on how one reads “characteristics” of the products and “their related process and production methods”. Are characteristics of a product only those reflected physically in that product? As mentioned before, on three occasions¹⁹⁸ the

¹⁹⁴ See the notification by Belgium on “socially responsible products”, G/TBT/N/BEL/2 and the discussions of Members in G/TBT/M/23 of 8 May 2001 and G/TBT/M/24 of 14 August 2001.

¹⁹⁵ See the Netherlands notification G/TBT/Notif.98.448 and the discussions of Members in G/TBT/M/13 of 15 September 1998, G/TBT/M/14 of 20 November 1998, G/TBT/M/23 of 30 March 2001 and G/TBT/M/24 of 29 June 2001.

¹⁹⁶ Yet it is still possible that a measure that is incompatible with the TBT be compatible with GATT.

¹⁹⁷ G/TBT/1/Rev.7, Section III:10.

¹⁹⁸ See Appellate Body Report, *US—Cotton Yarn*, WT/DS192/AB/R, at paras 86, 92, 96.

Appellate Body stated that the competitive nature and capacity of products constituted characteristics of the same products. On the other hand the Tokyo Standards Code made an explicit distinction in Article 14.25 in allowing challenges against “drafting requirements in terms of processes and production rather than in terms of characteristics of products”. Is the prescription for “their related” process and production methods a reference to PPMs that have a physical relation to the products? If so, do only the PPM regulations that have a physical impact on the product constitute technical regulations covered by the TBT Agreement? Or does this definition refer to PPMs that relate to the production of the said product (even without any physical impact on the product), as opposed to policy considerations that are general and that are not concerned specifically with the production or the process of any specific products, such as a distinction between imports that come from Members that have family allowances programmes and those who do not)?

If the TBT Agreement does not cover PPMs, then PPM regulation will be examined under Articles III/XI and XX of GATT which will remain the only WTO applicable law.

3. *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”.

J. 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 is 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 of a risk assessment. Yet 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.

Now, how would these different provisions work together?

IV. 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 equal 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.¹⁹⁹ 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, relating to services. Indeed, this occurred in the *EC—Bananas III* litigation.²⁰⁰ In its decision on *EC—Bananas III*, the Appellate Body made clear that the scope of application of each of the GATT and the GATS are independent, and may well overlap.²⁰¹

¹⁹⁹ 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 (September 2000), 473.

²⁰⁰ See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* ("EC—Bananas III"), WT/DS27/AB/R, adopted 25 September 1997.

²⁰¹ *Id.*, at paras 221–222.

A. CONDITIONS OF APPLICATION: APPLICABLE LAW

1. *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 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, it appears that Article XX would justify some PPMs.

2. *TBT Agreement*

The TBT Agreement applies both to voluntary standards and to mandatory technical regulations relating to all products, including industrial and agricultural products.²⁰²

In the *EC—Asbestos* case, the Panel and Appellate Body 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. According to the Panel, as a blanket prohibition, the measure did not "lay down product characteristics" within the meaning of Annex 1 of the TBT Agreement. The Panel separated this prohibition from the Decree's exceptions for purposes of analysis.

Canada appealed this separation, and the finding that the TBT Agreement did not apply. Furthermore, Canada argued that a "general prohibition" qualifies as a technical regulation under Annex 1.1 of the TBT Agreement. The Appellate Body found that the measure must be examined as a whole.²⁰³ When examined as a whole, the French measure was not a total prohibition, but "if this measure consisted only of a prohibition on asbestos fibres, it might not constitute a 'technical regulation'".²⁰⁴ 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 found that the ban on asbestos fibres under the decree must be understood as a ban on products containing asbestos fibres. The Appellate Body concluded that the Decree, viewed as an integrated whole, lays down "characteristics" for certain products (those that might otherwise contain asbestos), and is accordingly a "technical regulation" under the

²⁰² Article 1.3 of the TBT Agreement.

²⁰³ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 64. See a similar conclusion by the Appellate Body under Article XX of GATT in *US—Gasoline*, WT/DS2/AB/R, at pp. 13–14.

²⁰⁴ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 71.

TBT Agreement.²⁰⁵ 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”. Would all technical regulations be covered by Article III:4? Probably, so long as they “affect” internal sales.

3. 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.²⁰⁶ Sanitary or phytosanitary measures are defined by reference to their purpose,²⁰⁷ 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.²⁰⁸

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.²⁰⁹ 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?²¹⁰ As yet, there is no jurisprudence on this issue. However, 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.

²⁰⁵ *Id.*, at para. 75.

²⁰⁶ Article 1.1 of the SPS Agreement.

²⁰⁷ Contrary to TBT regulation defined by reference to, arguably, more objective criteria based on products’ characteristics.

²⁰⁸ SPS Agreement, Annex A.

²⁰⁹ 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 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.

²¹⁰ See Pauwelyn, as note 134, above, at pp. 643–644.

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).²¹¹

B. CUMULATIVE APPLICATION AND THE INTERPRETATIVE PRINCIPLE OF EFFECTIVENESS

The *EC—Bananas III* and *Canada—Periodicals*²¹² 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*²¹³), GATT Article XIII and the Agreement on Agriculture (*EC—Bananas III*), between GATT Article XIII and the Safeguards Agreement (*US—Line Pipe*²¹⁴) and between the Agreement on Safeguards and GATT Article XIX (*Korea—Dairy Safeguards*).

“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 ... 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’.²¹⁵ 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.²¹⁶ This was a simple application

²¹¹ 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 lines.

²¹² Appellate Body Report, *Canada—Certain Measures Concerning Periodicals* (“*Canada—Periodicals*”), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:1, 449.

²¹³ 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 July 1998, DSR 1998:VI, 2201.

²¹⁴ Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (“*US—Line Pipe*”), WT/DS202/AB/R, adopted 8 March 2002.

²¹⁵ [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 January 2000, at para. 81. See also Appellate Body Report, *United States—Gasoline*, WT/DS2/AB/R, at p. 23; Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at p. 12; and Appellate Body Report, *India—Patents*, para. 45.

²¹⁶ [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*, 5th edn (Oxford: Clarendon Press, 1998), p. 634; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–1954: Treaty Interpretation and Other Treaty Points*, 33 Brit. Y.B. Int'l L. (1957), 211, 220; A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp. 381–382; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 127–129; M.O. Hudson, *La Cour Permanente de Justice Internationale* (1936), pp. 654–659; and L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público*, Vol. 2 (Buenos Aires: Editora Argentina, 1985), p. 105.

of the principle of effective interpretation.²¹⁷ This fact that all provisions of a treaty must have an effective meaning and must be interpreted so as to ensure that no other provisions is made a 'nullity' is expressed in the principle for 'effective interpretation'."

It is suggested that the principle of effective interpretation calls for the harmonious interpretation and application of both rights and obligations. 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.²¹⁸ 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 1994.²¹⁹ 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 other WTO provisions should be such as to ensure that this right does not become a "redundancy or a nullity".²²⁰

In case of inconsistencies within a treaty between two obligations or between obligations and rights, 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*.²²¹

1. Possibility of Conflicts

(a) General Interpretative Note to Annex 1A

The General Interpretative Note to Annex 1A to the WTO Charter (the "General Interpretative Note") provides that

"[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."

²¹⁷ [Original footnote] Appellate Body Report, *Korea—Dairy*, WT/DS98/AB/R, para. 74, adopted 12 January 2000 (*Korea—Dairy*).

²¹⁸ Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, at pp. 22–23.

²¹⁹ Appellate Body Report on *Brazil—Measures Affecting Desiccated Coconut* ("*Brazil—Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, at p. 17.

²²⁰ Panel Report, *Turkey—Restrictions on Imports of Textiles and Clothing Products* ("*Turkey—Textiles*"), WT/DS33/R, adopted 19 November 1999, at paras 9.96 and 9.103, recalling the Appellate Body's wording in *US—Gasoline*.

²²¹ 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, *Conflicts of Norms*, as note 146, above.

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 Note is irrelevant in the case of conflicts between the TBT and the SPS Agreements.

(b) *Definition of a conflict in WTO law*

In international law a conflict²²² 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."²²³

"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."²²⁴

In the WTO context, this narrow definition of a conflict was confirmed in *Guatemala—Cement*,²²⁵ 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 of "conflict" and stated that "there is no conflict between Article 17.6(i) of the Antidumping Agreement and Article 11 of the DSU"²²⁶ and "... we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular".²²⁷ 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".²²⁸

²²² 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).

²²³ Wolfram Kall, "Treaties, Conflict Between", 7 *Encyclopedia of Public International Law*, p. 468, (in Berhardt ed., Elsevier Science Publishers, published under the auspices of the Max Plank Institute for Comparative Public Law and International Law, Amsterdam, N.Y.—Oxford, 1984). See also Wilfred Jenks, *The Conflict of Law-Making Treaties*, 29 Brit. Y.B. Int'l L. (1953), pp. 401–453. 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. Int'l L. (1988), p. 100; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, 9th edn (London: Longman, 1992), Vol. 1, Parts 2–4, p. 1280; Fitzmaurice, as note 216, above, at 237; and Sinclair, as note 216, above, at 97.

²²⁴ Jenks, *ibid.*

²²⁵ Appellate Body Report, *Guatemala—Anti-Dumping Investigation regarding Portland Cement from Mexico* ("Guatemala—Cement"), WT/DS60/AB/R, adopted 25 November 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.

²²⁶ 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 August 2001, at para. 55

²²⁷ *Ibid.*, at para. 62.

²²⁸ 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., 4 (2002), pp. 753–754; and Joost Pauwelyn, *Conflict of Norms in Public International Law, The Example of the WTO: Internal Hierarchy and How WTO Relates to Other Rules of International Law*, unpublished PhD thesis, University of Neuchâtel (2001) (on file with author).

(c) *Conflicts between the GATT, TBT and SPS Agreements?*

In the context of the question of the relationship between GATT, on the one hand, and the TBT and SPS Agreement, on the other hand, strict conflict is unlikely—it is difficult to imagine circumstances where one requires what the other forbids.

2. *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.²²⁹

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).²³⁰ 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.²³¹ 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.²³² 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.²³³ One of these customary rules of interpretation is *lex specialis*.²³⁴ This principle of interpretation would lead to identifying the more specific WTO obligation(s). The Appellate Body Report in

²²⁹ For instance, see 7 *Encyclopedia of Public International Law* 468 (Amsterdam: Elsevier, 1984). V. Lowe refers to B. Cheng, *General Principles of International Law*, 25–26 (1987); Fitzmaurice, *supra* note 216. A. McNair, *The Law of Treaties* 219 (Oxford: Clarendon Press, 1961); Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law*, 9th edn (London: Longman, 1992), p. 1280; D.P. O'Connell, *International Law*, 2nd edn (1970), 12–13.

²³⁰ 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) Int'l Trib. L. of Sea Case Nos 3 and 4 (4 August), available at <<http://www.itlos.org>>.

²³¹ H. Aufricht, *Supersession of Treaties in International Law* 37 Cornell L.Q. (1952), 655, 698.

²³² 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, Gabikovo-Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court*, E.E.L.R. (1997), 252. See also Jenks, as note 223, above, at p. 469; 7 *Encyclopedia of Public International Law* 468 (1984), and Fitzmaurice, as note 216, above.

²³³ See Article 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization.

²³⁴ Panel Report, *United States—Anti-Dumping Act of 1916—Complaint by Japan (“US—1916 Act (Japan)”)*, WT/DS162/R and Add. 1, adopted 26 September 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 p. 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 Int'l L.J.* (2000), 317, 322–323 (suggesting that *lex specialis* is not part of customary international law).

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.²³⁵

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 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* that would exclude the application of GATT 1994 and the jurisprudence has not considered the TBT *lex specialis* to GATT. In *EC—Asbestos*, the Appellate Body, after noting the application of the TBT Agreement, continued its analysis under Articles III and XX. Indeed the Appellate Body clearly stated that the TBT Agreement “added” to the GATT obligations. Therefore the TBT and GATT obligations were both applicable to the French measure (in addition to the provisions of the TBT Agreement).²³⁶ In *US—Gasoline* as well, notwithstanding the claims of TBT violations, the Panel and the Appellate Body concentrated exclusively on the claims and defences based on GATT.

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, even if the other general rules continue to apply but may be examined after the completion of the analysis under the more specific rules, when need be. Yet it has happened that the adjudication proceeded only on the basis of the general provisions.

C. GENERAL APPLICATION OF THE AGREEMENTS

1. *The 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.²³⁷ If these

²³⁵ Appellate Body Report on *EC—Bananas III*, WT/DS27/AB/R, at paras 155 and 204.

²³⁶ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 76.

²³⁷ 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 and 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 Int'l L.J.* (2000), 519.

conditions are met, this provision establishes a presumption that the relevant measures comply with GATT.

This presumption is probably best understood as rebuttable.²³⁸ 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 under Article XX.²³⁹ 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, it would be 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 the 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 ”

²³⁸ 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 and Elizabeth Türk, “The WTO Impact on Internal Regulations—a Case Study of the Canada–EC Asbestos dispute”, in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (London: Hart Publishing, 2001).

²³⁹ 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.

(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 ".²⁴⁰ 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)".²⁴¹ 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.

(a) *Which provisions of which agreements should be examined first?*

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.²⁴² 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.

(b) *Would a Panel or the Appellate Body continue its analysis under the GATT if it found 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

²⁴⁰ Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, at paras 101–102.

²⁴¹ (Footnote omitted).

²⁴² Panel Report, *Australia—Measures Affecting Importation of Salmon* ("Australia—Salmon"), WT/DS18/R and Corr. 1, adopted 6 November 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.

“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’.”²⁴³

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.²⁴⁴

2. *The GATT Versus TBT*

The TBT Agreement lacks an explicit provision relating it to the GATT. 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 Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.”²⁴⁵

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”,²⁴⁶ 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

²⁴³ Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, at para. 223.

²⁴⁴ Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, at para. 187.

²⁴⁵ *Id.*, at para. 80 (emphasis added).

²⁴⁶ *Id.*, at paras 77 and 78.

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, does it mean that a single measure may be in violation of the TBT while compatible with GATT? Possibly. But the reverse is less probable: a technical regulation that complies with Article 2.1 and 2.2 of the TBT Agreement is likely to be compatible with Articles III and XX. But if the necessity test under Article 2.2 TBT is somehow less stringent than that of for example Article III combined with Article XX of GATT (i.e., if Article 2.2 TBT is interpreted like 5.6 SPS, calling for less incursion into the degree of effectiveness of the challenged measure for instance than the XX jurisprudence), one may conceive of incongruent results under TBT and GATT.

Another interesting issue is the coverage of Article 2.1 of the TBT Agreement and its relationship with Articles I, III and XX of GATT. If the scope and meaning of Article 2.1 is similar to that of Articles III and I, a single technical regulation could be a *prima facie* violation of Article III but be justified under Article XX of GATT, while also in violation of Article 2.1 of the TBT Agreement without any possibility of justification—even if the same regulation were found not to be in violation of Article 2.2 of the TBT Agreement. Article 2.1 cannot be invoked as a defence to a violation of Article 2.1 and this seems to have been accepted by the Appellate Body in *EC—Asbestos* when it concluded that the TBT Agreement was applicable to the measure at issue but decided not to complete the analysis under that agreement (for various reasons including judicial economy). Its findings were that the measure could in any case be justified under Article XX of GATT. But Canada had made a claim under Article 2.1 of the TBT Agreement. If there was a possibility that the French measure violated TBT Article 2.1 without any acceptable defence, the Appellate Body would have committed a denial of justice against Canada in refusing to address its claim under Article 2.1 of the TBT Agreement.

Three potential solutions to this incongruous result may be available. The first two require a rather heroic approach to interpretation. First, Article 2.1 could be read using the “accordion” approach of the Appellate Body to defining “like products”—a definition of “like product” under the substantive disciplines of the TBT Agreement recognizing that non-compliance with the characteristic mentioned in a legitimate TBT regulation made products “unlike”. A second alternative solution would consider that, all WTO provisions being cumulative and simultaneously applicable, Article XX (as well as Articles XXI or XXIV of GATT) could be invoked to justify a violation under another agreement of Annex 1A.²⁴⁷ Under this view, the effective interpretation

²⁴⁷ Note for instance that Article XIV of GATS can be invoked to justify a violation of Article VI of GATS which contains in its paragraph 4 a necessity test parallel to that of GATT Article XX and that of Article 2.2 of the TBT Agreement.

principle would dictate that rights (in addition to obligations) under the WTO Agreements are cumulative. As noted above, this effective interpretation principle would depend on an interpretation of the specific provisions at issue.

A third approach to this problem is to emphasize the “right” of Members to maintain TBT regulation for “legitimate objectives” is recognized in the sixth paragraph of the TBT Preamble and in Article 2.2 of the TBT Agreement. Article 2.1 cannot be interpreted and applied so as to nullify the rights and obligations contained in Article 2.2. Therefore, the words “less favourable” contained in Article 2.1, could be interpreted as the Appellate Body has done in the Article III context in paragraph 100 of its *EC—Asbestos* decision and paragraph 137 of its *Korea—Various Measures on Beef* decision. Under this approach, a violation would only occur if, after respecting “legitimate” regulatory categories, the measure is still found to be “less favourable”.

Another interesting issue is the fact that the TBT Agreement allows Members to base their TBT regulations on “any legitimate governmental policies” while Article XX contains a closed list of policies. Therefore 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 sub-paragraphs of Article XX of GATT. Unless the TBT Agreement is understood as *lex specialis* to the exclusion of GATT, the GATT provisions continue to apply while the TBT Agreement may also be applicable.

(a) *Which provisions of which agreement should be examined first?*

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. 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).

(b) *Would a Panel continue its examination under the GATT if it found a violation under the TBT Agreement?*

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 treatment” and the “necessity tests” have different meanings and applications under each of these Agreements and are more stringent under the GATT

3. *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 dangers²⁴⁸—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 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 label would be covered by the SPS Agreement. If such label is not directly related to food or its object is the protection of the environment generally (say the planet’s biodiversity) the label may not be covered by the SPS Agreement and may call possibly 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. 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.

²⁴⁸ See the definition of “sanitary or phytosanitary measure” in Annex A to the SPS Agreement.

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.

D. APPLICATION TO SPECIFIC TYPES OF OVERLAP

1. *If a Measure Violates the SPS Agreement, but is Consistent With the GATT, is it WTO-consistent?*

It is possible for a measure to violate the SPS Agreement, but to be consistent with the GATT. For example, a measure may violate the requirement in Article 5.1 of the SPS Agreement for a risk assessment, but may be a non-discriminatory regulation of a product as such within the terms of Articles I or III of GATT. The best interpretation of the SPS Agreement and the GATT is that their provisions are cumulative, and therefore, the violation of the SPS Agreement would not be "cured" by GATT legality.²⁴⁹

2. *If a Measure Violates TBT, but is Consistent With the GATT, is it WTO-consistent?*

Here, again, the better reading is that these obligations are cumulative, and therefore that a violation of the TBT Agreement cannot be cured by GATT legality. There remains the issue of the proper reading of Article 2.1 of the TBT Agreement and its relationship with Article XX.

3. *If a Measure Violates the GATT, but is Consistent With SPS, is it WTO-consistent?*

This situation is difficult to conceive. Article 2.4 of the SPS Agreement sets up what is likely to be interpreted as a *rebuttable* presumption that conformity with the SPS Agreement entails compliance with the GATT. However, if the measure is clearly a violation of the GATT, so that the presumption is rebutted, compliance with the SPS Agreement is no defence.

4. *If a Measure Violates the GATT, but is Consistent With TBT, is it WTO-consistent?*

The TBT Agreement contains no explicit substantive provision establishing the relationship between its norms and those of the GATT. Therefore, the obligations

²⁴⁹ See Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, at para. 8.42; Panel Report, *Australia—Salmon*, WT/DS18/R and Corr. 1, at para. 8.39.

under these two agreements are best understood as cumulative. The TBT Agreement would therefore provide no defence in the case of a violation of the GATT, and no presumption similar to that under Article 2.4 of the SPS Agreement. The presumption provided under Article 2.5 of the TBT Agreement might be interpreted to assist with the establishment of necessity under GATT Article XX. For legitimate policies other than those listed in Article XX, incongruent results between the TBT and the GATT may be possible.

V. CONCLUSION

As the SPS Agreement, TBT Agreement and the GATT provide norms with subtle but important variations, it is 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.

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.

There are several 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.

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