

WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe

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Free trade and national environmental protection measures are not always consistent. Yet, the parties to the WTO decided, and committed in WTO law, that even where a national environmental protection measure would otherwise violate a free trade rule of the GATT or GATS, the national environmental measure would generally be permitted, subject to certain conditions. It is important to recognize that member states of the WTO were serious both about allowing great flexibility for national environmental measures, *and* about establishing some conditions so that this flexibility is not abused. It is also important to recognize that, by establishing the WTO dispute settlement system, member states decided that WTO Panels, and the Appellate Body on appeal, would generally decide disputes about the scope of this flexibility.

In this article, I show how the WTO Appellate Body has, in several important instances, sought to avoid carrying out this responsibility, and has limited the scope of its analysis such that it cannot carry out this responsibility effectively. Sometimes, the Appellate Body has done so by exalting textualism over the broader context, object, and purpose of provisions of WTO law, and sometimes the Appellate Body has done so by the opposite of textualism: by accepting limits on the analysis carried out by Panels where those limits are not expressed in the WTO treaty, and are inconsistent with the plain terms of that treaty. This type of selective textualism is doctrinally incoherent, and can only be explained as a method of cloaking the exercise of discretion by judges of the Appellate Body. While this discretionary authority is best understood as granted by the WTO treaty, and so is not an abuse of judicial authority, the attempt to cloak its exercise in textualism results in incoherence, and a failure to articulate and legitimize the true bases for a decision.

The issues addressed in this article are critical for the future of the WTO, as well as for existing and proposed preferential trade agreements, such as the Trans-Pacific Partnership (which the United States has now abandoned) and the Transatlantic Trade and Investment Partnership (which, at the time of this writing, was threatened with abandonment by the United States). Indeed, the ability to effectively implement international measures addressing climate change depends on a coherent and appropriate jurisprudence of trade and environment in these agreements.

I. INTRODUCTION

WTO law has as its focus the promotion of a liberal trading system. The primary purpose of WTO law is not to promote environmental protection. Even so, the first preamble of the Marrakesh Agreement Establishing the World Trade Organization refers to the need for compromise between the goal of growth, on the one hand, and the need to protect the environment,

on the other hand.¹ This is critical context for interpreting the WTO Agreement, and it suggests why many of the provisions of WTO law entail complex tradeoffs between trade liberalization obligations and regulatory space for environmental protection.

If negotiators were beginning with a clean sheet, they would be well-advised to write this compromise differently, and more generally, to apply consistently across the various agreements and commitments. The basic thrust of the negotiators' agreement would be to exempt from restriction under trade law all environmental protection measures that are not disproportionate—that are not excessively costly in relation to the benefits they offer.² Costs would be determined in terms of lost global welfare (including but not limited to both the importing country and the exporting country), and these costs would be compared with the environmental benefits. They might in addition include a prohibition of discrimination, but as shown below, in this area a prohibition of de facto discrimination would be congruent with a requirement of proportionality, and there might be circumstances in which even de jure discrimination could be proportionate.

In some ways, the WTO sub-agreements relating to Technical Barriers to Trade (TBT)³ and to Sanitary and Phytosanitary Measures (SPS)⁴ can be interpreted to include a requirement of proportionality along the lines I have described. However, most often, the requirement of proportionality is applied alongside other restrictions. In connection with the other applicable disciplines relating to non-discrimination, the Appellate Body has found *greater* restrictions than in the proportionality discipline, denying that discipline *effet utile*. The Appellate Body has done so by, at times, according a hypertextualist respect to differences in language within and between the WTO sub-agreements, and by developing strained interpretations that have no basis in treaty text, reading words into the treaty that are not there.

The good news is that, thus far, presumably because of the good instincts of the Appellate Body judges and the influence of the WTO community, we have avoided a major decision that is insensitive to environmental protection. But the relative incoherence of the existing system places undue reliance on good instincts, rather than an articulated jurisprudence, and therefore increases the risk of a virtual environmental disaster in Geneva. As a matter of jurisprudential risk management, some rectification is in order. Indeed, as explained below, the 2015 Appellate Body decision finding the

1. Marrakesh Agreement Establishing the World Trade Organization, preamble, Apr. 15, 1994, 1867 U.N.T.S. 154.

2. See Joel P. Trachtman, *Trade . . . Problems, Cost-Benefit Analysis, and Subsidiarity*, 9 EUR. J. INT'L L. 32, 38 (1997).

3. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120.

4. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493.

U.S. regime for dolphin-safe tuna labeling illegal under WTO law is a harbinger of future trouble.⁵

This article describes the evolution of the WTO trade and environment jurisprudence, focusing on the General Agreement on Tariffs and Trade (GATT)⁶ and TBT Agreements as the agreements principally concerned with this tradeoff, although recognizing that other WTO agreements, such as the SPS and Subsidies and Countervailing Measures (SCM)⁷ Agreements, as well as the General Agreement on Trade in Services (GATS),⁸ may play an important role in the relationship between trade liberalization and environmental protection.

Part II examines the evolution of WTO national treatment anti-discrimination jurisprudence, and the Appellate Body's unfortunate, and perhaps unintentional, refusal to respect national regulatory distinctions as legitimate and non-discriminatory bases for differential treatment. Part III explains the similar dangers that can arise in connection with the most-favored nation anti-discrimination rule. Part IV describes the limitations of the exception-granting clauses of Article XX of GATT. Part V explains the limited coherence between multilateral environmental agreements (MEAs) and WTO law. In Part VI, I describe the limits of textualism in the context of WTO trade and environment adjudication. Part VII concludes.

This examination will show that WTO law relating to trade and environment is not internally coherent. Its anti-discrimination prohibitions seem to apply to invalidate good faith regulatory action. In connection with its related environmental exceptions, the Appellate Body has failed to follow its own doctrine which calls for authentic balancing of trade and environmental values. It might be said that these two incoherencies—one invalidating environmental regulation in an overbroad manner, and the second providing a loose rationale for exempting violations—may balance one another out. However, this contraption stimulates little respect for the rule of law and for the Appellate Body's jurisprudence, and it is an unreliable mechanism by which to mediate between two of the great social goals of our time: improving welfare through trade and through protecting the environment.

5. It is suggested below that recent Appellate Body decisions in the *Tuna II* cases display a troubling degree of insensitivity to national autonomy in environmental and consumer protection policy. See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Recourse to Article 21.5 of the DSU by Mexico, WTO Doc. WT/DS381/AB/RW (adopted Dec. 3, 2015) [hereinafter *Tuna II 21.5*].

6. General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994 or GATT]; General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

7. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1869 U.N.T.S. 14.

8. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

II. GATT ARTICLE III

Imported products can affect the environment in two ways. First, the product itself may cause environmental degradation. For example, Brazil's restrictions on imports of retreaded tires, challenged by the European Union in *Brazil—Tyres*, were motivated by the environmental problems associated with disposal of used tires.⁹ These problems are consumption externalities insofar as the consumer of the tires does not sufficiently take into account the environmental problems that arise from his consumption decision. Second, and more commonly, domestic restrictions on imports are motivated by concerns regarding production externalities. Examples include concerns about the impact on dolphins resulting from the way imported tuna is harvested, or about the carbon released in the production of imported products.

The terms of the GATT 1947, as reiterated in the GATT 1994, do not contain any affirmative requirement of proportionality (parts of Article XX have been understood to provide a defense for measures that are proportionate, but these provisions are only relevant after a violation is found).¹⁰ GATT 1994 includes prohibitions of discrimination, in both the most-favored nation (MFN) sense under Article I¹¹ and in the national treatment sense under Article III. Most trade and environment cases have arisen under Article III, although they certainly can raise issues of Article I MFN discrimination as well. The terms of Article III:2 of GATT, relating to internal taxes, are somewhat different from, and more complex than, those of Article III:4. For simplicity's sake, then, this Article will focus on Article III:4—on environmental regulation as opposed to environmentally-motivated taxation. While Pigouvian taxes¹² can be applied to imported products in order to address environmental externalities, most environmental cases at the WTO have arisen from product regulation, addressed under Article III:4 of GATT.

Article III of GATT generally examines national treatment-type discrimination by engaging in a product comparison—"like products" under Article III:4—and a treatment comparison—"less favourable treatment" under Article III:4. Defining discrimination in legal terms is extremely difficult. Although many may feel that they know discrimination when they see it, no legal system has been able to produce an easily applied definition. The rea-

9. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Brazil—Tyres*]. For an economic analysis, see Chad P. Bown & Joel P. Trachtman, *Brazil—Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 *WORLD TRADE REV.* 85, 124 (2009).

10. Many environmental cases have been defended on the basis of Article XX(b), which protects certain measures "necessary" to protect human, animal or plant life or health. This necessity test has also been applied by the WTO Appellate Body to a proportionality test, as discussed below.

11. MFN requires that imported goods from country A be treated as well as imported goods from all other countries.

12. Pigouvian taxes are taxes that impose the costs of externalities on the producer or consumer.

son is that every determination of de facto discrimination is implicitly, and necessarily, a determination of whether a regulatory distinction is valid or invalid: those charged with determining discrimination cannot escape judgment of the validity of a regulatory distinction.

However, within the WTO's existing Article III jurisprudence, the Appellate Body has abdicated this function. The Appellate Body does not engage in this type of judging—it declines to determine whether regulatory distinctions are valid or invalid under Article III:4. While the Appellate Body does engage in this type of judging under Article 2.1 of the TBT Agreement, it does so in a highly formalistic mode, simply determining whether the regulatory categories are fully rational, without determining whether the irrationality it identifies has an effect on market access.

Although the Appellate Body nevertheless has a system for deciding cases where domestic regulation is challenged, this system is set up in such a way that some regulatory categories that lay people would find perfectly reasonable could be found invalid. This does not mean that they will be found invalid as de facto discrimination, but it does mean that in order to avoid finding reasonable regulation invalid, the Appellate Body judges will be required to exercise discretion in a way that is not included in their ostensible method. Thus, the normative question raised by this article is whether it is better for judges to retain this hidden discretion, or to make explicit the bases on which they exercise judgment. The following subsections set forth how this jurisprudence developed, why the judging function is so important, and how the latter could be reclaimed.

A. *Like products*

Of course, determinations of regulatory discrimination are always based on a comparison of two subjects of regulation, which must be sufficiently comparable to merit equal treatment. So, it is not understood to be discrimination to require automobiles to be equipped with air bags, while not requiring bicycles to be so equipped. In GATT Article III:4, this is the question of “like products.”

The Appellate Body has adopted the position that the determination of whether two products are “like” is fundamentally a determination about whether the products are sufficiently in competition with one another.¹³ At one level, this is a perfectly understandable approach, and it definitely must be at least a threshold part of the determination. But whenever we take a treaty term such as “like products,” and define it using other terms, it is difficult to avoid expanding or contracting its meaning. In this context, the Appellate Body has diminished “like products” from its ordinary meaning in an important way, because it has excluded national governmental deter-

13. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC—Asbestos*].

minations of regulatory categories from consideration in connection with the determination of likeness. The result is that when two products are sufficiently in competition, they are determined to be like products even if they differ in exactly the dimension that gives rise to the regulatory concern.

Thus, if gasoline-powered automobiles are required to be equipped with catalytic converters, while electric-only automobiles are not required to be so equipped, it is theoretically possible that this distinction could be found to constitute discrimination against imported gasoline-powered automobiles, only provided that gasoline and electric automobiles are sufficiently in competition with one another. This is absurd because the regulatory concern for emissions is the basis for distinction, and there is no protectionist intent.

In effect, under the Appellate Body's current approach, the question of whether products have a sufficient competitive relationship is a market-based determination, reflecting consumer behavior. But consumers are, by definition, insufficiently sensitive to both consumption externalities and production externalities, and consumers are also victims of information asymmetries compared to producers.¹⁴ They fail to take account of some of the effects on them (information asymmetries) and fail to take account of the effects on others (externalities). In economic theory, these are the reasons for regulation. So, the bases for regulatory distinctions are systematically excluded from the determination of "like products." This approach is essentially disrespectful of the sovereign right to regulate by distinguishing categories of products, regardless of consumer perceptions.

It would seem absurd to imagine that the authors of Article III of GATT intended that all regulation that was not congruent with consumer perceptions would violate Article III, and require justification under Article XX. To consign any regulation that is not congruent with consumer perceptions—that treats products differently for reasons that do not affect their competitive positions—to illegality under Article III is clearly overbroad. It delegitimizes the most important category of regulatory intervention—intervention where, by definition, the market does not sufficiently distinguish between products on the basis of the relevant regulatory concerns.

True determination of the discriminatory, as opposed to bona fide, nature of regulatory categories requires more nuanced analysis. Indeed, examining a line of trade cases, Robert Hudec observed that no matter what judges say they are doing in discrimination cases, they will inevitably consider "aim and effects."¹⁵ By this he meant that it is impossible to determine de facto discrimination in the trade context without some assessment of (i) whether

14. See FRIEDER ROESSLER, ROBERT SCHUMAN CENTER FOR ADVANCED STUDIES POLICY PAPER, THE SCOPE OF REGULATORY AUTONOMY OF WTO MEMBERS UNDER ARTICLE III:4 OF THE GATT: A CRITICAL ANALYSIS OF THE JURISPRUDENCE OF THE WTO APPELLATE BODY, 3 (2015).

15. Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L L. 619, 620 (1998). See also Amelia Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 783, 783–799 (2003).

the aim of the regulation is protectionist, or, alternatively, is motivated by an acceptable regulatory purpose, and (ii) whether the restrictions fall disproportionately on imported products. Hudec's work suggested that these factors be explicitly considered in connection with the "like products" determination, but they could also be considered under the "less favourable treatment" prong.¹⁶ His goal was to make explicit the substantive concerns that actually form the basis for decisions.

However, the Appellate Body rejected "aim and effects" early, in its *Japan—Alcoholic Beverages* decision,¹⁷ determining that the focus of the like products determination is on the Border Tax Adjustment¹⁸ factors—physical characteristics, end-uses, consumer perception and tariff classification—and that no proof of trade effects is required.

While the Appellate Body in *Japan—Alcoholic Beverages* pointed out that the purpose of Article III is to limit protectionism and to ensure equal competitive opportunities, it did not at this point hold that the like products determination is focused solely on competitive relationships. In the 2001 *EC—Asbestos* case, the Appellate Body determined that likeness under Article III:4 is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products."¹⁹ It did so on the basis of a fundamental logical error. Here is its logic:

As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* "less favourable" than the treatment accorded to *domestic* products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship.²⁰

This is a non-sequitur. Of course the Appellate Body is correct that a competitive relationship is *necessary* for a determination of like products, but an examination of this logic reveals that the second clause does not follow from the first: a competitive relationship is necessary, but not sufficient, to determine likeness. This fundamental logical error has informed, and distorted, much of subsequent jurisprudence. Furthermore, this understanding of likeness fails to reflect the object, purpose, and context provided by Article III:1, which is permissive of domestic regulation so long as it is not applied "so as to afford protection." The Appellate Body's interpretative

16. *Id.*

17. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 17-22, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996).

18. *Report of the Working Party on Border Tax Adjustments*, L/3464 (Dec. 2, 1970), GATT BISD (18th Supp.), at 97 (1971).

19. However, the concurring member of the Appellate Body expressed "substantial doubt" as to the "necessity or appropriateness" of adopting a "fundamentally" economic interpretation" of "like products" under Article III:4. Appellate Body Report, *EC—Asbestos*, ¶ 154.

20. Appellate Body Report, *EC—Asbestos*, ¶ 99.

methodology purports to follow Article 31 of the Vienna Convention on the Law of Treaties (VCLT or Vienna Convention), which states that “[a] treaty

Shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²¹

However, it often de-emphasizes object and purpose.

Perhaps more importantly, the Appellate Body’s position regarding likeness is inconsistent with the ordinary meaning of “like”—the Appellate Body has read into “like” a limiting word that is not included in the text: “competitive.” The ordinary meaning of “like” would, in natural parlance, allow broader consideration of factors salient to regulatory purposes—factors that determine the applicability or inapplicability of regulation. Even so, the Appellate Body in *EC—Asbestos* found that health risks may be considered in connection with a determination of likeness but only insofar as the health risks affect competitiveness.²² However, this approach fails to take into account the broadest category of health risks that form the basis for regulation: circumstances in which consumers fail to fully appreciate the risk.

Thus, under existing jurisprudence, a bona fide regulatory distinction that does not otherwise affect competitiveness is not a distinction that affects the determination of likeness. Note the implications: where such a measure also has less favorable effects on the class of imported products, even though those effects are purely an artifact of a legitimate regulatory distinction, it violates Article III:4.

Since the Appellate Body’s 2011 decision in *Philippines—Distilled Spirits*,²³ it has now extended the competition-focused approach to determining like products to all parts of Article III. The competition-based approach seems plausible in connection with evaluation of non-Pigouvian revenue-raising taxes, such as those applied in these alcoholic beverage cases, because in that context, there is often no plausible regulatory policy rationale for the distinctions.

How can it be that practically all domestic regulation of products is at risk of being found inconsistent with the GATT anti-discrimination obligations? The Appellate Body has argued that Article XX of GATT is sufficient to provide adequate scope for national regulatory autonomy, despite its

21. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT or Vienna Convention].

22. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶¶ 113, 115, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996).

23. Appellate Body Reports, *Philippines—Taxes on Distilled Spirits*, WTO Doc. WT/DS396/AB/R / WT/DS403/AB/R (adopted Jan. 20, 2012).

strict reading of Article III.²⁴ Part IV below explains why Article XX may be insufficient in an important range of cases.

B. *Product-process and the III-XI division*

The discussion above focuses on national environmental regulation concerned with consumption externalities. But there are also important national environmental regulations, and proposals for international environmental regulation, that address production externalities. In connection with imported products, these products might be taxed or prohibited entry, based on the manner in which they are produced. These types of taxes or prohibitions are understood as regulation of process or production methods (PPMs). The classic examples of this type of restriction are evident in the *U.S.—Tuna I*²⁵ and *U.S.—Shrimp*²⁶ cases, where imports are barred due to the way the product is harvested. In the future, a wide variety of issues, including national measures relating to carbon content of imported products, may raise similar issues.

The legal issue relating to PPMs is whether GATT/WTO law authorizes WTO members to maintain regulatory distinctions based on PPMs of imported products. In particular, the debate has focused on whether products that comply with specified PPM criteria and those that do not are “like” for the purpose of the national treatment obligations of Article III.²⁷ The implication of the competition-based approach to “likeness” is that, unless consumers distinguish between products on the basis of the PPM, differences in PPMs are unlikely to render products “un-like.” For example, in the case of carbon regulation, unless consumers distinguish between products on the basis of the amount of carbon used in their manufacture, high carbon-intensity and low carbon-intensity products would be treated as like products.

The pre-WTO *Tuna* Panel took the following approach. Under a GATT Article III analysis, regulation of PPMs, which by their nature are carried out in the exporting state, are not “subject to” Article III because, according to the Panel’s interpretation, Article III deals only with regulation of products, as opposed to regulation of the production process. The consequence of not being subject to Article III is strict scrutiny under Article XI, based on an interpretation of the *ad note* to Article III to the effect that if this type of measure is not subject to Article III it is subject to Article XI. These PPM-based national measures fail the strict scrutiny test of Article XI because

24. Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.128, WTO Doc. WT/DS400/AB/R / WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *EC—Seal Products*].

25. Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R, (Sept. 3, 1991), GATT BISD (39th Supp.), at 155 (unadopted) [hereinafter *U.S.—Tuna I*].

26. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *U.S.—Shrimp*].

27. See, e.g., Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59 (2002).

they operate to restrict market entry and are therefore illegal quantitative restrictions, unless an exception applies under Article XX. In the WTO period, the *U.S.—Shrimp* dispute presented similar facts and was analyzed at the Panel level in a similar manner, but the Article XI violation found by the Panel was not challenged by the United States and therefore the Appellate Body did not have an opportunity to consider whether PPMs should be analyzed under Article III.

The advantage of this approach to PPMs is that the product-process distinction serves as a clear and simple rule on territorial–extraterritorial regulatory distinctions in the main GATT market access rules. *Production processes* occur in the exporting state. Policies effected within the territory of the exporting state are not under the jurisdiction of the importing state, even using the lever of trade restrictions. *Products* coming into the territory of the importing state are. This way, a certain territorial vision of the regulatory autonomy of both the importing and exporting states would be maintained. Physical characteristics of products can be regulated by the importing state but not non-product related policies. It is worth noting here, however, that, as discussed in Part V, some extra-territorial policy considerations may be available under the exceptional provisions of Article XX.²⁸

However, if Article III does not cover PPM-type regulation, then, under the *ad note* to Article III, PPM-based regulation will likely be viewed as a quantitative restriction prohibited by Article XI, unless excepted under Article XX. This protects the exporting state’s regulatory autonomy, but not that of the importing state.

The fact that under the TBT Agreement the Appellate Body has implicitly found PPMs to be an inherent part of technical regulations raises questions about how this interpretation could influence future jurisprudence on the application of GATT Article III to PPMs.²⁹ In the 2012 Appellate Body decision on *Tuna II*,³⁰ applying Article 2.1 of the TBT Agreement, the Appellate Body accepted that, while the United States had not appealed the Panel’s determination of likeness, it is permissible in theory under the Article 2.1 national treatment obligation to differentiate among products on the basis of a PPM: “Article 2.1 should not be read . . . to mean that any distinctions, in particular ones that are based exclusively on particular product characteristics or on particular processes and production methods, would per se constitute ‘less favourable treatment’ within the meaning of Article 2.1.”³¹ This decision was made in the context of the TBT Agreement, which

28. See Lorand Bartels, *Article XX of GATT and the Rules of Public International Law on Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353 (2002).

29. See Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 169, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter *U.S.—Clove Cigarettes*].

30. See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter *U.S.—Tuna II*].

31. *Id.* ¶ 211.

specifically includes certain PPMs within its scope of coverage, so it does not necessarily suggest the outcome of a GATT Article III case.

Another view is that Article III covers all internal regulations, even when based on PPM or on extra-territorial considerations not reflected in the physical characteristics of the products as such. GATT is concerned with disciplines on products. According to this view, Article III applies to PPM regulations but the operationalization of Article III will generally lead to the conclusion that PPM and non-PPM based products are like products³² based on a competition and product-focused definition of likeness. The implication of the competition-based approach to likeness is that unless consumers distinguish between products on the basis of the amount of carbon utilized in *producing* the product, varying carbon intensity is unlikely to render products “un-like.”

Furthermore, in the *Canada—Feed-in Tariff Program* case, the Appellate Body stated that “what constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product.”³³ It is not clear how far the Appellate Body intended this statement to apply. If Article III does cover PPM-type internal taxes, the Appellate Body’s application of a competition-based test suggests that in most cases, different PPMs would be insufficient to make products “un-like.” For example, carbon-intensive imported products will be found to be “like” low-carbon domestic products. The test under Article III would then prohibit treating like products differently on the basis of PPM considerations. As discussed in more detail below, Article XX could, however, be invoked to justify the use of such a PPM-based regulatory distinction, as was recognized in *U.S.—Shrimp*.

To summarize, if Article III does not cover PPM-type regulations, then, under the *ad note* to Article III, PPM regulations will be viewed as quantitative restrictions (a ban of products not respecting the PPM prescriptions) subject to, and prohibited by, Article XI. If Article III covers PPM type regulations, the Appellate Body’s application of a competition-based test in *EC—Asbestos* suggests that in most cases, different PPMs would be insufficient to make products “un-like.” The test under Article III would then prohibit treating like products differently on the basis of PPM considerations. In this sense the product/process distinction may often restrict the

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

33. Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector / Canada—Measures Relating to the Feed-In Tariff Program*, ¶ 5.63, WTO Doc. WT/DS426/AB/R (adopted May 24, 2013).

extra-territorial application of national measures. Having said that, such Article III-inconsistent PPM regulation may benefit from the policy justifications set forth in Article XX.

C. *Less favorable treatment*

In order to find a violation of Article III:4, like products must be found to be treated “less favourably.” In paragraph 100 of its *EC—Asbestos* decision, the Appellate Body seemed, delphically, to leave open the possibility that this second major prong (after “like products”) of the Article III:4 test—less favorable treatment—would not necessarily be satisfied in cases where states made legitimate regulatory distinctions between (competitively) like products: “however, a Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of “like” imported products “less favourable treatment” than that accorded to the group of ‘like’ domestic products.”³⁴

This possibility has been foreclosed in the 2014 decision in *Seal Products*, where the Appellate Body held for the first time that “less favourable treatment” under Article III:4 would be determined purely by reference to effects on competition.³⁵

This holding, combined with the competition-based determination of like products, leaves no room for respect for national regulatory distinctions within Article III:4 of GATT, unless they happen to be congruent with competitive dynamics.³⁶ This outcome is surprising—how is it that a prohibition of discrimination has evolved into a prohibition of any regulation that happens to have adverse effects on competing imported products? A likely explanation is that the Appellate Body has been excessively modest in its willingness to exercise judgment, seeking a mechanical rule for determining both “like products” and “less favourable treatment.”

So, at this juncture, it appears that the Appellate Body’s Article III jurisprudence is hostile to legitimate regulatory distinctions. It is entirely possible that imported products would be in very close competition, but would result in substantial consumption externalities, or even production externalities, not caused by the like domestic products, making it perfectly rational, and desirable, to impose regulatory distinctions. Yet, under the Appellate Body’s Article III jurisprudence, these distinctions would be illegal, subject only to Article XX exceptions, as discussed below.

Thus the current Article III discrimination jurisprudence would often result in a finding of violation, and legitimate regulation could then only be permitted if an Article XX exception is available. Since the advent of the WTO, scholars and policy makers have wondered about the fact that the

34. Appellate Body Report, *EC—Asbestos*, ¶ 100.

35. Appellate Body Report, *EC—Seal Products*, ¶ 5.101.

36. See Appellate Body Report, *U.S.—Clove Cigarettes*, ¶¶ 118, 138.

TBT Agreement contains MFN and national treatment obligations, as well as other obligations, but lacks a set of general exceptions such as that found in Article XX of GATT. The Article III national treatment jurisprudence described above made this concern more pressing. In *U.S.—Clove Cigarettes*, the Appellate Body has interpreted “less favourable treatment” within the context of Article 2.1 of the TBT Agreement, to include an assessment of non-protectionist regulatory justification.³⁷ This is a departure from its understanding of the same language in Article III of GATT.

While some have assumed that the failure to include a general exceptions clause in the TBT Agreement was unintentional, Frieder Roessler suggests that “the drafters of the TBT Agreement . . . assumed that technical regulations that distinguish products with different characteristics for legitimate policy reasons would not be found to violate that Agreement’s national treatment requirement.”³⁸ They assumed that a national treatment obligation would not be violated by regulation motivated by non-protectionist concerns. Thus, no general exceptions clause was necessary. Note that the competition-based approach to “like products” described above, combined with the competition-based approach to “less favourable treatment,” if extended to Article 2.1 of the TBT Agreement, would be inconsistent with the assumption Roessler argues was made by the drafters of the TBT Agreement.

When this issue came up in the *U.S.—Clove Cigarettes* case, the Appellate Body engaged in a creative interpretation to find that “the context and object and purpose of the TBT Agreement weigh in favour of interpreting the ‘treatment no less favourable’ requirement of Article 2.1 as not prohibiting detrimental impact on imports that *stems exclusively from a legitimate regulatory distinction*.”³⁹

So, the Appellate Body “solved” the problem of its narrow approach to “like products” by interpreting “less favourable treatment” in two different ways within the WTO treaty.

Indeed, in addition to the relevant recitals and Article 2.2 of the TBT Agreement, the Appellate Body referred to the exceptions in Article XX of GATT as part of the context for interpretation of the TBT Agreement. This is starkly inconsistent with the normal *effet utile* approach to interpretation adopted by the Appellate Body, which insists on giving meaning to differences in treaty language: an *effet utile* approach would ordinarily treat the same words in the same treaty the same way.

To be clear, in *U.S.—Clove Cigarettes*, the Appellate Body found that a determination of discrimination in the TBT context requires assessment of the aim of the regulatory measure. The Appellate Body determined that the detrimental impact must stem *exclusively* from a legitimate regulatory dis-

37. Appellate Body Report, *U.S.—Clove Cigarettes*, ¶ 182.

38. ROESSLER, *supra* note 14, at 2–3.

39. Appellate Body Report, *U.S.—Clove Cigarettes*, ¶¶ 180–82 (emphasis added).

inction, in a context where we often see mixed motives and mixed effects. Indeed, perhaps a more appropriate phrase would be “necessary to fulfill a legitimate regulatory objective,” borrowed from Article 2.2, in order to allow for detrimental impacts that necessarily stem from a regulatory distinction, but do not stem exclusively from a regulatory distinction. But if the Appellate Body had chosen that formulation, then it would have been more obvious that Article 2.1 itself was robbed of *effet utile*, subsumed by Article 2.2, which already provides that technical regulations “shall not be more trade restrictive than necessary to fulfil a legitimate objective.”

The adherence to the principle of *effet utile* in this case seems to obstruct the path to a reasonable formulation. But note that if a reasonable formulation, along the lines of “necessary to fulfil a legitimate regulatory objective,” had been selected, then we could observe that the ineluctable substantive drive toward consideration of “aim” or regulatory purpose in de facto discrimination cases causes a rule against discrimination to morph into a proportionality test. So, in effect, we have learned by jurisprudential experience that the line between “discrimination” and proportionality is not as distinct as might have been assumed.⁴⁰

So, in the context of Article 2.1 of the TBT Agreement, the Appellate Body determined that some assessment of the aim of a national measure is appropriate in determining discrimination. Is a similar assessment required under the national treatment analysis in GATT?

In *Seal Products*, the EU argued that the “stems exclusively from a legitimate regulatory distinction” standard developed in *U.S.—Clove Cigarettes* should also be applied to interpretation of the similar “less favourable treatment” language of Article III:4 of GATT.⁴¹ That is, a measure should not be found to impose less favorable treatment within the meaning of Article III:4 if its detrimental impact stems exclusively from a legitimate regulatory distinction. The EU also argued that the MFN obligation in Article I:1 should be read the same way, despite the fact that the term “less favourable treatment” is not included there. The EU simply sought consistent interpretation of “less favourable treatment,” and consistent treatment across sub-agreements: if discrimination requires assessment of the aim of the regulatory measure under the TBT Agreement, discrimination should be determined similarly under GATT. This approach to interpretation not only

40. As might have been predicted, the Appellate Body has already begun to move in this direction under the TBT Agreement. In *Tuna II*, in the context of its TBT Agreement Article 2.1 discrimination analysis, the Appellate Body addressed the question of whether the U.S. tuna labeling regime was sufficiently “calibrated” to different conditions in different areas, asking “whether the United States has demonstrated that this difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.” Appellate Body Report, *U.S.—Tuna II*, ¶ 284.

41. Panel Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R / WT/DS401/R / and Add.1, ¶¶ 7.581-7.586, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R.

accords *effet utile* to the use of similar language in two parts of the WTO treaty, but is also respectful of context and object and purpose, and promotes substantive consistency in the face of suboptimal drafting.

The Appellate Body rejected these arguments, extending the line of WTO jurisprudence described above to the effect that discrimination cases, other than under Article 2.1 of the TBT Agreement, are to be determined based purely on competitive factors, subject to the availability of exceptions under Article XX.⁴² First, imported and domestic products (or under MFN imported products from different countries) would be determined to be “like” or “directly competitive or substitutable” based purely on competitive factors.

Furthermore, in *Seal Products*, the Appellate Body held for the first time that “less favourable treatment” under Article III:4 would be determined purely by reference to the effect on competition.⁴³ The evocative language of the Appellate Body’s 2001 report in the *EC—Asbestos* case, suggesting in paragraph 100 that a broader analysis is possible, was interpreted into irrelevance by the Appellate Body in the *Seal Products* decision.

Note the implications of the Appellate Body’s decision: regulatory purposes are now irrelevant to determinations of discrimination under the prohibitions of GATT (although they are relevant to the exceptions under Article XX), but not under the TBT Agreement.⁴⁴ The EU made the argument that this holding would leave a narrower right to regulate in the GATT than that which was found to exist in Article 2.1 of the TBT Agreement pursuant to the Appellate Body’s *U.S.—Clove Cigarettes* decision to respect “legitimate regulatory distinctions” under that provision—which would be inconsistent with what most people think was the negotiators’ and drafters’ intent. After all, the GATT only has Article XX, which has a limited list of permissible regulatory purposes, and for which the respondent largely bears the burden of proof. In response to the EU’s assertion of this point, the Appellate Body responded that the EU was unable to articulate any regulatory purpose not listed in Article XX of GATT.⁴⁵ However, it is easy to see in connection with the *Seal Products* case that the protection of indigenous people is not listed in Article XX, nor is consumer protection included. Furthermore, as Roessler has pointed out, the EU did provide concrete examples to illustrate its concerns.⁴⁶

42. See Appellate Body Report, *EC—Seal Products*.

43. *Id.* ¶ 5.101.

44. The Appellate Body asserts that the same things that form the basis for a regulatory distinction could also form the basis for a difference in competitive situation, but this does not mean that regulatory distinctions have any independent role. Indeed, as noted above, the reason for regulation is often that the marketplace fails sufficiently to make relevant distinctions.

45. See Appellate Body Report, *Seal Products*, ¶ 5.128.

46. See ROESSLER, *supra* note 14, at 5 n.17 (citing Other Submission of the European Commission, *European Union in European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 307 n.17, WTO Doc. WT/DS400 (Jan. 29, 2014)).

Seal Products represents what one may only hope will be a turning point in which the Appellate Body will apply Article XX liberally in order to ensure that states have sufficient regulatory autonomy, now that it has removed consideration of regulatory purpose from Article III discussion. Perhaps also, the Appellate Body will emphasize context, and object and purpose, over the more arid textualism and *effet utile* heretofore applied, in order to bring consistency and rationality to the regulatory exceptions in WTO law.

III. ARTICLE I MFN TREATMENT

The MFN anti-discrimination discipline expressed in Article I of GATT applies not only to ordinary customs duties, but also to the matters referenced in Article III:2 and III:4, including as salient for our purposes, domestic regulation. Thus, for example, if the EU were to require carbon permits for imported goods in a way that reflected differences in the carbon regulation of different exporting states, it could violate the MFN obligation of Article I.

In the 1952 *Belgian Family Allowances* Panel report,⁴⁷ the GATT Panel examined a Belgian law imposing a charge on foreign goods purchased by public bodies when they originated in a country whose system of family allowances did not meet specific requirements. Note that there was no basis for distinguishing the physical characteristics of the goods. While the Panel found it difficult to arrive at a “very definite ruling,” it stated that it “was of the opinion that the Belgian legislation on family allowances was not only inconsistent with the provisions of Article I (and possibly with those of Article III, paragraph 2), but was based on a concept which was difficult to reconcile with the spirit of the General Agreement.”⁴⁸

The Panel in *Belgian Family Allowances* explained as follows:

The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect [the requirement that advantages be granted unconditionally], and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.⁴⁹

The meaning of “like products” in Article I is probably closer to the scope of “like products” in Article III:4 than to that contained in Article

47. Report of the Panel, *Belgium—Family Allowances*, G/32 (Nov. 7, 1952), GATT BISD (1st Supp.) (1952).

48. *Id.* ¶ 8.

49. *Id.* ¶ 3.

III:2.⁵⁰ Thus, the fundamentally competition-based approach to “like products” described above would be applied, presumably with the same type of outcome. That is, all steel of a certain type would be treated as like products, and required to be treated the same, regardless of its origin, and regardless, for example, of how much carbon was used in the relevant production process.

However, in the more recent *Canada—Autos* case, the Panel rejected Japan’s argument that Article I prohibits less favorable treatment based on criteria unrelated to the product itself.⁵¹ The Panel found that:

A review of [previous dispute settlement] reports shows that they were concerned with measures that were found to be inconsistent with Article I:1 not because they involved the application of conditions that were not related to the imported product but because they involved conditions that entailed different treatment of imported products depending upon their origin.⁵²

The Appellate Body did not reach this issue, but emphasized the unconditional and broad scope of Article I:1 in finding that mere differential treatment of products originating in different member states, regardless of the producer-based rationale, violates Article I:1. Although the Appellate Body did not emphasize this, its interpretation is based on the “like products” reference of Article I:1—automobiles are like products regardless of whether, in that case, their manufacturers have or have not invested in Canada.⁵³ Given the focus on Article I:1’s reference to the matters addressed in Article III (national treatment), and to “any advantage,” it appears possible that “like products” regulated or taxed differently due to different production processes might result in a violation of MFN.⁵⁴ The Panel

50. “Like products” as defined in Article III:2 is understood to be narrower than “like products” as defined in Article III:4, due to the inclusion in Article III:2 of a separate discipline for a broader category of “directly competitive or substitutable” products. See Robert E. Hudec, *“Like Product”: The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101–123 (Thomas Cottier et. al. eds., 2000). See also William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 13–50 (Thomas Cottier et. al. eds., 2000).

51. See Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/R / WT/DS142/AB/R (adopted Feb. 11, 2000).

52. *Id.* ¶ 10.25.

53. Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 85, WTO Doc. WT/DS139/AB/R / WT/DS142/AB/R (adopted May 31, 2000).

54. For an example of a circumstance in which the fact of government certification did not provide sufficient distinction to support a finding that products were not ‘like,’ see Report of the Panel, *European Economic Community—Imports of Beef from Canada*, L/5099 (Mar. 10, 1981), GATT BISD (28th Supp.), at 92 (1981). For an example of differential import licensing procedures violating Article I:1, see Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 7.188–7.193; 7.251–7.256; 7.235–7.241, WTO Doc. WT/DS27/R (adopted Sep. 25, 1997).

in *Indonesia—Autos* took a similar view.⁵⁵

Thus, there is still some uncertainty as to whether national environmental regulation that focuses on foreign PPMs would violate the MFN rule of Article I of GATT. But if a tribunal applied the competition-based approach to like products, and a competition-based approach to its analysis of the “any advantage” prong of Article I, we would expect to find a violation.

IV. GATT ARTICLE XX

Article XX of GATT provides general exceptions from obligations under GATT. Analysis under Article XX follows a two-step process: first, determine whether the national measure found to violate another provision of GATT preliminarily qualifies under one of the subheadings, and second, determine whether it meets the requirements of the “chapeau” of Article XX.

Article XX of GATT provides exceptions from any obligation under GATT, including those discussed above. So, importantly, even if a national environmental measure violates Articles I or III, it may still be permitted if it satisfies the conditions set forth in Article XX. The most likely bases for exception would be Article XX(b) for measures necessary to protect human, animal, or plant life or health, or Article XX(g) for measures relating to the conservation of exhaustible natural resources. A measure must also satisfy the “chapeau” of Article XX, which requires that it not “constitute a means of arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade.” In this part, I will focus on the “necessary for the protection of human, animal, or plant life or health” test in Article XX(b), the “relating to conservation of exhaustible natural resources test” in Article XX(g), and the chapeau.

A. Article XX(b)

In order to qualify for an exception under Article XX(b), the relevant measure must (i) be necessary, (ii) to protect human, animal, or plant life or health, and (iii) satisfy the requirement of the chapeau of Article XX to the effect that it not be applied as arbitrary or unjustifiable discrimination, or a disguised restriction on trade. The burden of proof for each of these parameters is on the respondent. As explained below, in its Article XX jurisprudence, the Appellate Body purports to engage in the type of nuanced judgment that it avoids under Article III, but does not actually do so.

Traditionally in GATT, the exceptional provisions of Article XX(a), (b) and (d) have been available to justify measures otherwise incompatible with

55. See Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶¶ 14.145–14.147, WTO Doc. WT/DS54/R / WT/DS55/R / WT/DS59/R / WT/DS64/R and Corr. 1 and 2 (adopted July 23, 1998).

other GATT provisions if those measures are “necessary” to achieve certain policy objectives. This has been interpreted to require that the country invoking these exceptions demonstrate that no other more WTO-compatible or less-restrictive alternative was reasonably available to pursue the desired policy goal.

A contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.⁵⁶

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

In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.⁵⁷

After reiterating that WTO Members have the right to determine for themselves the level of enforcement of their domestic laws,⁵⁸ the Appellate Body called for an “authentic” balancing and weighing of (at least) these variables: “The more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument;”⁵⁹ “[t]he greater the contribution [to the realiza-

56. Report of the Panel, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Nov. 7, 1989), GATT BISD (36th Supp.), at 45 (1989). See also Report of the Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.52, DS23/R (June 19, 1992), GATT BISD (39th Supp.), at 71 (1992); Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 23, DS10/R (Nov. 7, 1990), GATT BISD (37th Supp.), at 7 (1990).

57. Appellate Body Report, *Korea—Various Measures on Beef*, ¶ 164, WTO Doc. WT/DS161/AB/R / WT/DS169/AB/R (adopted Dec. 11, 2000).

58. See *id.* ¶ 177.

59. *Id.* ¶ 162.

tion of the end pursued], the more easily a measure might be considered to be ‘necessary;’”⁶⁰ and “[a] measure with a relatively slight impact upon imported products might more easily be considered as ‘necessary’ than a measure with intense or broader restrictive effects.”⁶¹

While this sounds like the type of proportionality or balancing test that would seek to maximize the combination of environmental protection and increased welfare from trade, it is noteworthy that this test has never been applied as described. On the other hand, in view of the excessively restrictive approach to Article III, it is comforting that Article XX often seems to be applied with excessive deference. So, while the jurisprudence is unsatisfactory and unpredictable, the results have so far not been highly objectionable.

In *U.S.—Gambling* (2005) (interpreting the similar provisions of the General Agreement on Trade in Services), the Appellate Body further clarified the process for determining whether or not a measure is “necessary.” First, the responding party must make a prima facie case that its measure is “necessary” by “weighing and balancing” the factors outlined in *Korea—Various Measures on Beef*. Then, if the *complaining party* raises an alternative measure that it feels the responding party could have taken, it is for the responding party to rebut, showing that the proposed alternative does not achieve the regulatory goal or is not reasonably available. In contrast to certain GATT decisions in the pre-WTO era, the Appellate Body thereby determined that the burden of proof was not on the responding Member to demonstrate that there are *no* reasonably available alternatives, but rather for the complaining Member to make a prima facie case that there are.⁶² Moreover, the Appellate Body held that an alternative measure may not be considered reasonably available “where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.”⁶³

The Appellate Body’s synthesis of these two steps of the necessity test is contained in its *China—Publications and Audiovisual Products* decision:

In each case, a sequential process of weighing and balancing a series of factors was involved. *US – Gambling* sets out a sequence by using the phrases: “The process begins with an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure”; “Having ascertained the importance of the particular interests at stake, a Panel should then turn to the other factors that are to be ‘weighed and balanced’”; and “A compari-

60. *Id.* ¶ 163.

61. *Id.*

62. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306–311, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005) [hereinafter *U.S.—Gambling*].

63. *Id.* ¶ 308.

son between the challenged measure and possible alternatives should then be undertaken.” The description of this sequence in *Brazil – Retreaded Tyres* mentions, first, the relevant factors to be weighed and balanced for the measure sought to be justified, and continues that the result of this analysis “must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective”. Although the language used is not identical, both reports articulate the same approach and, like the Appellate Body report in *Korea – Various Measures on Beef*, emphasize the need to identify relevant factors and undertake a weighing and balancing process including, where relevant, with respect to proposed alternative measures that may be less trade restrictive while making an equivalent contribution to the relevant objective.⁶⁴

In *Brazil—Tyres*, in the case of alternatives to Brazil’s import ban on re-treaded tires, such as landfilling, which might have reduced the number of waste tires, but would entail side effects that might have diminished health, the Panel came up empty-handed because it provided no analysis of the relative magnitude of each risk. Here we see that it is impossible to weigh and balance, or even to evaluate alternatives in this context without some type of information regarding magnitude. Brazil’s actual ban was *theorized* to contribute to health by reducing the number of waste tires, while other alternatives might also reduce the number of waste tires or otherwise reduce the adverse effects of waste tires, at some cost in terms of other dimensions of health. And yet, the Panel rejected alternatives on the ground that they were likely to have some collateral deleterious effect on health, without assessing the magnitude of this effect.⁶⁵ Without knowing the magnitude of each effect, it is impossible to know whether Brazil’s import ban, or the alternative, protects health better, or whether it is justified when compared to its adverse trade effects.

According to the Appellate Body, “the weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment . . . [T]he contribution of the measure has to be weighed against its trade restrictiveness”⁶⁶ It defies understanding how this weighing could be done, and how the Appellate Body could agree with the Panel that “the contribution of the Import

64. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 242, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [citations omitted].

65. See Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/R (adopted Dec. 17, 2007), as modified by Appellate Body Report WT/DS332/AB/R.

66. Appellate Body Report, *Brazil—Tyres*, ¶ 82.

Ban to the achievement of its objective outweighs its trade restrictiveness”⁶⁷ without an assessment of the magnitude of the contribution of the import ban. How could one value possibly be said to outweigh the other when it has not been measured? Thus, this is no balancing test.

While the full weighing and balancing under Article XX necessity announced in *Korea—Beef* was not expected by the diplomats who negotiated the WTO, or their governments, the least restrictive alternative test was clearly intended. After all, in addition to the fact that the least restrictive alternative test is the natural meaning of the word “necessary,” this test had been enunciated in the GATT jurisprudence under Article XX, and was explicitly adopted (as a least trade restrictive alternative test) in a similar context in the TBT Agreement and in the SPS Agreement. Furthermore, it has been explicitly adopted by the Appellate Body. Therefore, it seems reasonable to say that the Appellate Body has backed away from its mandate.

States determined, in the Uruguay Round, that one of the functions of dispute settlement would be to identify in these contexts the existence of less “treaty inconsistent” or less trade restrictive alternatives that would contribute equivalently to the achievement of the relevant goal. They implicitly appointed the Panels and the Appellate Body to serve as their agents to perform this function. The Appellate Body has refused this mandate.

It appears that the Panel, and the Appellate Body, sought to be deferential to Brazil’s regulatory autonomy, especially in the environmental context. It is easy to see why this is an attractive course. But in order to rationalize deference, the decisions have done much violence to text, to precedent, and to legal logic. Furthermore, this approach cannot be explained by judicial modesty in the face of difficult public policy questions. Indeed, a balancing or least restrictive alternative examination in this case posed daunting problems of judicial determination of public policy parameters. But the Panel and the Appellate Body in *Brazil—Tyres* did not avoid this type of determination: they *made it*, using vague and unsatisfactorily conclusory statements, rather than seeking the best data available.⁶⁸ The Appellate Body noted, wistfully, that certain “estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel’s findings.”⁶⁹

B. Article XX(g)

In order to qualify for an exception under Article XX(g), the relevant measure must (i) *relate to* the conservation of exhaustible natural resources, (ii) be made effective in conjunction with restrictions on domestic produc-

67. *Id.* ¶ 179.

68. For a similar criticism in another context of Panel and Appellate Body analysis, see André Sapir & Joel P. Trachtman, *Subsidization, Price Suppression, and Expertise: Causation and Precision in Upland Cotton*, 7:1 WORLD TRADE REV. 183 (2008).

69. Appellate Body Report, *Brazil—Tyres*, ¶ 153.

tion or consumption, and (iii) satisfy the requirement of the chapeau of Article XX to the effect that it not be applied as arbitrary or unjustifiable discrimination, or a disguised restriction on trade. The burden of proof for each of these parameters is on the respondent. Note that instead of the “necessary” test of Article XX(b), here we have a “relating to” test.

The first question to be answered under Article XX(g) is whether there is an exhaustible natural resource being protected by the national measure. In *U.S.—Gasoline*, the Panel determined that clean air qualifies as an exhaustible natural resource, on the basis that it has a value and is therefore a resource, that it can be depleted and is thus exhaustible, and that it is natural.⁷⁰ In *U.S.—Shrimp*, the Appellate Body interpreted the term “exhaustible natural resources” in an evolutionary manner, referring to “contemporary concerns of the community of nations about the protection and the conservation of the environment.”⁷¹ On this basis, the Appellate Body declined to interpret “exhaustible natural resource” in accordance with its original meaning, which may have been confined to non-living resources, and thereby advanced environmental protection.

In its *U.S.—Gasoline* report, although the parties had both relied on the GATT “primarily aimed at” test for whether a measure is “related to” the exhaustion of natural resources, the Appellate Body noted that the threshold of Article XX(g) did not contain a requirement that the measure be “primarily aimed at,” but only a requirement that the measure be “related to.”⁷² The Appellate Body examined whether “the means (the challenged regulations) are, in principle, reasonably related to the ends.”⁷³

In *U.S.—Shrimp*, the Appellate Body appears to have abandoned the “primarily aimed at” test and focused on the means–ends relationship⁷⁴ between the measure and the goal pursued: “we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles.”⁷⁵ The “relating to” requirement under Article XX(g) has since

70. See Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report, WT/DS2/AB/R, ¶ 6.37.

71. Appellate Body Report, *U.S.—Shrimp*, ¶ 129.

72. Appellate Body Report, *U.S.—Gasoline*, at 17–22. In particular, participants and third parties agree that: “we see no need to examine this point further, *save, perhaps, to note that the phrase “primarily aimed at” is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX.*” *Id.* at 21–22 (emphasis added).

73. *Id.* at 20–22.

74. See Appellate Body Report, *U.S.—Shrimp*, ¶¶ 156–60.

75. See *id.* ¶ 137; see also *id.* ¶ 141 (“Focusing on the design of the measure here at stake, it appears to us that Section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States—Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.”).

been defined as a “close and genuine relationship of ends and means.”⁷⁶ In *China—Rare Earths*, the Appellate Body affirmed the means–ends relationship requirement articulated in *China—Raw Materials*, adding that there was no requirement under Article XX(g) that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption.⁷⁷

In *China—Rare Earths*, China argued, under Article XX(g), that its measure made a “contribution” to the conservation of natural resources, borrowing the “contribution” concept from Article XX(b) jurisprudence, where, indeed, the contribution is permitted to be relatively small. However, the Appellate Body insisted on a formal separation of concepts:

In the light of the different connecting words used, we consider that a mixing of the different tests under Article XX(b) and Article XX(g), absent of context, would result in an approach that ignores the important distinctions between the various subparagraphs of Article XX.⁷⁸

Here, one might have taken a different approach, based not on *effet utile* but on the object and purpose of the treaty, recognizing that while the connecting words are different, the substantive concept and purpose—that the national measure must be authentic enough to make a measurable contribution to the purported goal—is similar. Context, object, and purpose would counsel a less hermetically (and hermeneutically) sealed approach to these different subparagraphs. Excessive formalism can result in the erection of linguistic or jurisprudential structures that may not have been intended by the drafters and, more importantly, that may fail to encompass the substantive nuance of real life situations.

On appeal, China argued that the Panel had inappropriately declined to examine evidence of actual effects on conservation. The Appellate Body conceded that “the text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision.” But it continued that “all the same, we observe that, in past disputes, the Appellate Body has emphasized the importance of the design and structure of the challenged measure to a proper assessment of whether a measure satisfies the requirements of Article XX(g).”⁷⁹ It went on to argue that focus on “design and structure” allows the Panel to go beyond the text of the national measure, and even beyond nominal intent, which

76. Appellate Body Report, *U.S.—Shrimp*, ¶ 136.

77. See Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶¶ 356, 361, WTO Doc. WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R (adopted Feb. 22, 2012).

78. Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶ 5.116, WTO Doc. WT/DS431,432,433/AB/R (adopted Aug. 29, 2014) [hereinafter *China—Rare Earths*].

79. *Id.* ¶ 5.96.

seems necessary to a substantive analysis, but then it agreed with the Panel, and with prior jurisprudence, that it is not necessary to determine the empirical effects of the measure.⁸⁰

Here, as in the case of Article III, the Appellate Body has developed a jurisprudence interpreting “relating to” in a narrow way that fails to do justice to the plain language of Article XX(g). *Rare Earths* is a good example of a circumstance where it is quite difficult to determine whether the Chinese measure relates to conservation without examining its effects. By foreclosing this evidence, the Appellate Body artificially curtailed its ability to apply the treaty provision. Nor does the Appellate Body present a basis in interpretative practice for this limitation.

The Panel based its decision that China’s export quotas do not “relate to conservation” on the Panel’s view that, while China’s export quotas would induce conservation on the part of foreign consumers, it would also send a “perverse signal” of lower prices in the domestic market, inducing reduced conservation by domestic consumers. The Panel’s statement on application of Article XX(g) is worth quoting at length:

The Panel takes note of China’s indication that various rare earth recycling projects, efforts to modify industrial designs of downstream products so that they use less rare earths, and developments of rare earth substitutes are under way. The Panel acknowledges that these efforts may go a long way towards furthering what all involved in this dispute recognize is China’s bona fide conservation policy. Nevertheless, our consideration of the design and architecture of China’s export quota on rare earths does not convince us that the export quota is designed in such a way as to ensure that domestic demand is not stimulated by low prices. There does not appear to be any mechanism to ensure that the export quota is set at such a level that, in combination with the extraction and/or production caps, no perverse incentives will be sent to domestic consumers.⁸¹

Here, the Panel’s failure to consider actual effects becomes determinative, and improperly so. The Panel examined design and structure, finding that there is some reduction of foreign consumption, but that the “perverse incentives” expand domestic consumption. This is definitely true in theory and we would expect it to be true in practice.

But the Panel never evaluated the magnitude of the foreign reduction, and the magnitude of the effect of the perverse incentives. Note the language of the Panel’s statement: China must ensure that no perverse incen-

80. *Id.* ¶ 5.98 (citing *U.S.—Gasoline*, at 21).

81. Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶ 5.210, WTO Doc. WT/DS431/R / WT/DS432/R / WT/DS433/R (adopted Dec. 13, 2013) [hereinafter *Rare Earths Panel Reports*]; see also *id.* ¶¶ 7.172–7.179, 7.448.

tives are sent. But in order to “relate to” conservation, should it not be enough if the effects of the perverse incentives are less than the effects of the conservation incentives? If actual effects are not examined, then all the Panel has to support a determination that the Chinese measure does not relate to conservation is its speculation about the relative magnitudes of the effects.

The Appellate Body simply approved the Panel’s reasoning in this context.⁸² This seems too high a burden to set in connection with the “relating to” test: China was not required to eliminate perverse incentives, but to show that the overall mechanism results in some measure of conservation. Furthermore, by declining to examine actual effects, the Panel precluded presentation of evidence regarding the relative magnitudes of the effects.

China also challenged the Panel’s finding that the “in conjunction with” requirement is to be evaluated, again, based only on structure and design, and not on actual effects. So, here, although the Appellate Body upheld the Panel’s reasoning on the basis that the Panel never stated that it was *precluded* from examining actual effects, it appears that examination of effects will rarely, if ever, be appropriate. The Appellate Body referred to its earlier response to China’s claim regarding “relating to,” stating, somewhat audaciously, that “the legal characterization of a measure cannot be contingent upon the occurrence of subsequent events.”⁸³ Let us be clear that the Appellate Body is stating that actual effects are not material to the legal characterization of a measure. This certainly is not true in other areas of law, such as murder, or even in other areas of WTO law, such as the law of subsidies.

This language is striking, because the plain language of Article XX(g)—asking whether a measure relates to conservation of exhaustible natural resources and whether it is made effective in conjunction with domestic restrictions on production or consumption—would ordinarily be understood as asking whether the measure actually conserves natural resources and whether domestic production or consumption is actually restricted. Here, the Appellate Body seems to have added words of limitation that are not contained in Article XX(g).

Thus, in this decision, the Appellate Body appears to seek to avoid imposing difficult evidentiary and judgmental burdens on panels and on itself, and to protect the integrity of its jurisprudence by sacrificing the plain language of the treaty, also apparently inconsistently with the context, object, and purpose of that language. Furthermore, one might say that the Appellate Body is protecting the legal professional monopoly over determinations under Article XX(g) from encroachment by a more empirical methodology.

82. See Appellate Body Report, *China—Rare Earths*, ¶ 5.156.

83. *Id.* ¶ 5.138.

C. Extraterritoriality in Articles XX(b) and (g)

During the GATT era, the second *Tuna* Panel found that it was permissible under Article XX to protect animals outside the territorial jurisdiction of the regulating state.⁸⁴ Since the advent of the WTO, the Appellate Body has not yet provided a definitive interpretation as to whether relevant provisions of Article XX, such as Article XX(b) or (g), of GATT, allow exceptions for actions by importing states to protect values outside their territory.⁸⁵ In *U.S.—Shrimp*, the Appellate Body avoided addressing this issue on the grounds that the relevant “exhaustible natural resource”—sea turtles—were migratory and might enter U.S. waters.⁸⁶ However, the Appellate Body suggested that there must be “sufficient nexus” between the protected value (in that case the sea turtles) and the regulating state.

In its *Tuna II* decisions, under the TBT Agreement, the Appellate Body accepted that a “legitimate regulatory goal” may include the protection of dolphins outside the territorial jurisdiction of the regulating state. While this does not necessarily mean that Article XX can exempt measures seeking to address the listed goals outside the territory of the regulating state, it is a step in that direction.

D. The Chapeau of Article XX

Even if a measure satisfies the requirements for Article XX(b) or (g), it must still satisfy the requirements of the chapeau of Article XX in order to qualify for an exception. The chapeau establishes three standards regarding the application of measures for which justification under Article XX may be sought: first, there must be no “arbitrary” discrimination between countries where the same conditions prevail; second, there must be no “unjustifiable” discrimination between countries where the same conditions prevail; and, third, there must be no “disguised restriction on international trade.”⁸⁷

Therefore, a violation of any of these standards would suffice to disqualify the measure under Article XX. Yet, the standards embodied in the language of the chapeau of Article XX are not only different from the requirements of the remainder of Article XX, but are also different from the standards used for the substantive violations of GATT.⁸⁸

84. Report of the Panel, *U.S.—Tuna I*, ¶ 5.20.

85. For a useful discussion in the human rights context, see Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353 (2002).

86. See Appellate Body Report, *U.S.—Shrimp*, ¶ 133.

87. See Appellate Body Report, *U.S.—Gasoline*, at 23; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 118, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001); Appellate Body Report, *U.S.—Shrimp*, ¶ 150.

88. See Appellate Body Report, *U.S.—Shrimp*, ¶ 150. See also Appellate Body Report, *EC—Asbestos*, ¶ 115: “Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply

The Appellate Body in *Shrimp* (faced with a measure benefiting from a provisional justification under Article XX(g)) examined, under the chapeau of Article XX, whether less trade restrictive alternatives were reasonably available to the United States and whether the restrictiveness of the measure was somehow disproportionate, since similar costs were not at all imposed on domestic producers.⁸⁹ In other words, even after Article XX(g) itself is satisfied, a least trade restrictive alternative analysis akin to a “necessity” test seems to be performed under the chapeau of Article XX.

As part of the less trade restrictive alternative analysis, one question is whether the respondent has made sufficient attempts to engage in “across-the-board negotiations with the objective of concluding bilateral or multi-lateral agreements”⁹⁰ regarding the concern at issue. The Appellate Body found in the *Shrimp* case that the “most conspicuous flaw” in the U.S. measure was “its intended and actual coercive effect on the specific policy decisions made by foreign governments.”⁹¹ The Appellate Body stated that the U.S. measure was, “an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.”⁹²

Under the chapeau it is permissible to treat different countries differently, so long as the discrimination is not arbitrary, is justifiable, and is based on salient differences. Purity of motive is important. To the extent that imports from different sources, or even imports of different types, are treated differently for reasons that are not reflected in the justifying purpose under Article XX(b) or XX(g), a national import restriction may be determined to include arbitrary or unjustifiable discrimination.⁹³

Due process in a national import restriction regime would be necessary. The Appellate Body found the U.S. certification process at issue in the *U.S.—Shrimp* case to constitute arbitrary discrimination because exporting countries were “denied basic fairness and due process, and are discriminated against, vis-à-vis those Members which are granted certification.”⁹⁴

In *Brazil—Tyres*, the Appellate Body held that discrimination within the chapeau is arbitrary or unjustifiable “when the reasons given for this discrimination bear no rational connection to the objective *falling within the*

because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to “adopt and enforce” measures “necessary to protect human . . . life or health.”

89. See Appellate Body Report, *U.S.—Shrimp*, ¶ 171.

90. *Id.* ¶ 166.

91. *Id.* ¶ 161.

92. *Id.*

93. See Appellate Body Report, *Brazil—Retreaded Tyres*, ¶ 227; see also Appellate Body Report, *EC—Seal Products*, ¶ 5.306.

94. Appellate Body Report, *U.S.—Shrimp*, ¶ 181.

purview of a paragraph of Article XX . . .”⁹⁵ This limits the scope for measures with multiple purposes. The Appellate Body softened this line slightly in *Seal Products*: “one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.”⁹⁶

In sum, Article XX offers justifications that can lead to exemption from any provision of GATT,⁹⁷ in situations where the trade restriction or discrimination is viewed as necessary, or otherwise appropriately and proportionately related to the implementation of the policies listed in Article XX.

V. MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAs)

So far, this article has focused on the relationship between trade and environment within the WTO legal universe. But in the broader universe of international law, of course, trade law and environmental law are of equal weight, and conflicts between them can be worked out diplomatically. To some extent, they can also be worked out judicially, although it is unlikely that the WTO Appellate Body will directly apply international environmental law.

The reluctance of the Appellate Body to do so, as described below, and as probably dictated by the DSU, leaves open the possibility for a ruling holding a member state in violation for a measure that is required by international environmental law. So far, Article XX has avoided direct conflict between international environmental law and international trade law in WTO dispute settlement, but some measures required by international environmental law might not be justified under Article XX. For example, the measure required by international environmental law may, for otherwise appropriate reasons, not be the least WTO inconsistent means to achieve the environmental goal, and therefore may not be “necessary” under Article XX(b).

The Appellate Body in the early *U.S.—Gasoline* report memorably wrote that the GATT “is not to be read in clinical isolation from public international law.”⁹⁸ Similarly, in the *U.S.—Sbrimp* case, the Appellate Body re-

95. Appellate Body Report, *Brazil—Retreaded Tyres*, ¶ 227 (emphasis added).

96. Appellate Body Report, *EC—Seal Products*, ¶ 5.318.

97. See Appellate Body Report, *U.S.—Gasoline*, at 24 (“The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words “nothing in this Agreement”, and Article XX as a whole including its chapeau more easily integrated into the remainder of the General Agreement, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.”).

98. Appellate Body Report, *U.S.—Gasoline*, at 17.

ferred to “modern international conventions and declarations” in order to interpret the terms “exhaustible” and “natural resources” in Article XX(g) of GATT.⁹⁹

The WTO Dispute Settlement Understanding (DSU) does not explicitly specify the body of applicable law that WTO adjudicators are assigned to interpret and apply, although it does provide that the mandate to Panels and the Appellate Body is “to clarify the existing provisions of the [WTO covered agreements],” which are listed in Appendix 1 to the DSU.¹⁰⁰ The Appellate Body has said clearly that WTO adjudicators are not empowered to interpret non-WTO international law for purposes of applying non-WTO international law.

In the 2006 *Mexico—Soft Drinks* case, the Appellate Body stated that it would be inappropriate for a Panel to make a determination whether the United States had acted inconsistently with its NAFTA obligations.¹⁰¹ It declined to accept “Mexico’s interpretation [which] would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements.”¹⁰² While the Appellate Body determined that it could not “determine rights and duties outside the covered agreements,” it did not explicitly state that it could not give effect to rights and duties outside the covered agreements in assessing claims based on WTO law.

Of course, if an MEA were understood to actually modify WTO covered agreements, then the covered agreements, as modified, would be applicable as law in WTO dispute settlement. However, in *Peru—Agricultural Products*, the Appellate Body held that other treaties, such as free trade agreements, do not modify WTO obligations under Article 41 of the VCLT, because “the WTO Agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over” Article 41.¹⁰³ Therefore, it is unlikely that an MEA would be applicable as law in WTO dispute settlement.

The combination of the *Mexico—Soft Drinks* and *Peru—Agricultural Products* decisions means that WTO dispute settlement will not determine rights and duties under other international law, and that this other international law, even if it is somehow made definitive, will not modify existing WTO

99. Appellate Body Report, *U.S.—Shrimp*, ¶ 130.

100. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Apr. 15, 1994, 1869 U.N.T.S. 401.

101. See Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 56, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006).

102. *Id.*

103. Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶ 5.112, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015). See also JOEL P. TRACHTMAN, *Jurisdiction in WTO Dispute Settlement*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 132, (Rufus Yerxa & Bruce Wilson eds., 2005); Joel P. Trachtman, Book Review, 98 AM. J. INT’L L. 855 (2004) (reviewing JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003)).

law. The only influence that other WTO law can have, then, is in interpretation.

The WTO Appellate Body has used non-WTO international law in the interpretation of WTO law. Article 31(3)(c) of the VCLT specifically instructs that interpreters shall “take into account . . . any relevant rules of international law applicable in the relations between the parties.”¹⁰⁴ Furthermore, the Appellate Body has not yet definitively addressed the question as to whether the other relevant rules of international law used in interpretation under Article 31(3)(c) of the VCLT are limited to those to which all WTO members subscribe, or whether they only need bind the parties to the particular dispute.¹⁰⁵

In the *EC—Biotech* case, the Panel determined that “Article 31(3)(c) should be interpreted to mandate consideration of rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted.”¹⁰⁶ Therefore, only those international legal rules to which all WTO Members are party, such as general customary international law or treaties that include all WTO Members, would be *required* to be taken into account. The Panel observed that “requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.”¹⁰⁷ This position was subsequently criticized in a report of the International Law Commission.¹⁰⁸ In the *EC—Biotech* case, since the complainants (as well as many other WTO Members) had not ratified the Biosafety Protocol, the Panel found that the language of

104. VCLT, *supra* note 21, art. 31(3)(c).

105. Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 845–46, WTO Doc. WT/DS316/AB/R (adopted Mar. 23, 2012).

106. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.70, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Nov. 21, 2006) [hereinafter *EC—Biotech*].

107. *Id.*

108. See Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, at 226–28, 237–39 (Apr. 13, 2006) (finalized by Martti Koskenniemi) (“The Panel buys what it calls the “consistency” of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, taking “other treaties” into account as evidence of “ordinary meaning” appears a rather contrived way of preventing the “clinical isolation” as emphasized by the Appellate Body A better solution is to permit reference to another treaty provided that the parties in dispute are also parties to that other treaty. In addition, it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been “implicitly” accepted or at least tolerated by the other parties “in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned.”)

Article 31(3)(c) of the VCLT did not require it to take the Biosafety Protocol into account in the interpretation of the WTO treaty.¹⁰⁹

The Panel in the *EC—Biotech* case nonetheless left open the possibility that a Panel would have *discretion* to take into account another international treaty where the parties to the dispute had each ratified that other treaty.¹¹⁰ In addition, it recognized that other rules of international law might inform the interpretation of WTO law as applied to a particular factual context, rather than as rules of law.

The *EC—Biotech* Panel also maintained, although in a more circumscribed manner, that:

[O]ther relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do.¹¹¹

An important example of this use of other international law is the Appellate Body decision in *U.S.—Shrimp*, in which the Appellate Body used the Inter-American Convention for the Protection and Conservation of Sea Turtles to mark out the “line of equilibrium” under the chapeau of Article XX.¹¹²

While it is clear that a limited mandate for the Appellate Body’s and Panels’ jurisdiction accentuates the phenomenon of “fragmentation” of international law, pursuant to which different types of international law are separated both at the negotiation and at the implementation stages, it is also possible that states would prefer different types of dispute settlement mechanisms for different types of international law. Thus, the acceptance of this type of fragmentation could be viewed as an acceptance of an institutional choice made by states: a choice to differentiate among different types of international law in terms of the available institutional infrastructure. Yet, this choice accentuates the possibility that the conflict between trade law and environmental law will not be managed judicially at the WTO.

109. Argentina and Canada had signed the Biosafety Protocol but not ratified it, while the United States had not signed it. Argentina and Canada had signed and ratified the underlying Convention on Biodiversity, while the United States had signed it but not ratified it. *EC—Biotech*, ¶ 7.74.

110. *EC—Biotech*, ¶ 7.72 (“It is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.”).

111. *Id.* ¶ 7.92.

112. Appellate Body Report, *U.S.—Shrimp*, ¶¶ 159, 170.

VI. A CRITIQUE OF TEXTUALISM AT THE WTO IN THE TRADE AND ENVIRONMENT CONTEXT

At the founding of the WTO, member states sought to establish a more legalistic approach to adjudication and interpretation, compared to the approach that developed during the GATT period. The DSU included a specific reference to the customary international law rules of interpretation, understood to mean the provisions of the VCLT addressing interpretation. While the Appellate Body has often taken this instruction to mean that it must focus on text, the relevant language of the Vienna Convention calls also for references to context, object, and purpose, and where those references leave the meaning obscure or absurd, to the circumstances of the treaty's conclusion and its preparatory work.

For example, in developing its Article III jurisprudence, the Appellate Body has focused on the different formulations in the two sentences of Article III:2 and in Article III:4. Yet the basic context, object and purpose, as set by Article III:1, is the same. So, in this type of case, the judge is faced with a choice between applying the *effet utile* principle to honor the differences in slightly differing language, or giving effect to the overall stated purpose in a coherent fashion. Indeed, in the Article III context, it turned out that *effet utile* was a janus-faced trap, requiring the Appellate Body to give a meaning to “like products” where it appears in Article III:2 that is different from its meaning where it appears in Article III:4, in order to give effect to the references in Article III:2 to “like products” as well as to the broader category of “directly competitive or substitutable products.”

To be sure, the Appellate Body uses the full capabilities of the provisions of the Vienna Convention relating to interpretation. But, as suggested above, its use of context, object, and purpose is often highly circumscribed. The *expressio unius* canon of interpretation is a passive means of interpretation, and can easily be reversed by reference to a more teleological approach to interpretation, as would be required by a reference to context, object, and purpose.¹¹³

In its *U.S.—Clove Cigarettes* decision, the Appellate Body dealt with a somewhat similar circumstance. Textually, the TBT Agreement does not include an exception like GATT Article XX. But in interpreting the national treatment obligation in Article 2.1 of the TBT Agreement, the Ap-

113. For a trenchant criticism of this limited approach to interpretation in a similar context, see Douglas A. Irwin & Joseph Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS 285), 7 *WORLD TRADE REV.* 71, 94 (2008), “[T]his peculiar brand of hermeneutics developed by the Appellate Body and demonstrated so clearly in this case . . . repeatedly plays lip service to the VCLT while ignoring its holistic and integrative approach to text, context, and purpose.” It is interesting that in the *Gambling* case, the Appellate Body utilized a teleological argument to avoid applying the plain language of the text of Article XVI of GATS, holding that the proscription of certain measures “in the form of numerical quotas” could include measures in the form of qualitative requirements. *Id.* at 93.

pellate Body utilized the context of GATT Article XX, in conjunction with the TBT Agreement preamble and other elements, to interpret the obligation in Article 2.1 in a less restrictive way than the similar text contained in Article III of GATT.¹¹⁴ While the Appellate Body did not go so far as to find Article XX applicable to member states' TBT Agreement obligations, it did use the exception contained in GATT, combined with preambular language calling for a balance between trade and environmental goals, as interpretative context in order to depart from a purely textualist interpretation of TBT Article 2.1. Here, the Appellate Body ignored the *effet utile* canon of interpretation, in order to focus on context, object, and purpose.

It is perhaps understandable that the Appellate Body would expect that adherence to textualism insulates it from criticism, and deflects responsibility to the member states. Thus, perhaps a stricter textualism was the right strategy for the early Appellate Body. As Robert Hudec mentioned in the context of the Appellate Body's approach to WTO legal rules restricting domestic regulation "recognizing (its) very exposed position, the Appellate Body may well have concluded that the safest refuge from political criticism was to stay as close as possible to the shelter of the legal texts accepted by governments."¹¹⁵ But is it still normatively attractive for a judge to leave the text as it stands, declining to amplify, limit, or correct the text in a manner suggested by the context, object, and purpose?

Economic analysis of the law of contracts suggests that, in the realm of contract, judicial amplification, limitation, or correction is in the interests of the contracting parties.¹¹⁶ A purely textual method of interpretation is inferior to some method of non-literal interpretation, unless the parties were able to address the relevant issue specifically.¹¹⁷

Thus, if a treaty could address every contingency specifically, purely literal interpretation would be an efficient rule. However, treaties, like other contractual structures, are necessarily incomplete.¹¹⁸ Parties may fail to provide for certain events, and, on the "amplification" side, the GATT/WTO doctrine of non-violation nullification or impairment seems designed to limit the ability of obligors to nullify or impair their obligations without compensating the beneficiaries of their obligations. However, non-violation nullification or impairment has only been applied successfully in a limited range of cases, and there is no converse doctrine, like a common law doctrine of equity, limiting or otherwise correcting the text.

114. Appellate Body Report, *U.S.—Clove Cigarettes*, ¶ 181, referring to ¶ 101.

115. Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an 'Aim and Effects' Test*, 32 INT'L L. 619, 633 (1998).

116. See Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J. L. ECON. & ORG. 289, 289 (2005).

117. *Id.*

118. Oliver Williamson, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 20 (1985).

Perfect, and detailed, contracting over all future contingencies is infinitely costly, and so parties can be expected to use general terms to address issues. Given these general terms, interpretation is not just about determining what the parties meant, but about applying the heuristic established by the parties. Thus, again on the amplification side, it seems clear that much of the WTO's law relating to discrimination and domestic regulation is written in general terms with the expectation not that the Appellate Body will simply apply linguistic techniques to decide the case, but with the expectation that the Appellate Body will actually engage in a type of maximizing judgment. The Appellate Body's jurisprudence of national treatment has sought to avoid judgment, but, as Robert Hudec suggested, some degree of judgment is unavoidable in cases of de facto regulatory discrimination. It is also necessary in determinations of necessity and in determinations of scientific basis.

Richard Posner suggests that courts charged with "disambiguating" a contract have four choices:¹¹⁹

1. Seek to determine the intent of the parties—this involves high judicial costs. Obviously also, the intent of the parties may not be homogeneous: very often disputes arise from honest differences in understanding at the time the treaty was drafted.

2. Resolve the ambiguity in the way that the court determines is most efficient. Here, the WTO dispute settlement system has several limitations in determining efficiency, even more so than do domestic courts, insofar as the judges would be required to identify and commensurate among the preferences of diverse people from very different cultural and economic circumstances. On the other hand, there are some circumstances in which expert economic advice would assist the WTO judges in seeking efficiency in some types of cases.

3. Use a tiebreaker. A rule such as *expressio unius*, unless the parties are aware that the court will use it, can be seen as a tiebreaker. It is a non-substantive way of resolving disputes. If the parties are aware of its use, on the other hand, it confers an advantage on those diligent enough to anticipate its effects.

4. Use a combination of one and three, by assuming that the tiebreaker reflects the parties' intent. This is a literalist method of interpretation.

Posner suggests that use of a tiebreaker is the cheapest method in terms of judicial costs, but yields the fewest benefits in most cases because its arbitrariness will cause parties to over-invest in specificity *ex ante*. The first two

119. Richard Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1589 (2005).

approaches minimize negotiating and drafting costs. In the WTO context, negotiating and drafting are expensive in terms of both political capital and time. Indeed, by abstaining from substantive interpretation, and using literalist tiebreakers, the Appellate Body makes it more difficult for WTO member states to reach agreements.

I have suggested above that a move toward greater judicial judgment in seeking efficiency would be desirable. I suggested replacing the Appellate Body's reluctance to judge with specific instructions to judge by establishing an exemption from restrictions under trade law for all environmental protection measures that are not disproportionate *i.e.*, that are not excessively costly in relation to the benefits they offer. This would not be a pure cost-benefit analysis—it would not directly seek efficiency—but it would approximate efficiency as fully as possible under the constraints of international adjudication. It would be an improvement over the selective textualism used by the Appellate Body to avoid exercising the judgment that has been delegated to it.

VII. CONCLUSION

The WTO Agreement may be understood as a state-contingent contract containing obligations and exceptions, each dependent on findings of particular facts. The obligations contained in Article III of GATT, and the exceptions contained in Article XX of GATT, may be understood as designed to provide a mechanism for applying and relaxing WTO obligations where specified reasons apply and specified conditions are met. This serves to preserve WTO obligations, while ensuring that compliance with these obligations is not excessively costly in terms of other values, such as conservation of exhaustible natural resources.

During the GATT period, and over the first twenty years of the WTO period, WTO jurisprudence addressing the relationship between trade liberalization commitments and environmental protection has evolved based on a text-focused set of interpretations of various provisions of WTO law. That there has been no “environmental disaster” in Geneva is a testament to the inclusion in the WTO treaty of appropriately permissive rules and exceptions that leave sufficient room for environmental protection, as well as to the sensibilities of WTO judges. But there is still significant uncertainty, and the jurisprudence contains significant inconsistencies and poses significant risks. There are two ways to reduce the uncertainty, inconsistency, and risk.

First, the Appellate Body could re-emphasize the object and purpose of the WTO treaty, as expressed in the first recital of the Marrakesh Agreement, and take a broader view of the context of the provisions it interprets, in order to develop interpretations that clearly and consistently permit even-handed and proportionate measures to protect the environment. Measures

that have a legitimate regulatory motivation that justifies the regulatory distinctions would be understood as even-handed, and measures that are not excessively burdensome on exporting state interests in comparison to the environmental benefits achieved would be understood as proportionate. This is the direction that the jurisprudence has tended toward, but there have been twists and turns along the way.

There is room for this type of interpretation without doing any violence to the text of the treaty, but it would do some violence to the jurisprudential superstructure that the Appellate Body has developed over the past twenty years. The Appellate Body would need to emphasize object and purpose over *effet utile* in its interpretative method. Now, after twenty years of experience, it is time for the Appellate Body to rectify and consolidate its jurisprudence. The Appellate Body is already quite sensitive to its role in this context. In the *China—Raw Materials* dispute, it held that “we understand the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns.”¹²⁰

Alternatively, and for greater clarity and reliability, WTO member states may, through a simple treaty amendment, achieve the same purpose, by stating that, notwithstanding any other provision in the WTO treaty, even-handed and proportionate measures to protect the environment shall be permitted. Indeed, this amendment could be extended beyond the environment to ensure that an appropriate right to regulate is available to all member states in all legitimate areas of regulation.

120. Appellate Body Report, *China—Raw Materials*, ¶ 306.

