

THE GATT AND ENVIRONMENTAL PROTECTION: PROBLEMS OF CONSTRUCTION

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1. The Consequences of Opening Up Markets

There has been much debate concerning the environmental consequences of the global process of opening up markets. This debate is divided into two fundamentally opposing points of view. The proponents of free markets who expect raised levels of income especially to benefit the weaker economies, enabling them to provide the necessary finance for environmental protection. The critics, on the other hand, who predict a further impoverishment of these weak economies and the accelerated exploitation of natural resources due to the increase of transportation and production within a global economy.

Neither side has been able to produce data sufficient enough to uphold their thesis. Following the eight years of free trade ensuing from GATT 1994 and the previous 27 years of free trade heralded in by GATT 1947, one could be forgiven for assuming that the WTO would have conducted some accompanying empirical investigation of the consequences of its own actions. It would appear, however, that this is not the case. The WTO seems to content itself with issuing glowing reports which focus on the quantitative increases of trade flows; the accompanying abundance of data is so highly aggregated that it becomes impossible to differentiate between the various geographic zones and states concerned in order to determine the beneficial or detrimental effects on specific countries and social groups. There is no visible attempt to compile statistics which would reveal the effects caused by the increased exploitation of natural resources.¹ Even the in-depth country reports which appear in the trade policy reviews tend to concentrate more on steps towards the liberalisation of trade in the countries under review, rather than dealing with the subsequent effects on the local population or natural resources.² To be true, the committee for trade and

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¹ WTO, *Annual Report 2001* (Genf: WTO, 2001) see online version of the Journal; *Trade Income and Poverty* (Genf: WTO, 2000). For a critical view see, J. Mander and E. Goldsmith (eds), *The Case Against the Global Economy and for a Turn Toward the Local* (San Francisco: Sierra Club Books, 1996).

² For instance, the summary of the report on Madagascar, *Focus Newsletter* 52/2001, p 8, in which on the one hand the privatisation of state-run enterprises, the tariffisation of import restrictions and GDP growth of 3.5% are presented in glowing terms, whereas no mention whatsoever is made of developments concerning the

environment does make a contribution of sorts to the theoretical debate³ by discussing effects based on individual insights—but it has not been deemed necessary to establish any more complex monitoring programme.⁴

One is left to one's own initiative to glean information from the press—and to one's own perception in order to piece together an opinion. My own anecdotal evidence is as follows: Global trade has significantly increased the standard of living of the industrialised nations (at least in the sense of consumerism). The classical forms of environmental pollution resulting from high production and consumption levels have been decreased (e.g. improved methods of dealing with waste, lowering of vehicle exhaust fumes); nevertheless, the problem of using up resources and climate change inherent to the affluent society (resulting, for example, from increased transport flows), remains unsolved. Investment is growing in the emerging economies due to low wage structures, but the gap between rich and poor within these countries has widened. They remain hesitant to spend any of their newly found revenues on measures to protect the environment. In the developing countries incomes have fallen further due to the impact of international competition on domestic production and the trade barriers the industrialised countries have retained for agricultural and high skill manufactured goods.⁵ A small number of the population lives from the export of raw materials, or manages to hang on to the slender lifeline of development aid, that part of the population living in the traditional subsistence sector is diminishing and life in poverty is increasingly becoming the norm. The per capita destruction of the environment may be minimal here, but the aggregate effect is significant—and in consequence of the fact that there is little spending on measures of environmental protection, it is growing progressively.

The consequences are thus either positive or negative, depending on one's geographical location and social position. A less egotistic view, though, gives rise to real concern. At the Johannesburg conference of 2002, at least the development countries' message was heard that free trade as it stands does not sufficiently create equal opportunities. The conclusions taken reflect a wide consensus that free trade must be 'embedded', i.e. that a supportive framework must be created allowing weaker economies to persist in a global market.⁶

However, environmental concerns appear somewhat to have been lost on the road. The paradigmatic vision is the industrialised plantation in the developing country having unlimited access to the agricultural markets of the industrialised world; sustainability in the sense of organic production plays only a marginal role. The stock of multilateral environmental agreements and organisations addressing trade grows

country's natural resources and the sole reference to distribution of income is restricted to the statement that 'the reforms have fallen short of reducing poverty in Madagascar'.

³ For example, H. Nordstroem and S. Vaughan, *Trade and Environment*, WTO Special Studies No. 4 (1998) see online version of the Journal.

⁴ The committee's report on *Trade and Environment*, WT/CE/1 of 12.11.1996, also contained in the appendix of the study by Nordstroem and Vaughan.

⁵ See on this particular aspect the recent UNCTAD Report (2002), 'The Least Developed Countries' see online version of the Journal. See e.g. the summary statement on p 101 that 'the current conventional wisdom that persistent poverty in LDCs is due to their low level of trade integration and insufficient trade liberalisation is grossly simplistic'.

⁶ The proposals include among others trade related technical assistance and capacity building, the strengthening of differential treatment, the elimination or reduction of tariffs on imports to developed states, the stabilisation of commodity prices and terms of trade, and the enhancement of trade infrastructure.

at a very slow pace. Resounding similar conclusions of the 4th WTO Ministerial Conference at Doha of 2001⁷ and those of Johannesburg only vaguely consider steps to be taken in the environmental direction.⁸ Such promises have often been made but very few real steps have been taken in the direction of joint efforts of the global community of states. In lack of such 'positive integration', trade related environmental protection has basically remained to be a matter of 'negative integration', i.e. of unilateral action by single states or regions as supervised by the WTO dispute settlement mechanism. The 'embedding' of free trade principles into environmental concerns must, therefore, be traced in the jurisprudence of the GATT panels and those of the Appellate Body of the WTO.

The purpose of this paper is not to discuss what steps are necessary on the level of international positive integration, rather it will explore to what extent the WTO panels and Appellate Body have succeeded in putting trade law into an environmental protection framework. Although much has been written on this subject there is still a need for work on questions of doctrinal construction. The case law is mature enough to be discussed not just in terms of good policy but also in terms of good jurisprudential techniques. It will be seen that this is not *l'art pour l'art* but that the precise construction of freedoms and restrictions have major implications for the margin states possess to introduce environmental protection measures.

2. Principles of World Trade Law

At first glance it would seem appropriate when viewed from the structures of basic rights and basic freedoms in many states and the EU to construe the relationship between freedom of trade and environmental protection as conforming to a model of 'broad area of rights content—limited exceptions': The cross-border trade with goods is thus a broadly defined basic freedom, in the context of which intervention is allowed, but only by commensurate means and in the cause of serving a legitimate goal. However, in contrast to the state and the EU, the GATT lacks any human-rights basis for fundamental freedoms (e.g. freedom of movement) essential to the justification of the dignity of a broadly defined basic freedom. Indeed, the freedoms contained in the GATT do not (yet) apply directly to the individual at all, but rather to individual states: One state constrained in its freedom to trade is confronted by the other state imposing a trade restriction as a derivative of its sovereignty. Furthermore, in contrast to the state and the EU, there is hardly any possibility at the WTO level for 'positive integration' by means of harmonisation, so that the states will have to maintain latitudes for their own policies for some time to come.

Not least, the text of the WTO agreement itself stands in the way of a concept along the lines of 'broad principle—narrow exception'. Textual clues regarding the

⁷ Ministerial Declaration (14.1.2001) at paras 31–3. See online version of the Journal.

⁸ The proposals are the encouragement of the WTO Committee on Trade and the Environment to act as a forum to debate environmental issues (para 91), to promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements to 'better identify trade, environment and development interlinkages' (para 92), to 'support voluntary WTO compatible market-based initiatives for the creation and expansion of domestic and international markets for environmentally friendly goods and services' (para 93).

relationship between trade and environment can be found in the preamble to the WTO convention. To summarise the wordy formulations contained therein, essentially the goal is presented as a triad comprising affluence, environmental protection and development. Free trade appears as the means to attaining this goal and not as a goal in itself.⁹ Thus, not being an end in itself, it must subsequently be assessed on the basis of the three named goals.

Implicitly, though, the message is evident in that there is a belief that free trade alone constitutes the sole means of attaining the goals. This is underlined by the fact that other means, in particular the control of trade (apart from 'positive efforts' to benefit the developing countries¹⁰), find no mention in the preamble. However, if we take a look at the instruments of what the preamble refers to as the 'trade system', here we find a greater diversity. This in effect boils down to a number of principles behind the individual rules including the principles of non-discrimination (most favoured nation and national treatment), the transparency and successive dismantling of barriers to imports and exports, as well as preferential treatment of developing nations and the sovereignty of states with regard to the pursuit of certain political goals.¹¹ None of these principles possess an absolute character, and their substantive content must be determined in relation to other principles or goals. It is hardly a satisfactory state of affairs, though, that mainstream thought does not define human health and environmental protection as principles of the trade system in their own right, allowing them be hidden away in the more formal notion of state sovereignty. The need to at least extrapolate such genuine principles results from the fact that protection of the environment is included in the catalogue of goals laid down in the preamble, the repeated mention of protection of health and/or the environment in Article XX GATT,¹² the TBT and the SPS agreements, the commitment of states to support processes of harmonisation and to apply harmonised norms,¹³ as well as the existence of multilateral agreements on protection of health and the environment having an effect on the WTO system which I shall elaborate on below. It follows that protection of human health and of the environment is a principle which ranks equally alongside the other principles.¹⁴

As to doctrine at the level of the individual regulations, the resulting logic is that we must search for a different construction to that of broad principle and narrow exception. It is inadmissible (as would otherwise seem appropriate on the basis of such a construction) on the one hand to interpret the principle as broadly as possible, but on the other hand to apply a narrow definition to the goals pursued by the exceptions—and in every case to require close scrutiny of their proportionality as well as to impose on the state invoking the exception the burden of furnishing facts, presenting evidence and failing in the case of *non liquet*. In contrast to previous panel reports

⁹ See the wording of the third consideration of the WTO Agreement: 'Being desirous of contributing to these objectives by ...' Cf. St. Charnovitz, 'Environmental and Labour Standards in Trade', *World Economy* (1992) 335ff, 353.

¹⁰ See second consideration of the WTO Agreement.

¹¹ Chr. Tietje, *Normative Grundstrukturen der Behandlung nicht-tarifärer Handelshemmnisse in der WTO/GATT Rechtsordnung* (Berlin, 1998) p 187.

¹² In the following, all Articles mentioned without further reference relate to the GATT 1994. See online version of the Journal.

¹³ Articles 2(6) and 2(4) of the TBT agreement. See online version of the Journal.

¹⁴ See also, M. Hilf, 'Freiheit des Welthandels contra Umweltschutz?', *NVwZ* (2000) 481.

which proceeded in just such a way,¹⁵ more recent panels and the Appellate Body have indeed attempted to weight each concern equally: the basic freedoms are to be defined precisely and somewhat narrowly,¹⁶ the so-called exceptions are not to be interpreted restrictively, the appropriateness of the goals pursued is only to be examined according to the contents of Article XX,¹⁷ and the burden of proof is restricted to furnishing *prima facie* evidence which, if established, moves the burden of proof to the other party.¹⁸

The new case law, however, has avoided, establishing any plausible dogmatic legal formula for the relationship between, on the one hand, non-discrimination and the opening up of markets, and on the other, sovereignty and protection of health/environment. Perhaps it would be useful to interpret all regulations as either positive or negative factual prerequisites of more comprehensive rules. As result of this, any state measure would be inadmissible if: first, it falls within the scope of a freedom provided by the GATT or any sub agreement; second, it is *prima facie* in breach of the content of the pertinent freedom; and third, it is not justified within the context of protection of the environment (or another goal).

In the following sections I shall attempt to test this construction against three main market restrictions for reasons of protection of the environment, viz:

- regulation of product quality
- regulation of process quality
- introduction of environmental charges on products

3. Regulation of Product Quality

The case of asbestos shall serve as the example. France introduced a ban on the manufacture and trade in asbestos and asbestos products, against which Canada raised its objection.¹⁹ We shall first examine how the areas of various freedoms are defined, and how they might be encroached upon (1). Then we turn to possible justifications of encroachments (2).

3.1 Scope of Freedoms and Kinds of Encroachment

We concentrate on Articles I, III, XI and XIII, because these are most often affected by environmental protection regulation.

3.1.1 General most-favoured-nation treatment (Article I) and non-discriminatory administration of quantitative restrictions (Article XIII)

Article I calls for the equal treatment of all WTO signatories with regard to like products when a state takes steps to improve access to its markets. Article XIII dic-

¹⁵ See the—approving—analysis contained in the first tuna fish report by A. Bogdandy, 'International Handel und internationaler Umweltschutz: A Definition in Light of the GATT', *EuZW* (1992) 243.

¹⁶ See analysis of the judicature, R. Senti, *WTO: System und Funktionsweise der Welthandelsordnung*, Zürich (Schulthess, 2000) p 312.

¹⁷ AB Report, *USA/Gasoline*, WT/DS2/AB/R, 29.4.1996, Ch III(B).

¹⁸ Panel Report, *France/Asbestos*, WT/DS135/R, 18.9.2000, Article 8.1777: 'It is therefore for the European Communities to submit in respect of this defence a *prima facie* case showing that the measure is justified. (...) It will then be for Canada to rebut that *prima facie* case, if established.' See online version of the Journal.

¹⁹ *Ibid.*

tates that there should be no discrimination when applying quantitative restrictions. So, according to Article I, all benefits must be generalised; and according to Article XIII any restrictions which may be applied must not affect any one, or group of nations more than others. These rules put into concrete form the basic principle of the sovereign equality of states²⁰ contained in customary international law. From this perspective and in connection with protection of the environment, it is problematical, for instance, that the EC regulation governing the transport of waste excludes imports of certain categories of waste from some non-member states—and exports into some non-member states, but not for others.²¹ In the asbestos case, though, there was deemed to be no breach, since the French regulation did not discriminate between any non-member states.

3.1.2 National treatment on internal taxation and regulation (Article III)

Article III GATT contains the principle of national treatment, in Paragraph 1 as a programme and in Paragraph 4 as an applicable rule.²² Pursuant to this, national regulations on, say, charges on products or the quality of products may not treat foreign goods more unfairly than like products originating within the domestic economy. Thus, whilst Article I prevents discrimination between different third states (TC1 and TC2), Article III prevents discrimination between a third state (TC) and the regulating state (RC).

3.1.3 Like products

Article I, as well as Article III, presuppose that the products suspected to be treated unequally, i.e. the product originating from TC1 (or TC) and the product originating from TC2 (or RC) are 'like products'. Therefore, it is important to examine precisely how the term 'like products' is defined.²³ Following a narrow definition, whereby goods would predominantly be considered as not being of the same type, difference in treatment between TC1 and TC2, or between TC and RC would seldom be deemed a violation of Articles I or III. By contrast, a broader definition of 'like products' would more often lead to establishing a violation thus reducing the potential of market restrictions (if the scope for such action is not reopened by the existence of public interests legitimising such restrictions).

The criteria for determining whether goods are deemed to be like products or not go back to recommendations contained in a GATT report from 1970: product properties, utilisation of product and consumer patterns.²⁴ Sometimes the customs classification is used to aid definition. Recently there has been resort to health and environmental aspects. For instance, in the case of *USA/Alcoholic Beverages*, due to the

²⁰ For more cf. Article 2, Item 1 UN Charter. A Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edn (Berlin: Duncker & Humblot, 1984) p 274.

²¹ Regulation (EC) No 259/93, Articles 16, 18, 21.

²² For an explanation of the relationship between Article III(1) and the other paragraphs including the reconstruction of the historical development see O.K. Fauchald, *Environmental Taxes and Trade Discrimination* (London: Kluwer, 1998) p 110.

²³ The judicature does not define likeness as identical for Articles I and III. See AB Report, *Japan/Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 4.10.1996, FN 58 at 114, where it is said that 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'. There are nevertheless some more basic questions of construction cross-cutting the different provisions, of which one is discussed in the text.

²⁴ Quoted from Tietje, aaO, p 235.

different effects on health the panel did not regard beer with low alcohol content as the same type of product as a beer with high alcohol content, with the consequence that the different treatment of low and high-proof beer in some US states is not to be deemed to be discriminatory against high-proof beer imported from Canada.²⁵ In the case of *USA/Gas Guzzler Tax* the panel decided against vehicles with high fuel consumption and those with low consumption being regarded as like products, since they were different within the context of achieving energy savings.²⁶ They therefore ruled that the different taxation treatment between the two categories is not to be considered discriminatory against EC imports.

By resorting to health or ecological effects, much of the second and third of the three steps of examination proposed here are already treated at the first step. The investigation into the discriminatory character of a measure, as well as justification for subsequent encroachment, is largely boiled down to the question of determining the products' likeness at the outset. By way of contrast, in the case of *France/Asbestos* the panel was of the opinion that risks to health could not be deemed integral to any definition of likeness. It therefore took the view that asbestos and products containing asbestos are to be treated the same as other fibres and products containing other fibres, even though other fibres probably constituted less danger to health.²⁷ Essentially, we are dealing here with similar problems of construction as in the case of all principles of equality. The clearest solution would appear to be that of the panel just cited.²⁸

- 1 First, two products which appear to be alike in their properties and utilisations (the customs classification is too formal a criterion, that of consumer patterns too variable) are selected as candidates for comparison. These criteria, i.e. properties and utilisations, indicate that the products to be compared have something in common which makes them to compete on the internal market, which in turn gives reason to check if they are treated differently. The generic term which binds them together (e.g. the alcohol content of beer, the fibric nature of products such as asbestos and other kinds) and the competitive stance released by it provide the *tertium comparationis*.
- 2 Should a likeness of two products be ascertained we inquire into the way they are treated in order to find out whether there is a case of unequal treatment. It must here be kept in mind that the GATT does not contain a general prohibition of unequal treatment of comparable products. It only prohibits unequal treatment of products stemming from or exported to different countries. The countries of origin whose products may be compared in the frame of the most favoured nation clause are TC1 and TC2, and in the frame of the national treatment clause TC and RC. Should there be differences of treatment resulting from the comparison of treatment of TC1 and TC2, or of TC and RC, then a case of unequal treatment exists.

²⁵ Panel Report, *USA/Alcoholic Beverages*, BISD 39S/206-299, 19.6.1992, para 5.74. Cf. Senti, *ibid* at 312. See online version of the Journal.

²⁶ Panel Report, *USA/Gas Guzzler Tax*, GATT Doc DS31R, 11.10.1994, para 5.26. See online version of the Journal.

²⁷ Panel Report, *France/Asbestos*, WT/DS135/R, 18.9.2000, para 8.130. In its ruling on the appeal, though the AB adhered to the criterion of health risk. See AB Report, *France/Asbestos*, WT/DS 135/AB/R, 12.3.2001, paras 114-16.

²⁸ See also A. Epiney, *Welthandel und Umwelt* (DVB1, 2000) 80; Fauchald, *ibid* at 143 f.

- 3 Whether or not there is any material reason for differentiation is the object of investigation at the third level. We shall turn to this below at page 124.

Following such a sequence of examination renders much of the awkward deliberation concerning the likeness of goods superfluous. This is because the mixing of product-immanent criteria of comparison with the criteria of the goal of the regulation which so complicates the debate is split up into several different steps. When in the cases of *USA/Alcoholic Beverages* and *USA/Gas Guzzler Tax* the panel stresses that the intention is to give a narrow definition of likeness in order not to restrict the states involved in their scope for political manoeuvre, this is to be welcomed as an intention; but in terms of means the aim could just as easily (but more transparently) be achieved by ascertaining whether there has been an act of discrimination only at the second level. At the first level, then, nothing is prejudiced by broadly defining likeness, i.e. by generously *prima facie* viewing different products as being equal—since at the second level (and later the third) it may still be proven that no discrimination has taken place or rather not an act of discrimination without material justification. One may even say that the broader likeness is understood the more reasons there will be to justify differences of treatment.

3.1.4 General elimination of quantitative restrictions (Article XI)

Article XI prohibits—at least in principle—so-called non-tariff barriers for imports and exports. Protectionism as such is not categorically disallowed, but instead it is the multiplicity of innumerable protectionist measures ranging from blunt import prohibition to product quality regulation which, in order to promote competition, are to be turned into the more transparent and more easily calculable and competitive instrument of tariffs (so-called tariffication). Other provisions of the WTO system can then ensure that the tariffs are successively melted down.²⁹ Thus, whilst Article XI is primarily concerned with regulations to do with imports and exports, aiming to convert them into forms more amenable to competition Article III focuses on internal measures which are addressed to the domestic market but incidentally also cover imported products.

In the asbestos case the French prohibition referred to the placing on the French market of asbestos (no matter where it came from) and was consequently to be checked under Article III. In addition, the prohibition extended, as an auxiliary measure, to the import of the product. The issue was whether this import regulation also fell under Article III which normally deals with internal measures such as marketing restrictions. The panel assumed correctly that the principle of national treatment also stretched to import regulations when these merely constitute 'a logical corollary' of the general prohibition on marketing, or simply serve the aim of this being realised to the fullest extent.³⁰ The panel failed to address the question as to whether Article XI is also applicable. We shall come back to this question immediately.

3.1.5 Prohibition of measures not discriminating between domestic and foreign products?

According to its wording, the principle of removing quantitative restrictions laid down in Article XI extends only to import and export rules, i.e. measures which *per se* treat goods of foreign origin differently to domestic products. The question has arisen

²⁹ Senti, aaO, pp 227 et seq.

³⁰ Panel Report, *France/Asbestos*, op cit, para 3.397. See also Panel Report, *USA/Beverages*, ibid, para 5.28.

whether this provision also covers internal measures which do not distinguish between domestic and foreign products, and thereby prohibits the very taking of such measures. If so, how would this relate to the fact that Article III follows a more modest approach which does not prohibit any measure from the outset but only requires equal treatment of domestic and external products.

We may look for assistance in Articles 28 and 29 of the EC Treaty which uses about the same wording as Article XI.³¹ The EU Court of Justice has indeed extended these provisions to include non-discriminatory measures (so-called Dassonville formula). In the Cassis ruling the Court qualified this extension by deciding that in the event of 'compelling reasons' such measures would not be taken as measures having the same effect as quantitative restrictions.³² This characteristic feature of Community law concerning extension of the principle of market opening to barriers affecting both national and foreign products alike has, it seems, never been explicitly adopted within the context of the GATT, and rightly so, since in light of the reasons explained above the basic elements of equal treatment and removal of quantitative restrictions ought not to be interpreted so broadly.

A test on how the jurisprudence proceeds in this regard concerns cases in which an import ban merely constitutes the side effect of a non-discriminatory measure. Market opening in the sense of Article XI is, as said before, by its wording solely applicable to genuine import regulations. To extend this to import regulations serving as a corollary to domestic market regulations would be to take the first step toward the further extension and inclusion of measures not discriminating between domestic and foreign products. Therefore, the answer to the question which was left open by the asbestos panel is that in the case of corollary import regulations only the provision for internal measures applies, i.e. only Article III (para 4) and not Article XI as well.

The result of the foregoing analysis is that the asbestos ban ought to have been dealt with exclusively as an issue of the prohibition of internal trade regulation discrimination and not in addition as one of the prohibition of quantitative import restrictions. The panel actually ended up doing just that, but not for the reasons which I have suggested. Assuming that asbestos fibres and alternative fibres are like products (which I find correct) the panel found that France had treated these like products differently by forbidding the marketing of asbestos fibres and allowing the marketing of alternative fibres. However, this is not a logical analysis because, taking account of the approach argued above, the different treatment of asbestos and alternative fibre products did not include a difference in treatment of domestic and foreign products. This is apparent from the legal framing of the regulation, because any imported and domestic products were treated indiscriminately. If one includes indirect (de facto) discrimination into the inquiry the result is the same for there was also no proven *de facto* effect discriminating against the Canadian products. The panel could have contented itself in simply establishing this fact. All its deliberations concerning the scientific justification for prohibiting asbestos products were therefore not only superfluous, but also irrelevant. In essence, the French regulation constituted the classic example for a non-discriminatory measure. Within the EC context it would

³¹ Article 28 EC states: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.' Article 29 is identical but for replacing 'imports' by 'exports'.

³² See E.-U. Petersmann, 'Freier Warenverkehr und nationaler Umweltschutz in EECR and EER', *Aussenwirtschaft* (1993) 95, 115.

have had to be subjected to the test of compelling reasons as defined in Community law. The WTO frame does not though, as pointed out, extend to non-discriminatory measures. So therefore, due to its false assumption of discrimination the panel conducted *in nuce* an extension of its examination to non-discriminatory measures.³³ In a roundabout way, 'Dassonville' and 'Cassis' have therefore encroached upon the WTO.

3.1.6 Scope of the TBT and SPS agreements

The agreement on 'technical barriers to trade' (TBT) is concerned with technical standards for products; the agreement on 'sanitary and phytosanitary measures' (SPS) with sanitary and phytosanitary control. Both types of measure can be used to create barriers to trade and are therefore subject to certain requirements. Since such measures often serve the goal of protecting either health or the environment, the two agreements are of particular significance for the present analysis of product regulation.

With regard to the concept of technical standards within the frame of the TBT agreement, the panel ascertained in the case of *France/Asbestos* that a total ban on marketing does not constitute a technical standard and was therefore to be judged on the basis of GATT rules directly. Technical standards apply to the quality aspect of products and not to their complete exclusion from the market place. However, in the case of a prohibition containing provisions for exceptions—in the asbestos example a set of temporary rules concerning the use of asbestos in certain indispensable products—such provisions with respect to exceptions are to be treated as technical stipulations. In view of the widespread practice of restricting market access by a complex mixture of partial prohibitions, transitional allowances and product quality requirements, the solution reached by the panel is somewhat unclear. For this reason the AB in the same case reversed the panel's approach by assessing the measures as a whole and holding them to constitute a technical barrier.³⁴

As a rule, whether the agreement on TBT or SPS is deemed applicable is decided on the basis of whether a technical standard or a sanitary or phytosanitary measure is given. Following this procedure it is not found necessary to first determine whether the measure is in violation of Articles I, XIII, III or XI.³⁵ There is some doubt, though, as to whether the two agreements constitute fully-fledged rules in their own right, or whether they merely serve the function of clarifying reasons for justification for primary breaches of Articles I, XIII, III or XI. The question is particularly relevant for non-discriminatory internal measures. As pointed out above, these measures do not fall within the scope of Articles I, XIII, III and XI. Correspondingly, they would also not fall within the scope of the TBT and SPS agreements were these to be deemed as merely serving the function of justification for intervention. This would not be the

³³ Canada called precisely for this in its party speech, see para 3.472: 'Article XI(1) can apply to an internal regulation that has the effect of restricting or prohibiting imports. Excluding any internal regulation from the scope of Article XI(1), simply because it is an internal regulation, would deprive the words 'other measures' in the conclusion of Article XI(1) of any useful effect.' However, it follows from the aim of Article XI to 'tarifficise' quantitative restrictions that 'other measures' must be read to mean 'other import or export measures' such as, for instance, product quality standards established for imported goods.

³⁴ AB Report, *France/Asbestos*, 12.3.2001, para 64.

³⁵ Cf. H.R. Trüb, *Umweltrecht in der WTO* (Zürich: Schulthess, 2001) p 338.

case if they constituted fully-fledged rules having the status of *lex specialis* in relation to the GATT.³⁶

In view of the discrimination rules contained in Articles I and III, both agreements could indeed be considered as standing in their own right as result of the wording of their texts which restate the discrimination rules in principle, namely in Article 2(1) TBT agreement and Article 2(3) SPS agreement. It is similar in the case of Article XI: Article 2(2) of the TBT agreement states that 'technical stipulations' may not be created 'with the view to or with the effect of creating unnecessary obstacles to international trade'. The fourth consideration contained in the SPS agreement states that rules must be created for measures 'in order to minimise their negative effects on trade'. This wording could be construed as reflecting the contents of Article XI and, indeed, as addressing also trade barriers which are non-discriminatory. Nevertheless, to view the two agreements as fully independent agreements alongside the GATT would be an excessive interpretation.

As far as the SPS agreement is concerned, this is illustrated by the wording of the last consideration, according to which the SPS agreement serves 'to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary and phytosanitary measures, in particular the provisions of Article XX(b)'. Thus, the SPS agreement merely has the function of more closely determining the exceptions as per to Article XX GATT.³⁷ Before it can be applied, therefore, there must first have been proof of a *prima facie* violation of Articles I, XIII, III or XI.³⁸

The TBT agreement, though, contains no such mention of consideration as found in the SPS agreement. Indeed, this agreement goes much further than the 'negative' integration approach of the GATT inasmuch as it calls for 'positive' development and observance of harmonising technical standards. This could be taken as an indication of a genuine stand of the TBT agreement. But that 'positive' element stops short, though, of stipulating that (as can be seen in parallel secondary legal EC regulations) a contravention of harmonised standards is to be viewed as a contravention of the TBT agreement. This is because as a rule the harmonised standards are soft law, for which the TBT agreement (in Article 2(4)) does not contain any declaration of general obligation.³⁹ Harmonised standards therefore simply represent the concretisation of the reasons for exception contained in the GATT. Thus, the TBT agreement can only be applied in connection with Articles I, XIII, III and XI GATT. It follows that with regard to Article III there must first be proof of a discriminatory effect as result of the internal regulation; and for Article XI that there must first be evidence of a direct barrier to imports before the TBT agreement—and with it harmonised technical regulations—can be applied within the frame of justification for intervention in

³⁶ This seems to have become the position of the judicature, see for the SPS agreement, Panel Report, *EC/Hormones*, WT/DS26/R/USA, 18.8.1997 at paras 8.35–8.42 (see online version of the Journal) and for the TBT agreement, AB Report, *France/Asbestos*, WT/DS 135/AB/R, 12.3.2001, para 80.

³⁷ See also Article 2(4), according to which measures which concur with the SPS agreement are to be seen as being in concordance with Article XX letter (b) contained in the GATT.

³⁸ This was also the position the EC defended in the Panel proceedings concerning *EC/Hormones*, see Panel Report, WT/DS26/R/USA, 18.8.1997 at para IV(1). The panel rejected this view at paras 8.38–8.41 arguing that the SPS agreement was a special agreement. The EC did not appeal against the panels' rejection of its position. Cf. AB Report, *EC/Hormones*, WT/DS26/AB/R and WT/DS48/R, 18.1.1998, para 7.

³⁹ Obligation can only be construed if a technical stipulation becomes incorporated in a treaty under international law.

the national treatment clause and the principle of market opening. The TBT agreement is thus not applicable to internal non-discriminatory measures.

This view is by no means at variance with the general rule of interpretation to Annex 1A of the WTO agreement, according to which in the event of a contradiction between the GATT and the WTO agreement it is the provisions of the WTO agreement which are decisive. This order of precedence is only in the eventuality of actual conflict. If, though, the TBT and SPS agreements do not actually encompass areas protected by GATT independently, but exist solely to concretise the reasons for exception, then no conflict can occur. It remains true that the special agreements can be prayed in aid where issues of exception are concerned. If, for instance, Article XX(b) GATT were to be interpreted (which in my opinion is not the case) to mean that a situation of highly probable harm has to be proven, whereas the SPS agreement takes uncertain risks into account, then the SPS agreement would have precedence in its area of application.

3.2 Grounds for Exception

Intervention in one of the fundamental freedoms is justified when:

- it serves to protect one of the protected goods named in Article XX,
- the protected good would otherwise be impaired, and
- the measures implemented correspond to specific additional requirements.⁴⁰

3.2.1 Protection goals

As already pointed out, it is, above else, all the measures 'necessary to protect human, animal or plant life or health' contained in Article XX lit. (b), as well as the measures 'relating to the conservation of exhaustible natural resources' in lit. (g) which may be considered relevant for justifying trade barriers for reasons of protecting health and the environment. However, one should also take lit. (a) into account. Under the heading of 'public morals' in that subsection, the protection of animals (inasmuch as not covered by lit. (b)) is to be considered. With regard to humans, one instance of application is the ban on imports of human organs.⁴¹ In future we can expect the morals clause to play a significant role in matters concerning gene policy, such as import restrictions for human embryos or for animal constructions like the so-called cancer-mouse.

In a case where the TBT agreement is applicable the Article XX GATT catalogue of protection goals is extended insofar as Article 2(2) of the agreement includes the 'environment' as such to be a protected good. Thus, over and above the health and life of humans, animals and plants as well as exhaustible natural resources, other fundamental goods like the climate would move into view.

3.2.2 Impairment of the protected good

Above all it is the concept of risk underlying Article XX which needs to be clarified. The risk concept affects the sensitiveness of risk identification and assessment. This

⁴⁰ This is the examination sequence recommended by the panel in *France/Asbestos*.

⁴¹ St. Charnovitz, 'The Moral Exception in Trade Policy', *Virginia Journal of International Law* (1998) 688.

is sometimes separated from the problem of determining the protection level for the measure in question. In essence, though, it represents one and the same issue; namely, to what extent the principle of precaution is taken into account? Both the panel as well as the Appellate Body deliberated this aspect in detail with regard to the case of *EC/Hormones*. This case involved a ban on the trade within the Community as well as on the import of meat obtained from animals which had been treated with certain growth hormones.⁴² The following aspects of this case contribute to the concept of precaution⁴³:

One issue is whether risk is an objective or subjective concept. In the hormone case (objective) proof of hormones residues in meat was hard to find, but there was (subjective) consumer concern. The bodies deciding this case could well have touched on the issue of whether the subjective risk assessment on the part of consumers was not legitimate enough to restrict sales, quite regardless of its objective correctness.⁴⁴ However, neither the panel, nor the disputing parties, nor the Appellate Body ever seriously took this idea into consideration. The Appellate Body, stuck to the requirement for an objective basis for assessment of the risk (which I also believe to have been correct).

But in doing so, the Appellate Body reproached the panel for its insistence on demanding that the risk had to be proven on the basis of quantified scientific data. In this instance the Appellate Body appears to recognise the significance of qualitative scientific insights or commonplace experience:

It is essential to bear in mind that the risk to be evaluated in a risk assessment under Article 5(1) [of the SPS agreement, G.W.] is not only ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.⁴⁵

As for the necessity for well-grounded evidence, the Appellate Body refers to Article 5(7) of the SPS agreement, according to which measures are also admissible when the relevant scientific evidence is insufficient; though, the measures should be solely of a temporary nature until better evidence is available.⁴⁶ The Appellate Body also recognises that the regulating state should be permitted certain room for manoeuvre in respect of scientific controversy. The state is allowed to decide whether it adheres to the mainstream scientific opinion, or to a minority view—provided at least that the latter comes from ‘qualified and respected sources’.⁴⁷ Moreover, the signatory state may exceed in its own level of protection the level afforded by international standards, guidelines and recommendations.

Considering all these elements, it is correct to say that the SPS agreement entitles

⁴² In my opinion, this measure constitutes a non-discriminatory measure and as such is neither disallowed under Articles III or XI; inasmuch there is no need for justification pursuant to Article XX. Cf. supra, n 33.

⁴³ See also the list contained in the notice issued by the European Commission with regard to application of the principle of precaution, Kom (2000) 1, No. 4 and Appendix II.

⁴⁴ Senti, *ibid* at 501.

⁴⁵ AB Report, *EC/Hormones*, WT/DS26/AB/R, 16.1.1998, No. 187. C. Godt, ‘Der Bericht des AB zum EG-Einfuhrverbot von Hormonfleisch’, EWS (1998) 202, 207, interprets the passage to mean more an opening for ‘national policy decisions open to different evaluation’.

⁴⁶ AB Report, *EC/Hormones*, 16.1.1998, No. 124.

⁴⁷ *Ibid*, No. 194.

the signatory states to apply the principle of precaution.⁴⁸ Since a similar view is held by the panel and the Appellate Body in the case of *France-Asbestos* with regard to Article XX(b) GATT,⁴⁹ one may extend this interpretation beyond the SPS agreement and apply it to Article XX GATT itself.

Another question is whether the protection goals should be interpreted in a narrow sense. Panel case law, drawing on the term 'exceptions' used in the heading of Article XX has held that a restrictive interpretation is correct. In the hormone case, though, this was rejected by the Appellate Body.⁵⁰ This is commendable from the perspective advocated in this article.

Similar issues arise with sharing the burden of furnishing proof.⁵¹ It is not possible to conclude from the mere reference to a rule as being an exception that it follows that only the party which invokes the exception has to bear the whole burden of proof. Rather, both parties are under obligation to contribute towards clarification of the matter. In jurisprudence it is only the sequence of presentation which remains unclear. In the hormone case the Appellate Body required the plaintiff (in that case, the USA) to bring forward *prima facie* evidence in support of its claim that the defendant (in that case, the EC) had unjustly invoked an exception pursuant to the SPS agreement, whereupon the defendant should subsequently bring forward its counter proof.⁵² In the *Asbestos* case, on the other hand, the panel required the defendant (in that case, the EC) to provide *prima facie* evidence in support of an exception, whereby this entailed a corresponding burden of participation on the part of the plaintiff. The different sequence may possibly be explained by the fact that in one instance it was the SPS agreement that was applicable and in the other instance it was only Article XX GATT itself. Nor is it of pivotal importance, since in both cases a burden to participate was placed on both parties. The iterative participation of the parties, in whatever form, has to date proved sufficient for the panel or Appellate Body either to form an opinion in the matter, or to determine that a party had not brought forward sufficient evidence to support its case.⁵³

Until now, as far as I am aware, no case has been judged solely according to rules of an objective burden of proof, so in the end there has been no need to clarify how to reach a decision in the absence of conclusive evidence: in favour of market freedom, or in favour of the protection goal? If the answer were ever needed, it would have to be derived from the goals of the WTO: the market is solely the means for pursuing the goals (full employment, environmental protection and development), not an end in itself; the market must therefore take second place when after extensive examination doubt still remains as to whether the goals are endangered. Or, in the termino-

⁴⁸ With regard to the question as to whether the principle of precaution is also an integral part of international customary law, the AB is of the opinion 'that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation' (*ibid.*, para 123).

⁴⁹ Panel Report *France/Asbestos*, 18.9.00, No. 8, 182; upheld by AB *France/Asbestos*, 12.3.01, No. 162.

⁵⁰ AB Report, *EC/Hormones*, 16.1.1998, No. 104.

⁵¹ The Panel and the AB choose to speak of sharing the burden of proof. This is not merely to be seen in the 'objective' sense of how to eventually decide in situations of 'non-liquet' (i.e. of inconclusiveness) but primarily in the procedural ('subjective') sense of allocating the burden of furnishing facts and presenting proof.

⁵² AB Report, *EC/Hormones*, 16.1.1998, No. 109.

⁵³ Cf. the statement made by the AB in *EC/Hormones*, *ibid.*, No. 208: 'In the absence of any other documentation, we find that the EC did not actually proceed to an assessment, within the meaning of Articles 5(1) and 5(2), of the risks arising from the failure of observance of good veterinary practice combined with problems of control of the use of hormones for growth promotion practices.'

logy of state sovereignty: the regulation competency of the states to realise protection goals remains in place so long as it is not proven that the market does not endanger those goals.

3.2.3 Specific requirements for the measures implemented

With regard to the TBT and SPS agreements it was already emphasised that their special accomplishment is to be seen in the fact that they represent a first step towards a harmonisation of product rules at a global level. In particular Article 3(1) of the SPS agreement and Article 2(4) of the TBT agreement provide emerging transnational soft law (e.g. the codex alimentarius emerging from the WHO and FAO) with an orientation role in the interpretation of exceptions as per Article XX GATT. In this way soft law is being guided in the direction of legal obligation, although the rather cautious phrasing 'use them . . . as a basis' (Article 2(4) TBT agreement) 'shall base . . . on' (Article 3(1) SPS agreement) stand in the way of pure obligation.

The harmonised norms are only defined as minimal rules, and there is nothing to prevent the signatory states from going further, although certain conditions must first exist which approximate to those laid required in Article 95, paragraphs 4–6, of the European Community Treaty but are less restrictive than these. Member States may introduce a higher level of protection pursuant to Article 3(3) SPS agreement if there is 'scientific justification' or the Member 'determines (this) to be appropriate', and pursuant to Article 2(4) TBT if the relevant international standards 'would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems'.

Some would see a further requirement in the stringent proportionality of the measure with regard to the protection goal.⁵⁴ The Appellate Body in the case of *USA/Gasoline*⁵⁵ has drawn attention to some difference in the wording used in Article XX, which in lit. (b) states that the measure must be 'necessary to protect human, animal or plant life or health', while lit. (g) talks of measures 'relating to the conservation of exhaustible natural resources'. The Appellate Body interprets this difference to mean that in relation to the protection of natural resources there is no strict test of necessity.

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.

The panel took an even more emphatic stance in favour of natural resources in the case of *Canada/Unprocessed Herring*:⁵⁶

As the preamble of Article XX indicates, the purpose of including Article XX(g) in the GATT was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.

⁵⁴ von Bogdandy, *EuZW* (1992) 247; Epiney, *DVB1* (2000) 84; for a less stringent check of necessity H. Ginzky, *Saubere Produkte: schmutzige Produktion* (Düsseldorf (Werner)/now Baden-Baden (Nomos) 1997) p 180.

⁵⁵ AB Report, *US/Gasoline*, 29.4.1996, Part III B. See online version of the Journal.

⁵⁶ Panel Report, *Canada/Unprocessed Herring*, BISD 35S/98–115, 22.3.1988, No. 4(6).

A more recent position adopted in this issue is to be found in the Appellate Body report concerning the case of *USA/Shrimps*. According to this, within the context of lit. (g) it merely has to be established that the measure is closely connected with the protection goals embodied therein ('the means and ends relationship . . . is manifestly a close and real one').⁵⁷ The Appellate Body does however call for a proportionality check, deriving it from the opening Paragraph ('chapeau') of Article XX. The measures listed there ('unjustifiable and arbitrary discrimination') are not interpreted to require a stringent examination of necessity, but rather represent an appeal to exclude arbitrarily excessive intervention.

Exercise by one member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI(1), of other Members.⁵⁸

In contrast to this, in the asbestos case the view held by the panel and the Appellate Body was that there should be a stringent examination of necessity for lit. b. In this case it was proved in detail whether a 'controlled use' of asbestos would not have been just as effective as a complete ban.⁵⁹ It is true, however, that the density of control is reduced by the acceptance by the panel and Appellate Body of a margin of discretion on the side of the regulating state.⁶⁰

The concept of proportionality as developed by the WTO jurisprudence appears somewhat confused. From a teleological point of view it is not at all logical why in respect of the protection of human health and life there should be a more stringent examination of appropriateness than in respect of the protection of natural resources. Why should the Contracting Parties have broad discretion only if nature protection is concerned but not in cases of health protection? Such an approach would not give so much emphasis to the difference in wording in the lit. (b) and (g). Furthermore, it is not convincing to project the proportionality requirement into the chapeau. For the latter is meant to prevent discrimination between two or more third countries whilst the proportionality test only concerns the relationship between the regulating state and one third state. A more simple version of the whole arrangement would seem to be the following:

- 1 Proportionality in the sense of a means-end test is indeed to be required.
- 2 It should be understood to leaving a broad margin of appreciation to the Member States.
- 3 The proportionality requirement should be located in and derived from lit. (b) and (g), not the chapeau.
- 4 The test should be shaped as being identical for lit. (b) and (g) (the difference of wording the Appellate Body rightly notes should not be overestimated).

For measures as per lit. (g) there is yet a further requirement that they must be 'made effective in conjunction with restrictions on the domestic production or consumption'. This sounds as if the principle of equal treatment is stripped of any pos-

⁵⁷ AB Report, *USA/Shrimps*, WT/DS58/AB/R, 12.10.1998, No. 7 in VI B 1. See online version of the Journal.

⁵⁸ Ibid, No. 14 VI B 1.

⁵⁹ In view of the possible heedless misuse by careless persons of asbestos the panel eventually refused to accept the alternative of controlled use. See Panel Report, *France/Asbestos*, 18.9.2000, No. 8.214. This was upheld by the AB, see report in the same case, 12.3.2001, No. 174.

⁶⁰ Panel Report, *France/Asbestos*, 18.9.2000, No. 8.204; AB Report in the same case, No. 168.

sible exception. It could be read in the following way: In cases where nature protection measures prima facie violate Article III they can only be justified under Article XX(g) if they abide by the principle of equal treatment. Such reading would however annul the potential of Article XX to justify any encroachment on the basic freedoms including the principle of equal treatment. The Appellate Body also acknowledged this problem in the case of *USA/Gasoline* and ruled that the statement 'in conjunction with ...' ought not to be construed as meaning precise equality of measures, but rather as means of enabling a sensible differentiation.⁶¹

4. Regulating Process Quality

4.1 General Remarks

Restrictions on the trading of goods can not only take their origin from the product itself, but also from the means of their production (so-called production and process methods, ppm): in respect of the protection of exhaustible natural resources (lit. (g)), for instance, import restrictions for furniture made from wood when this may contribute to the irreversible destruction of the tropical rain forests, or for animals, or parts of animals, which are threatened with extinction. Under the protection of the health and life of humans, animals and plants (lit. (b)), for instance, this would apply to import restrictions on shoes using leather from Indian tanneries which pollute the water supplies vital to residents, animals and plants in their vicinity. This may also include the regulation of imports for reasons of public morals (lit. (a)), such as bans on the import of goods made by child labour, or for animals caught by snap-jaw traps.⁶² Along with measures which ensue from environmentally harmful modes of production, one could also imagine measures directed against processes such as environmentally harmful transport or storage, like import regulations for products transported by emission-intensive air-cargo transport, or export restrictions due to the hazards involved in storing dangerous waste.

All in all, the distinction between product-based and production-based regulation is of major importance for the new policy of integrated production and product design, which serves the goal of environmental protection by means of focussing on the entire life cycle of products. If the distinction were to result in the exclusion of production-based measures, this would constitute a grave hindrance to such integrated policies.⁶³

A reference case for measures ensuing from ppm is the USA regulation for the protection of sea turtles from being caught in the nets of shrimp fishers. This stipulates that imports of shrimps must be accompanied by a certification of the exporting country, and the certification will only be issued by the relevant USA authority when

⁶¹ AB Report, *USA/Gasoline*, under III B. The issue was that the 'baseline' which was to serve as basis for the calculations with regard to levels of emissions for domestic enterprises was to be defined according to their individual circumstances and for foreign enterprises it was to be aggregated. The justification put forward was the difficulty of establishing reliably the individual circumstances pertaining to foreign firms.

⁶² Further examples are listed by H. Ginsky, *ibid* at 7.

⁶³ Trüb, *ibid* at 362. For integrated product policy see the contributions in M Führ (ed.), *Stoffstromsteuerung durch Produktregulierung* (Baden-Baden: Nomos, 2000).

either there are no sea turtles in the exporting state, or special nets are used to protect the turtles.

4.2 Likeness of Products in spite of Different ppm?

In the case of ppm measures it first has to be ascertained whether they interfere with the basic freedoms. With regard to Articles I and III, clarification must be obtained as to whether products manufactured or won from environmentally harmful ppm might possibly qualify as being something other than products which would otherwise be of the same type, but which are obtained in an environmentally friendly way. The products could then be deemed different and subsequently subject to different measures—with no further need for justification; for example, a marketing ban on the environmentally harmful and a marketing permission on the environmentally friendly method of production.

The predominant view maintains that it is the quality of the product itself which determines the likeness of differently processed products and that the different methods of production bear no relation to their likeness.⁶⁴ In principle, this should be considered correct. As explained above, for reasons concerning the sequencing of examination steps a broad definition of likeness is desirable. Thus, as a rule different ppm of a product category should be considered as being alike. Nevertheless, one ought not exclude the possibility that the difference between the methods of production for a product may be so great that it appears to be of a different type. For instance, it is justifiable to classify products obtained from purely biological production as being different from those obtained by intensive farming methods. It is therefore to be recommended that ppm should be included as an additional criterion in the catalogue of indicators for likeness.

4.3 Extra-Territorial Effects

Market regulations based on ppm may be aimed at domestic ppm; import restrictions on hazardous waste for which there is no infrastructure of disposal in the importing country would be an example of this. Regulations which effect ppm in other countries attract far more attention. Besides the political debate they have generated, they gave rise to doctrinal discussion about their proper understanding in terms of international customary law. Four approaches are being considered.

The first approach views external ppm measures as examples of paternalistic intervention in the sovereign jurisdiction of the exporting nation states. A closer reading of the principle of sovereign freedom, however, would argue that it is the importing state which uses its sovereignty whilst the free trade of goods does not constitute an anchored principle of international customary law. By implication the importing state may impose conditions on permitting imports. For the exporting state this would constitute the restriction of an opportunity or privilege, not of a right.⁶⁵ A third and very progressive approach would see emerging a new customary law principle of free trade which necessitates the justification of any trade restriction. The kinds of accept-

⁶⁴ Cf. the report by Fauchald, *ibid* at 130.

⁶⁵ Trüb, *ibid* at 355.

able reasons would then be related to the interest of free economy rather than nation states. I myself do not believe that such a customary principle has already materialised, nor would I think that it should be.

A fourth view is more realistic and closer to what the WTO system can shoulder at the moment. This view sees a conflict of sovereign realms. Whilst accepting the right of the importing state to decide about tradable goods it also concedes that discriminatory restrictions also intrude into the export state's sovereign rights (albeit only due to the reality of international economic integration) which must be legitimated by the showing of links for the national interests of the importing state.⁶⁶ Such links certainly exist when, for instance, the ppm cause cross-border emissions onto the territory of the import state. In addition hazards to the global commons or environmental goods of common interest (e.g. rain forests) may also be acknowledged as a link to the interest of the importing state.⁶⁷

Such intervention-friendly interpretations of Article XX resulting from relevant general principles of international law is also underlined by the history of the Article's origins.⁶⁸ The negotiating parties were in no doubt that the type of process-related trade restrictions contained in several conventions at the time would continue to be valid.⁶⁹

In the case law of the GATT and WTO panels and the Appellate Body this question is as yet unresolved. It was brought up with regard to Article XX(g) in connection with import restrictions imposed by the USA, in one instance for tuna fishing which endangers dolphins and in another instance for shrimp fishing techniques which endanger sea turtles. The panel in the case of *USA/Tuna* had strictly rejected the admissibility of concern for extra-territorial objectives, whereas the second panel approved it, albeit solely in respect of controls applied to the external activities of nationals belonging to the regulating state. The flaw in this reasoning, as often bemoaned, is that in speaking of extra-territorial 'jurisdiction' the panel implied that the regulating state intends that its law should apply in another state which is clearly not the case.

The Appellate Body has taken position on the issue in the shrimps case. However, it avoided any thorough doctrinal discussion. In terms of the doctrine of links in international law it merely determined there was a sufficient 'nexus' because sea turtles migrated across national frontiers and also inhabited USA waters:⁷⁰ We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

Although one may have wished for more clarity, due to the lively international debate surrounding the matter and the vested interests at stake, the Appellate Body

⁶⁶ For the fundamentals in international law and examples from judicial practice see J.P. Müller and L. Wildhaber, *Praxis des Völkerrechts*, 3rd edn (2001) p 414.

⁶⁷ Ginsky, *ibid* at 5 and 264.

⁶⁸ For methodology cf. Article 31(3)(c) and Article 32 of the Vienna agreement.

⁶⁹ St. Charnovitz, 'Exploring the Environmental Exemptions in GATT Article XX', *Journal of World Trade Law* (1991) 37; similarly for Article XX(a), St. Charnovitz, 'The Moral Exception in Trade Policy', *Virginia Journal of International Law* (1998) 688, 705.

⁷⁰ AB Report, *USA/Shrimps*, 12.10.1998, VI B 1.8.

was well advised to tread cautiously. One may interpolate that the Appellate Body is alluding to the category of environmental good of common interest. The link with the migration phenomenon however appears to be too naturalistic for that. Rather, a common cultural and ecological interest in the protection of biological variety should be the leading idea. Otherwise the entire point of the agreement regarding the international trade in endangered species (CITES) would be missed; for such trade is restricted regardless of whether or not the species exists in the import country. Nevertheless, one could interpret the Appellate Body's cautious answer in the shrimps case to mean that as a minimum a nexus is accepted when the resources of the import state are affected *naturaliter*.

4.4 Proportionality and Prevention of Discrimination between Countries

Measures within a ppm context are also subject to the prohibition contained in the chapeau of Article XX on any arbitrary or unjustified discrimination between countries or disguised restriction on international trade. In this sense, the provision can extend just as well to the legal content as to the actual implementation of the measure.⁷¹

In the shrimps case, the Appellate Body ruled in connection with the criterion 'unjustified discrimination between countries' that the import state when regulating import conditions was to provide the exporting state with scope for its own political solutions. The USA was in violation of this due to its insistence that the exporting states were to use exactly the same type of fishing techniques which it had itself introduced.⁷²

It is submitted that this rule, which is perfectly commendable in itself, should not be derived from the chapeau because the chapeau only concerns discrimination between third countries. Its proper place appears to be the proportionality principle based on lit. (g). According to this principle a stringent measure is unacceptable if a milder measure is equally appropriate to reach the goal.

The Appellate Body also held the USA to be guilty of unjustified discrimination between countries because on the one hand they had been instrumental in obtaining a pan-America agreement for the protection of sea turtles, but on the other they had made no attempt to reach contractual solutions with non-American exporting countries.⁷³ The Appellate Body held a further example of discrimination to be that the fact that the USA had granted some exporting countries longer phasing-in periods than others.⁷⁴

With regard to the prohibition on arbitrary discrimination the Appellate Body developed a further requisite for trade restrictions in that fair procedures must be in place, if the restriction requires some kind of certification by the importing state. This may already be seen to be taken care of by Article X(3) in conjunction with Article XI GATT, but it is reiterated from the perspective that the exporting countries may otherwise be differentiated against arbitrarily.⁷⁵

⁷¹ Ibid, VI C 1.16.

⁷² Ibid, VI C 2.22.

⁷³ Ibid, VI C 2.29.

⁷⁴ Ibid, VI C 2.31.

⁷⁵ Ibid, VI C 2.39.

The rule postulated by the Appellate Body that the regulating state must attempt to reach an agreement with the exporting state is of major importance for the relationship between the GATT and multilateral environmental agreements (MEAs). Therefore some more clarification may be appropriate concerning the precise content of that rule. First of all, as the Appellate Body has underlined in a more recent report on an Article 21(5) DSU proceeding equally concerning the *Shrimps* case, the requirement is one of procedure and not of effect. This means, that the regulating state must seriously attempt to come to an agreement but is not bound to postpone the unilateral trade restriction until an agreement has been reached.⁷⁶ Secondly, although the Appellate Body in the *Shrimps* report was dealing with a clear case of discrimination between other countries (namely the American and the Asian countries) it might be extrapolated from its reports⁷⁷ that the rule requiring negotiation is meant to be a general one which also applies where the regulating state has not attempted to negotiate any agreement. After all, inaction in relation to all others including the exporting state is no discrimination.

It appears nevertheless that such a general principle requiring negotiation in any case could not be based on the chapeau. Any generalisation could only be based on general international customary law. However, neither is the freedom of entering foreign markets a principle of customary law, nor do import restrictions based on ppms violate the principle of sovereign freedom of states. Therefore a general obligation of prior negotiation is hard to deduce. But this does not exclude to accept prior negotiation as a matter of good morals.

5. Environmental taxes

5.1 General Remarks

Most relevant here is Article III, paragraph 2:

The products of the territory of any contracting party imported into the territory of another contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.⁷⁸

There is a violation of sentence 1 in the event that a foreign product is deemed to be 'like' a domestic product, but is subject to taxation 'in excess' of one imposed on the domestic product. The scope of sentence 2 extends beyond sentence 1, embracing products which are not 'like' but nevertheless compete or can be substituted. In compensation for this sentence 2 is more open to justification of divergent treatment.⁷⁹

⁷⁶ Ibid, WT/DS 58/AB/RW, 22.10.01, Nos. 115-34.

⁷⁷ Ibid, No. 128 where the AB distinguishes between the question of sufficient effort and the question of discrimination.

⁷⁸ The distinction compared to sentence 1 is unclear. Sentence 2 would appear to refer more to the taxation conditions considered apart from the taxation level. See Fauchald, *ibid* at 169.

⁷⁹ For the reasoning that points to a narrow interpretation of likeness in sentence 1 due to the fall-back function of sentence 2 see AB Report, *Japan/Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 4.10.1996, p 23 (see online version of the Journal).

Different treatment is deemed impermissible only when the discriminated product is 'burdened by a similar tax'.⁸⁰

Article III, paragraph 2, originally refers to classic taxes aiming at state revenue rather than goals of substantial policies, like value added tax, for instance. In wake of the increasing use of taxes as policy instruments, though, its scope has been extended and thus become the object of even more difficult problems of interpretation. Its reach embraces both 'greened' general taxes as well as special environmental charges of diverse shape such as:

- charges for financing special tasks of environmental protection,
- charges for steering environmentally-friendly patterns of behaviour, and
- charges for compensating for the utilisation of environmental resources.

Such special charges may be considered 'other internal charges' in the sense of Article III, paragraph 2.

5.2 Discrimination in Relation to Ecological Taxes and Environmental Charges

USA/Superfund serves as a suitable reference case.⁸¹ In order to cover the costs of recovering contaminated sites, the USA had set up a 'superfund' which was financed inter alia from a tax on the sale of oil products and certain chemicals. The tax rate levied on oil products was either lower or higher, depending on whether the oil was refined within the USA or outside whereas the tax level for the chemicals was the same—regardless of whether they came from home or from abroad.

The contributions paid into the superfund could be classified as greened taxes or as a special charge aiming at financing environmental programme. The Appellate Body correctly held that the different tax rates for oil products from abroad and from domestic production constituted a violation of Article III, paragraph 2. It was not possible to derive justification for such unequal treatment as per the grounds contained in Article XX.

In other instances where the tax scheme treats domestic and external products alike it may be possible that the product tax leads to a de facto discrimination since the product concerned may not be produced domestically, or only in small quantities. For instance, Switzerland levies a tax (a steering charge according to the classification used above) on products which contain volatile hydrocarbons (VOC). Only 5% of such products marketed in Switzerland are actually produced domestically, though.⁸² But as far as I can see the GATT and WTO jurisprudence has not yet developed a precise concept as to whether, and if so, under what circumstances de facto discrimination is covered by Article III, paragraph 2. In any case concerning the example of the Swiss VOC tax it could be argued that there is no de facto unequal treatment because any product is treated equally. Alternatively, if de facto discrimination is conceded environmental protection is reason enough to allow for a certain inequality of de facto effects.

⁸⁰ Annex 1 to GATT 94, on Article III, para 2.

⁸¹ Panel Report, *USA/Taxes on Petroleum and Certain Imported Substances (USA/Superfund)* L/6175-34S/136, 17.6.1987. See online version of the Journal.

⁸² Trüb, *ibid* at 478.

5.3 Border Tax Adjustment making up for Domestic Environmental Charges

A special problem arises insofar as taxes are not only used as an instrument of environmental protection, but also with the aim of establishing a level playing field for cross-border competition which has been affected by internal levies, for example, environmental charges or taxes of the importing state. In order to make up for the thereby higher prices of the domestic products, imported goods are subjected to an additional tax. This is called 'border tax adjustment'. It can already be derived from Article III, paragraph 2, that this does not constitute an act of discrimination. This is reaffirmed by Article II, paragraph 2(a).

An example for a border tax adjustment was the levy on chemicals in the superfund case. So long as the levies were on domestic products their purpose was to create a disincentive for the environmentally harmful production of chemicals (this at least was the argumentation during the hearings). In order not to disadvantage the correspondingly more expensive American products in competition with foreign imports a levy was imposed on the imports as a border tax adjustment. Since the internal levies were approximately the same level the panel perceived no violation against Article III, paragraph 2.⁸³

5.4 Border Tax Adjustment and Costs due to Regulation or Taxes on Production in the Exporting State

From a widened perspective, the question arises as to whether there should not be a more encompassing comparison of the individual strategies for minimising the burden on the environment caused by production processes. This could reveal that the import products were likewise subject to additional production costs as result of the law in the country of origin (by way of regulation or via product taxes or taxes on production) in attempts to enforce the polluter pays principle. A border tax adjustment by taxing import products would in this case amount to a double burden adding up to the burden already imposed by the country of origin. In the superfund case this was precisely the line of argument pursued by the opposing parties, in particular the EC.⁸⁴

The panel, though, rejects any such far-reaching approach and maintains that it is responsible only for examining levies on products, which indeed is strictly in accordance with Article III, paragraph 2, and not those imposed on processes or even process regulation. The superfund levy for American chemicals was an example of such a product levy, likewise the levy on imported chemicals which functioned in the form of a border tax adjustment. Actually, there was no European levy imposed on the chemicals as such, but simply the existence of regulatory legislation—and sometimes levies on production processes, for example, emission taxes. The panel acknowledged that the USA may take such external burdens into account (by means of exemption from border tax adjustment), but that they were not obliged to do so as per GATT rules.⁸⁵

⁸³ Panel Report, USA/Superfund, No. 5.2.5.

⁸⁴ *ibid.*, No. 3.2.8.

⁸⁵ *Ibid.*, No. 5.2.5.

5.5 Steering or Compensation Charges with regard to Extra-Territorial ppm

The tax on chemicals in the superfund case could also have been regarded as a steering charge acting as incentive for more environmentally-friendly ppm not only in the domestic economy but even abroad. This means that by imposing the charge the US government would attempt to influence the production technology in the exporting state. The point was not brought up at all in the superfund case. The question is important, though, since taxes are increasingly being debated as an alternative to regulatory instruments. If such levies were only to be dealt with from the perspective of border tax adjustment, the specific extra-territorial steering effect would not be achieved. This would entail not only necessary changes to the concept, but a number of additional prerequisites would possibly also have to be observed.

First of all with respect to the extra-territorial effect it must be pointed out, as explained above, that the GATT when interpreted in connection with international customary law concerning the sovereign freedom of states does not declare such external reach to be inadmissible a priori. Insofar as the targeted environmental goods are of common interest or are common goods, measures—including levies—which impact across borders are basically permissible. The situation is different with regard to environmental goods which have a local character.⁸⁶ Charges which are aimed at the protection of local environmental goods can only be justified as border tax adjustments.

No matter if we are dealing with border tax adjustment or a genuine internal and external environmental charge, the problem, though, is that the calculation modality for the charge in relation to the production process located in another state cannot be assessed by the state levying the charge. In the event, for instance, of an energy tax being imposed on products, it would have to be proved what type of energy was involved and how much of it is consumed in the production process. The superfund panel paved the way for a possible solution to this by allowing that certain production procedures are taken to be typical and that it is the party called upon to pay the levy who has to prove that more environmentally-friendly procedures are being applied.⁸⁷

6. Multilateral Agreements on the Environment and the GATT

As explained above, in respect of justification for product regulations directed at extra-territorial ppm the Appellate Body requires that once the regulating state has attempted to find a solution by means of international law with third states, it must subsequently proceed to make an attempt at finding similar agreements with the exporting state.

In the event that agreements in international law already exist in the case under review and if these are valid for the disputing parties of the GATT, such agreements being 'rule of international law' pursuant to Article 31(3)(c) of the Vienna Agreement on the Law of Contracts may serve to provide orientation for the interpretation of Article XX.⁸⁸ In this instance, according to the wording of Article 31(3)(c), but also

⁸⁶ Fauchald, *ibid* at 174.

⁸⁷ Panel Report, *USA/Supfund*, No. 5.2.9.

⁸⁸ See Trüeb, *ibid* at 227, 251.

due to leading decisions,⁸⁹ it would be immaterial whether they came into force before or after conclusion of the WTO system of agreement.

In the event that an environmental agreement contains precise and unconditional rules as well as provisions for its own arbitration mechanism, the question arises as to whether the GATT with its WTO dispute settlement system is applicable in the first place.

An example may help to illustrate this question. According to Article 4 of the Regulation (EC) No. 338/97 which deals with trade in endangered species, the import of animals listed in annex A is subject to an export and import licence issued on the basis of individual examination. This is conform with Article III of the Washington Agreement on the Protection of Species (CITES). According to Article 4(6) of the Regulation, though, the Commission may impose a more far-reaching general ban on trade with animals belonging to certain species. Article XIV(1)(a) CITES makes provisions for stricter measures to be imposed by signatory states. Let us assume that the Commission declares a general ban on the trade of ivory obtained from African elephants, and Kenya, for instance, holds this to be excessive due to the increased stock of elephant in its country: Is the dispute to be regulated pursuant to CITES—and should Kenya therefore make a subsequent appeal to the court of arbitration at Den Haag? Or is the GATT applicable—and thus the DSU dispute settlement system?

In the first eventuality the EC would enjoy greater discretion for pursuing its nature protection goals. Any recourse to the court of arbitration would entail securing the agreement of the EC. The successful party could make an application for the conference of the signatory states to pass "recommendations to enhance the effectiveness" of the treaty (Article XI(2)(c) CITES). This path would probably favour the chances for the EC. Kenya, on the other hand, might perceive better chances for its case by taking the second path. First of all, the measure would be classified as constituting a violation of Article XI GATT, which would subsequently have to be justified in accordance with Article XX(g); this, though, would entail an in-depth examination into whether the protected species actually is endangered. Application of Article XX(g) would also entail an investigation into the appropriateness of a complete import ban and the possibility of taking less intrusive measures. In addition, the EC would not be able to avert the matter being dealt with by the dispute settlement mechanism.

The general legal principle of *lex specialis*⁹⁰ could be considered to rule on collision between the two agreements, GATT and CITES. But which is more specialised: CITES because it only applies to special 'goods', or the GATT because it only protects special basic freedoms? And if we were to include the type of legal procedure, is the WTO mechanism more special due to it being more differentiated, or the CITES court due to it being responsible for only a limited number of disputes?

An alternative possibility would be to apply both agreements together with their arbitration processes and to bypass contradictions by means of a harmonising inter-

⁸⁹ The GATT is an agreement open to new developments and therefore it cannot be simply relegated by any new agreements. See AB Report, *USA/Shrimps*, No. 129. See also Trüb, *ibid* at 248. The same must also apply to the WTO system in converse relation to other fundamental agreements.

⁹⁰ A. Verdross and B. Simma, *ibid*, Article 640.

pretation. The CITES with its broader scope, particularly when confirmed by a court of arbitration, would then have to be observed by the panel and the Appellate Body within their application of Article XX(b) and (g). By the same token, the court of arbitration would have to take consideration of the trade implications pursuant to CITES.

An even better solution would be to supplement Article XX by inclusion of a paragraph referring to observance of MEAs.⁹¹ This could also include the proviso that under certain circumstances the content of MEAs would also serve an orientation function even in the event that the WTO members involved in the dispute were not all MEA members.⁹²

On the other hand, provided the MEA members were able to arrive at a precise and rigorous formulation, the MEAs should follow the example set by the chapeau to Article XX GATT and include prohibition of arbitrary discrimination and veiled protectionism. They should also provide for exclusive and binding arbitration within the scope of MEA. A move in this direction is the Rotterdam Agreement on the prior consent procedure for chemicals of 1988,⁹³ when in Article 11(g) it says: 'A Party that (. . .) takes a decision not to consent to import of a chemical, or to consent to its import only under specified conditions shall if has not already done so, simultaneously prohibit or make subject to the same conditions: (a) import of the chemical from any source; and (b) domestic production of the chemical for domestic use.' Article 20(6) also provides for a binding dispute settlement.

These issues are presently under negotiation following the November 2001 Declaration of the WTO 4th Ministerial Conference in Doha, Qatar. The declaration is optimistic that a balance between trade and environment issues can be struck and many win-win solutions will be found. It is to be hoped that such trade speech will not mislead the negotiators to disregard the fact that nature does not trade.

7. Summary

- 1 The WTO system sets itself the goal of prosperity, environmental protection and development. As a means, free world trade is to be treated with caution—it is not an end in itself and also not the sole means.
- 2 The examination of state restrictions on cross-border trade should proceed in accordance with the sequence 'applicability of basic freedoms—prima facie violation—eventuality of justification'. The three steps are not, though, to be interpreted, along the lines of 'broad area of protection—narrow interpretation of exceptions'.
- 3 As opposed to the case law of the Appellate Body, the notion of likeness with regard to (disadvantaged and favoured) products, which governs the

⁹¹ This has been proposed several times in a 'non-paper' of the European Commission in 1996, quoted in St. Charnovitz, 'Multilateral Environmental Agreements and Trade Rules', *Environmental Policy and Law* (1996) 163, 167.

⁹² On this point see A.-C. Shih, 'Multilateralism and the Case of Taiwan in the Trade Environment Nexus', *Journal of World Trade* (1996) 109.

⁹³ Agreement on the prior consent procedure for certain hazardous chemicals and pesticides in international trade, 10.9.1988. See online version of the Journal.

applicability of certain basic freedoms, ought not be narrowly defined. In particular, health and environmental risks should not be examined as characteristics of likeness, but rather as grounds for justification.

4 *Tertium comparationis* (i.e. the criterion of comparison) for discrimination as per Articles I and III GATT should be the origin of the product, not its properties.

5 In opposition to the case law of the Appellate Body import and export restrictions which treat domestic and external products equally do not fall within the scope of Article XI GATT. This also applies if an import restriction is framed as such only as a corollary to internal measures under Articles I or III GATT.

6 As opposed to the case law of the Appellate Body and some panels the SPS and TBT agreements are only to be applied following (prima facie) violation of a basic freedom of the GATT. They specify the grounds for justification as per Article XX GATT.

7 The risk concept contained in Article XX GATT corresponds to the principle of precaution. The judicature on sharing the burden of proof should be read to refer to the burden of feeding facts and evidence into the procedure. In an objective sense of who wins in *non liquet* situations (i.e. situations of uncertainty), the burden of proof falls to the state contesting a trade restriction.

8 Article 3(1) SPS and Article 2(4) TBT move harmonised soft law into the proximity of legal obligation, but are not to be interpreted as binding reference.

9 In view of some confusion with regard to the place and content of the proportionality test of a measure in relation to the protected goods contained in Article XX GATT it is submitted to understand proportionality as a test allowing for broad discretion of the Member States which has about the same bearing with regard to both lit. (b) and (g). It should be derived from the lit. (b) and (g) rather than from the chapeau to Article XX GATT.

10 Market restrictions which are based on so-called production and process methods (ppms) only constitute non-likeness of products in extreme cases.

11 Extra-territorial effects of ppm measures are permissible insofar as a link can be determined with the state of importation. This is i.a. the case for reverse emissions and hazards to the global commons or environmental goods of common interest.

12 The import state when regulating import conditions is to provide the exporting state with scope for its own political solutions. Whilst the Appellate Body derives this rule from the 'chapeau' of Article XX GATT its proper place appears to be the proportionality principle imbedded in lit. (b) and (g).

13 The 'chapeau' of Article XX GATT entails an obligation to prior negotiation. This is not a general rule but only concerns cases of discrimination.

14 Until now, restrictions by means of levies were dealt with predominantly as border tax adjustment. In contrast, environmental taxes perform a special function which could be taken into account for justification of prima facie violations of basic freedoms.

- 15 The dispute settlement mechanisms of the WTO and the Multinational Environment Agreements (MEAs) are structurally different and may be conflicting. It is suggested that the wording be clarified, obliging the WTO to observe MEAs and, on the other hand, under certain circumstances providing for exclusivity of arbitration by individual MEAs.