TRADE AND THE ENVIRONMENT: THE DEVELOPMENT OF WTO LAW

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Introduction

The decision of a GATT panel in 1991 in respect of a United States ban on imports of tuna caught by methods that harm dolphins,[1] brought the intersection of trade and the environment to the forefront of public debate.[2] Coming as it did in the course of the Uruguay Round of Multilateral Trade Negotiations, the resulting furore had some impact on the final outcome of the Uruguay Round and on the Agreement Establishing the World Trade Organization and the annexed multilateral trade agreements.[3] Nevertheless, although the Uruguay Round negotiators may have intended to present an image of an international trade organization that would be responsive to issues relating to the environment, they did not make any substantive changes to basic GATT obligations.[4]

In the foreseeable future, therefore, the way in which the WTO responds to trade and environment issues will be again through decisions reached in the context of individual disputes under the WTO dispute settlement process. In that sense, nothing has changed since the *Tuna/Dolphin* decision in 1991. What has changed, however, is the dispute settlement process itself. Instead of a recommendation being made by a single panel which may be accepted or rejected

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1 *United States - Restrictions on Imports of Tuna*, (1991) 30 I.L.M. 1594. Although the panel decision was never adopted by the GATT Council, it and the subsequent panel decision dealing with essentially the same issues (*United States - Restrictions on Imports of Tuna*, (1994) 33 I.L.M. 839), have been treated as authoritative statements of GATT law.

2 The subject has resulted in a substantial literature. For a review of the issues see Torsten H. Strom, "Another Kick at the Can: Tuna/Dolphin II" (1995) 33 CYBIL. 149. See also Shinya Murase, "Perspective from International Economic Law on Transnational Environmental Issues" (1995) 253 Rec. des Cours 287; Ernst-Ulrich Petersmann, *International and European Trade and Environmental Law After the Uruguay Round*, (1995).

3 The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed at Marrakesh on 15 April 1994. The Agreement Establishing the World Trade Organization entered into force on 1 January 1995. The preamble to the Agreement Establishing the WTO recognizes that the relations of the Members should be conducted (*inter alia*) "to protect and preserve the environment". Explicit reference to the environment is also found in both the preambles and the substantive provisions of other of the WTO agreements.

4 A Committee on Trade and the Environment was created by Ministerial decision at Marrakesh. The Committee delivered its first report in 1996 (WT/CTE/1, 12 November 1996) and is continuing its work. No changes have resulted to member states obligations in respect of the environment.

by the GATT Council, under the WTO Dispute Settlement Understanding (DSU)[5] panel decisions are virtually guaranteed acceptance by the Dispute Settlement Body (DSB).[6] An appeal may be made to an Appellate Body whose decision is also virtually guaranteed acceptance by the DSB.[7] The result, under the WTO, is binding dispute settlement.[8]

Nevertheless, important as it is, process is not the only determinant of how issues relating to trade and the environment will be dealt with under the WTO. The question is whether the existence of this new dispute settlement process will result in any changes to the way in which the law is applied to trade and the environment issues. This involves considering how WTO panels and the WTO Appellate Body have approached questions relating to trade and the environment. Are there new developments in substantive law that have to be taken account of? Are the approaches of the panel and of the Appellate Body adequate for the problems posed by the intersection of trade and the environment?

In this paper I wish to discuss first, the general nature of the trade and environment debate; second, the way in which WTO disciplines affect the ability of states to take measures for the protection of their environment; third, the approach to these issues that is emerging in the decisions of WTO panels and the WTO Appellate Body; and fourth the adequacy of WTO law and of the WTO dispute settlement process for dealing with trade and environment issues.

I The Intersection of Trade and Environment

The trade and environment debate is often depicted in terms of a clash of values — crass market-oriented commercial interests opposed to a cleaner, purer world — and the literature is sprinkled with rhetoric about which discipline holds the moral high ground. Such rhetoric is, in my view, counterproductive and ultimately irrelevant. Economic activity within states has environmental implications; environmental regulation within states has economic implications. The same is true for cross-border economic activity, that is trade constituted by the movement of goods, services and investment across borders. Rivalry between international trade lawyers and international environmental lawyers over whether their disciplines hold the ultimate truths, overlooks the inextricable linkage between these areas.

This linkage between the environment and trade is quite fundamental and is rooted deeply in the theory of international trade on which today's liberal

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5 The DSU, which is contained in Annex 2 of the Agreement Establishing the WTO, is binding on all WTO Members.

6 Article 16 of the DSU provides that a panel report is to be adopted by the DSB within 60 days of its circulation, "unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." Since the DSB is a plenary body, that consensus must include both parties to the dispute.

7 Article 17 of the DSU provides that an Appellate Body report is to be adopted by the DSB unless there is a consensus in the DSB not to do so.

8 Non-compliance with an adopted panel or Appellate Body report attracts the sanctions of the WTO which include compensation and the suspension of concessions: DSU Article 22.

international trade regime is based. This is the principle of comparative advantage. The environmental costs of producing goods and services are costs that, in principle at least, are relevant to the determination of the social cost of production and hence of comparative advantage.[9] This is why exports from countries with low environmental standards may quite genuinely be characterized as "unfair trade".[10] It is trade that undermines the rationale for a liberal trading regime. A trade regime that took environmental regulation seriously would be very concerned about lax environmental controls for economic, or trade policy, and not just for environmental, reasons.

But, of course, the international trading regime is not a pure extrapolation of the idea of comparative advantage. The principal reason that environmental issues have ended up in international trade litigation is, as I have just suggested, more mundane and pragmatic. Economic activity itself has environmental consequences. The production of goods or their use or consumption may cause environmental harm. Efforts to deal with these environmental consequences will inevitably result in restrictions on economic activity. But the international trade regime limits the ways in which states may impose restrictions on economic activity. Environmental regulation may therefore impinge on international trade disciplines. Moreover, not all environmental regulation is for environmental purposes. Some governments adopt environmental measures overtly or covertly precisely in order to restrict foreign trade.[11]

The involvement of environmental issues in international trade litigation, which has been of heightened concern over the past ten years, is going to increase. Trade is increasing as new markets are opening and with the more or less universal adoption of market economies. With the increase in cross-border economic activity comes an increase in awareness of the environmental impact of trade and of the impact of environmental regulation on trade. Moreover, as already pointed out, the WTO dispute settlement system is to all intents and purposes binding. The result of the existence of these binding procedures, and of the enthusiasm with which states are using them,[12] is that environmental measures taken by states that have an impact on foreign trade are likely to end up before a WTO panel. WTO member states no longer have a choice over whether or not they will be involved in trade litigation. Measures taken by a state to protect its environment if objected to by another state may be the subject of scrutiny by a WTO panel and ruled contrary to that state's WTO obligations. To this extent, it is too late to engage in debates over what is the appropriate

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9 See Jagdish Bhagwati, *Protectionism* (1988) 25: "... free trade would guide one to the efficient outcome only if the price mechanism worked well. *Prices had to reflect true social costs.*" (Emphasis added.)

10 For an analysis of the concept of "fair" trade in a number of areas see, Jagdish N. Bhagwati and Robert E. Hudec eds, *Fair Trade and Harmonization: Prerequisites for Free Trade? Vol. 2: Legal Analysis*, (1996).

11 An additional way in which trade and the environment may overlap is where trade measures are used as sanctioning measures for environmental harm. So far this has not been a significant issue in international trade litigation.

12 Since the coming into force of the WTO on I January 1995, over 118 requests for consultations have been made. A request for consultations is the first stage in the initiation of the WTO dispute settlement process.

forum to determine whether certain types of environmental regulation are proper for states to enact.

II The Impact of Trade Disciplines on Environmental Regulation

WTO disciplines operate in two broad ways. First, they seek to limit or prevent the imposition of border restrictions. When states do impose border restrictions the international trading regime requires that they should be in the form of tariffs applied at bound (agreed) rates and applied on an MFN basis — in the words of GATT Article I "any advantage, favour, privilege or immunity" granted to any product from one country "shall be accorded immediately and unconditionally to any like product" from any other country.

Second, WTO disciplines require states to treat foreign products in their domestic market in the same way as they treat domestic products — they are to provide "national treatment". This is expressed in GATT Article III.4:

> Products of the territory of any contracting party imported into the territory of any other contracting party shall receive no less favourable treatment than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Thus, both at the border and within their internal markets states have an obligation not to discriminate between foreign products from different countries or between domestic and foreign products.

But, these obligations are not meant to be absolute. There are exceptions to them, some of which apply particularly to environmental regulation. Article XX of GATT provides that nothing in the Agreement is to be construed to prevent the adoption or enforcement by any party of measures that are "necessary to protect human animal or plant life or health" or of measures "relating to the conservation of exhaustible natural resources." The exception relating to the conservation of exhaustible natural resources can only be applied if the measures are "made effective in conjunction with restrictions on domestic production and consumption" — a further manifestation of the non-discrimination principle. Both of these exceptions are also subject to the further restriction in the chapeau to Article XX that such measures are not to "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" nor are they to constitute a "disguised restriction on international trade".

The obligation not to discriminate in the adoption or enforcement of environmental measures does not appear to be a particularly onerous or unreasonable obligation. Why then has the intersection of trade and the environment been so contentious? One reason is largely sovereignty-related. A prohibition on the imposition of import restrictions may inhibit the ability of a state to determine the content of its environmental regulation. This is perceived as an interference with what should be the sovereign right of a state to determine its own environmental security and inconsistent with the "full permanent sovereignty" of a state over its "wealth, natural resources and economic

activities".[13] Another reason relates to the effectiveness of environmental regulation. Trade disciplines are seen as preventing states from imposing the most effective forms of environmental regulation. Ultimately, they will force states to adopt only the lowest common denominator of standards that can be agreed to internationally — what is sometimes referred to as the "race to the bottom".[14]

III The Development of WTO Law on Trade and the Environment

The extent to which WTO disciplines will impose an unreasonable limitation on the ability of states to regulate their environment will depend on the way in which GATT rules are interpreted. In particular, it will depend on the precise content of "non-discrimination" under the national treatment principle and of the content of the Article XX exceptions relating to the environment. And this in turn depends on the way in which these provisions are interpreted and applied under the WTO dispute settlement process. In my view, the experience so far under the WTO dispute settlement process gives some cause for concern about the ability of the world trading system to deal adequately with trade and environment disputes. There are two aspects to this concern. The first relates to the interpretation of the term "like product" in GATT Article III, and the second relates to the interpretation of Article XX, and in particular paragraph (g).

1 The "Like Product" Problem

The obligations under the first sentence of GATT Article III.2 and GATT Article III.4 to treat foreign products no less favourably than domestic products within a state's internal market, is an obligation that applies in respect of "like" products. One might have thought, therefore, that there was scope here to treat foreign products that had environmentally harmful effects, whether in the process of production or in their use, differently from domestic products that did not have such environmental effects. Surely, it could be argued, environmentally harmful and environmentally benign products are not "like" products. Since differential treatment can be provided to foreign products that are different — products that are not "like" domestic products — then this would appear to be a basis on which distinctions can be made that would allow for the imposition of stricter standards on imported environmentally harmful products.

The extent of the ability of the WTO system to make such distinctions, however, depends on how "likeness" is to be determined. In the pre-WTO period, GATT panels had tended to look at external characteristics in determining whether products were "like". They looked at the properties, nature, and quality of products, and their "end-use".[15] Under such an approach, provided that the actual end-use of the products in question was the same, the environmental

[13] *Charter of Economic Rights and Duties of States*, adopted by General Assembly Resolution 3281 (XXIX), U.N. Doc. A/9631 (1974) 50.

[14] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, (1995) 332.

[15] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Panel Report adopted 10 November 1987, 34th Supp. BISD 83 (1988) para 5.6.

consequences of use would not have been a relevant basis for concluding that the products were not "like".

The approach of GATT panels to the question whether a foreign product manufactured by a process that is environmentally harmful can be "like"a domestic product manufactured by a process that is environmentally friendly, has also shown little flexibility. In the first *Tuna/Dolphin* case, the panel took the view that a regulation directed at the production or processing process from which a product results, is not a regulation directed at a "product".[16] The implication of this is that "products" cannot be distinguished on the basis of the way they are produced, or on the basis of factors not directly related to the product as such.

However, an alternative approach had been emerging in some GATT panel decisions. Taking as its starting point that the objective of the "national treatment" obligation in Article III is to prevent measures from being applied "so as to afford protection to domestic production,"[17] this approach looked at the objective of the measure in question. In deciding whether a measure — a tax or other regulation — was being applied to "like" products, a determination would have to be made whether the "aim and effect" of the measure was to afford protection to domestic production. If it was not, then distinguishing between foreign and domestic products was legitimate. They were not "like" products. On this basis a tax on fuel-inefficient motor vehicles would not offend Article III even though its incidence was to fall on foreign imported vehicles unless the "aim and effect" of the measure could be shown to be protectionist.[18] Such an approach opened the possibility that environmental measures that distinguished between domestic and imported products on the ground that their environmental effects were different might not contravene the national treatment obligation as long as their "aim and effect" were not protectionist.

This new potential for differential regulation to deal with foreign products that have environmentally harmful effects through the interpretation of the "like products" test of GATT Article III, does not appear to have survived the transition of the GATT into the WTO. It was rejected in the first case under the new WTO dispute settlement process to interpret Article III: *Japan - Taxes on Alcoholic Beverages*.[19] The case was not concerned with environmental regulation; it involved complaints about taxes applied by Japan to imported alcoholic beverages that were higher than those imposed on the domestic Japanese product, *shochu*. A critical question facing the panel was whether *shochu* was a "like product" to the imported beverages within the meaning of the first sentence of GATT Article III.2.[20]

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16 *Tuna/Dolphin*, supra n1, (1991) 30 I.L.M. 1594 at paras 5.1 1-5.16.

17 Article III.1 provides: "The contracting parties recognize that internal taxes and other internal charges and laws and laws, regulations and requirements affecting the internal sale, offer for sale, purchase, transportation, distribution or use of products ... should not be applied to imported or domestic products so as to afford protection to domestic production."

18 *United States - Taxes on Automobiles*, GATT Doc. DS31/R 29 September 1994.

19 Report of the Panel of 11 July 1996, WT/DS11/R; Report of the Appellate Body of 4 October 1996, WT/DS11/AB/R.

20 The first sentence of Article III.2 provides: "The products of the territory of any

In supporting its measure, Japan had argued that the "aim and effect" of its taxation measure had to be considered. In its view, that "aim and effect" was not to afford protection to domestic production within the meaning of Article III.1, and this must influence the determination of whether these products were "like products" within the meaning of Article III.2. This argument was rejected by the Panel. In its view, the "aim-and-effect test is not consistent with the wording of ArticleIII:2, first sentence" [21] and it specifically declined to follow the reasoning of the earlier GATT panels that had utilized the "aim and effect" test.[22] Instead, the Panel went back to the approach of those GATT panels that had relied on criteria such as the product's properties, nature and quality, its end-uses, consumers' tastes and habits and the product's tariff classification. The term "like product", the Panel noted, involves some flexibility and should be interpreted on a case-by-case basis.[23]

Although the Appellate Body did not deal specifically with the "aim and effect" test in the interpretation of GATT Article III, it appeared to endorse the view of the Panel that "like product" determinations are to be made on the basis of the physical properties of the products in question, consumer tastes and preferences and their end-use.[24] The Appellate Body also endorsed the Panel's view of the need for flexibility and to adopt a case-by-case approach in the interpretation of "like products". The Appellate Body used the analogy of an accordion which can be expanded or contracted to meet the needs of the circumstances, although it took the view that in the context of the first sentence of Article III.2, the concept of "like products" is to be given a narrow interpretation.[25]

The Appellate Body's rejection of the "aim and effect" test in the interpretation of GATT Article III is implicit also in its treatment of the second sentence of Article III.2.[26] Since the panel had concluded that certain imported alcoholic beverages were not "like" the Japanese product *shochu*, the question to be addressed was whether the differential taxation applied to such products was nevertheless contrary to the terms of the second sentence of Article III.2. In the

contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

21 Report of the Panel, supra n19 at para. 6.16.

22 Ibid at para 6.18.

23 Ibid at para. 6.21.

24 Report of the Appellate Body, supra n19 at p. 20. However, the Appellate Body indicated that less weight should be given to classification in tariff bindings as some countries use very broad bindings in respect of certain products; ibid at 22.

25 Ibid at 21. The justification for a narrowness in the interpretation of "like products" in the first sentence of Article III.2 derives in part from the fact that the broader concept of "directly competitive or substitutable products" is included in the second sentence of Article III.2 which comes into effect if the first sentence of Article III.2 does not apply. Hence, there is no need to give a broad interpretation to the concept of "like product" in the first sentence of Article III.2.

26 The second sentence of Article III.2 provides: "Moreover, no contracting party shall other wise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1." In short, this means that such taxes or charges cannot be applied in order to afford protection to domestic production. An interpretative note to Article III.2 indicates that the second sentence of paragraph 2 applies to "directly competitive or substitutable" products.

Appellate Body's view, this involved a determination of whether the products in question were "directly competitive" with or "substitutable" for *shochu* and whether the differential taxation had been "applied ... so as to afford protection to domestic production."[27] In approaching the interpretation of this phrase, the Appellate Body rejected any idea that the issue was one of intent. The Appellate Body stated:[28]

> It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If a measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective....

Instead, the Appellate Body said, the determination of whether a measure affords protection to domestic production "requires a comprehensive and objective analysis of the structure and application of the measure in question."[29] It then reiterated this approach indicating that "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure."[30] Such an approach appears to eliminate any possibility of an "aim and effect" test.

This formulation of the approach to the interpretation of the term "so as to afford protection to domestic production" was repeated by the Appellate Body in its decision in *Canada - Certain Measures Concerning Periodicals*.[31] However, the way in which the test was applied in that case suggests that there is some ambiguity in the Appellate Body's approach. In demonstrating that the "very design and structure of the measure is such as to afford protection to domestic periodicals"[32] the Appellate Body in *Periodicals* quoted from ministerial and other government statements that demonstrated that the objective of the legislation was to protect the Canadian magazine industry. Governmental statements of that nature surely go to the intent of a measure. Implicitly, therefore, the Appellate Body seems to have been applying an "aim and effect" test.

There are, nevertheless, contrary indications in the *Periodicals* decision as well. By rejecting the view that the "Canadian" content of a Canadian news magazine, *Maclean's*, prevented it from being "directly competitive" with or "substitutable" for the American news magazine *TIME*,[33] the Appellate Body apparently accepted that the determination of "like" or of "directly competitive or substitutable" products focuses on end-use or on physical, external characteristics. The

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27 Report of the Appellate Body, supra n 19 at 24.

28 Ibid at 27.

29 Ibid at 29.

30 Idem.

31 Report of the Appellate Body of 30 June 1997, WT/DS31/AB/R, p. 31.

32 Idem. The measure in question was an 80% excise tax on foreign magazines sold in Canada that had the same editorial content as those sold outside of Canada but included advertising directed at the Canadian market. These are so-called "split-run" magazines.

33 Ibid at 29.

Appellate Body's peremptory refusal, without analysis, to entertain the idea that the cultural content of a news magazine might be a basis for distinguishing between products[34] does not augur well for arguments distinguishing products on the basis of their environmental impacts or effects.

The approach of the Appellate Body suggests that the concept of "like product" in the first sentence of GATT Article III.2, or the concept of "directly competitive or substitutable" products in the second sentence of GATT Article III.2, or the scope of the phrase "so as to afford protection to domestic production" in GATT Article III.1, will be not be interpreted in a manner that is sufficiently flexible to accommodate measures that treat foreign products differently because of their environmental impact. However, given the lack of clarity in the decisions, the interpretations that have been advanced so far should not be regarded as immutable. Faced with new arguments — and with facts more compelling than those in either the *Japan Alcohol* or the *Periodicals* cases — the Appellate Body might be prepared to develop other interpretative approaches. Certainly the apparent reliance of the Appellate Body on considerations relating to intent in *Periodicals* might suggest that the "aim and effect" test has not disappeared completely. Nevertheless, at least in the immediate future, the weight of ensuring that WTO disciplines do not impede legitimate environmental regulation by states will rest not on the interpretation of GATT Article III, but rather on the exceptions to GATT obligations provided in Article XX.

2 *The Application of Article XX*

GATT Article XX sets out general exceptions to WTO obligations. Two of these exceptions, paragraph (b) and paragraph (g), relate to environmental matters. Article XX provides as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
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> ...
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> (b) necessary to protect human, animal or plant life or health;
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> ...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production:
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> ...

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[34] The Appellate Body simply stated "But newsmagazines, like TIME, TIME Canada and Maclean's, are directly competitive or substitutable in spite of the 'Canadian' content of Maclean's." Idem.

[35] *United States - Section 337 of the Tariff Act of 1930*, Report of the Panel adopted 7 November 1989. 36th Supp. BISD 345 (1990) para. 5.26.

Three issues call for discussion here: the "necessary" test in paragraph (b); the meaning of "relating to" in paragraph (g); and the concept of a "disguised restriction on international trade" in the chapeau to Article XX.

(a) The "Necessary"Test in Article XX(b)

The hurdle that must be faced in seeking to justify environmental measures relating to human, animal or plant life or health that contravene GATT/WTO obligations is that they must be shown to be "necessary".GATT panels have interpreted "necessary" to mean that there are no alternative measures that are consistent with the GATT or no alternative measures that are less GATT inconsistent than those adopted that a government might reasonably be expected to employ and are not otherwise inconsistent with other GATT provisions.[35] Thus, in the *Thai Cigarette* case,[36] a panel found that restrictions on the importation of cigarettes was not justified under Article XX(b), concluding that Thailand could have achieved its health objectives in respect of smoking by adopting measures that applied equally to foreign and domestic cigarettes rather than those that applied to foreign cigarettes alone. The panel was influenced by the fact that none of the measures proposed by the World Health Organization to combat the health problems caused by cigarettes contemplated discriminating between sales of domestic and sales of foreign cigarettes.[37]

In many respects, the "necessary" test is extremely intrusive. It permits WTO panels to second-guess domestic policy-makers and thus limits the action of governments in the pursuit of their environmental goals. The question, then, is whether WTO panels are equipped to make these determinations about the appropriateness of different forms of environmental regulation. In this regard, it should be noted that the application of the "necessary" test requires an answer to three questions:

First, is an alleged alternative measure consistent with the GATT or less inconsistent than the measure chosen?

Second, is the alleged alternative really an alternative?

Third, could a government reasonably be expected to adopt such an alternative?

The first of these questions is one that a WTO panel composed of trade lawyers or trade policy experts is clearly in a position to answer. It involves a determination of the compatibility of the measure chosen and the alternative measure with the provisions of the WTO. It is question of interpretation, classically within the province of the lawyer. But the other two questions require a different kind of expertise. It requires some assessment of the nature of the measures concerned, their environmental effects and consequences, and what might reasonably be expected of governments — hardly matters that fall within the realm of legal interpretation or matters on which trade lawyers or trade policy experts have any necessary expertise. Since this question also arises under GATT Article XX(g) it will be considered further below.

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[36] *Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes*, Report of the Panel adopted 7 November 1990, DS10/R, BISD 29th Supp. 200 (1991).

[37] Ibid at para. 80. However, Trebilcock and Howse, supra n14 at 339, ar gue that the immense powers of "persuasion and psychological manipulation employed by Western cigarette manufacturers" was ignored by the panel in looking at less trade-restrictive methods by which Thailand might have been able to secure its objectives.

(b) The Environmental Exception in Article XX(g)

Article XX(g) permits states to take measures that would otherwise be inconsistent with their WTO obligations "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." What, then, is an "exhaustible natural resource"? On this issue, the WTO Appellate Body has indicated some flexibility, adapting the words of the 1947 GATT to contemporary reality. In the *Reformulated Gasoline* case,[38] it accepted the view of the panel that "clean air" is an exhaustible natural resource.[39] However, the interpretation of other aspects of the wording of Article XX(g) and of the chapeau to Article XX are more problematic.

(i) The "primarily aimed at" test

In order to come within the scope of Article XX(g) a measure must be one "relating to" the conservation of an exhaustible natural resource. How is "relating to" to be interpreted? It is presumably a standard that is different from the requirement in Article XX(b) that a measure must be "necessary" to protect human, animal or plant life or health. And, in fact, GATT panels had interpreted "relating to" differently from "necessary". A measure was one "relating to" conservation, a GATT panel said in the *Herring and Salmon* case, if it was "primarily aimed at" conservation.[40]

But this just transposes one interpretative problem for another, and the interpretation of the term "primarily aimed at" is no less difficult than the interpretation of the term "relating to." On its face, the term "*primarily* aimed at" sets a standard that is higher than the term "relating to". It suggests that a judgment has to be made about the purpose of the measure concerned. In a dispute under the Canada-United States Free Trade Agreement, Canada contended that a prohibition that it had imposed on direct shipping of salmon and herring caught in Canada's 200 mile-zone to the United States (the fish had to be landed in Canada first) was "primarily aimed at" conservation.[41] The panel, established under Chapter 18 of that agreement, took the view that a measure would be primarily aimed at conservation if a government would adopt such a measure if the burden fell wholly on its own nationals. The panel then embarked on an analysis of the conservation benefits of a landing in Canada rule and concluded that a 100% rule could not be regarded as "primarily aimed at" conservation.[42]

This approach was, however, not adopted in the *Reformulated Gasoline* case, which was the first case to be heard under the WTO dispute settlement procedures and thus the first case to involve the application of Article XX(g).

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38 *United States - Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R.

39 Ibid at 14.

40 *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, 22 March 1988, 37th Supp. BISD 1989-90.

41 *In the Matter of Canada's Landing Requirement for Pacific Salmon and Herring*, Report of the Panel 16 October 1989, CDA-89-1807-01.

42 Ibid at para. 7.10 and para. 7.38.

The issue in *Reformulated Gasoline* was whether baselines for establishing "purity" levels in gasoline in the United States, under the requirements of the Clean Air Act, that were different for foreign suppliers from those applicable to domestic suppliers were "primarily aimed at" conservation. The panel took the view that in order to show that a measure was "primarily aimed at" conservation there had to be a "direct connection" between less favourable treatment of imported gasoline and the conservation objective of ensuring clean air.

The Appellate Body rejected this "direct connection" test. The term "primarily aimed at", it said, is not treaty language and is not a simple litmus test for inclusion or exclusion from Article XX(g),[43] and it emphasized that decisions have to be made on a case-by-case basis in the light of the particular facts. But in providing its own interpretation of Article XX(g) the Appellate Body appeared to provide two alternative interpretations of "primarily aimed at". On the one hand it said that there was a "substantial relationship between" the baseline rules and the objective of preventing a deterioration in air quality, but on the other hand it also said that the baseline rules "cannot be regarded as merely incidentally or inadvertently aimed at" the conservation of clean air. But "substantial relationship" and "incidentally or inadvertently aimed at" are two quite different tests. Which one did the Appellate Body mean to establish?

In fact, the decision of the Appellate Body appears to suggest that although there was a "substantial relationship" in this case, all that needed to be shown was that the measure was not "incidentally or inadvertently aimed at" conservation.[44] If this is so, then the Appellate Body appears to have lowered drastically the threshold for meeting the requirements of Article XX(g). This relaxation in the standard for determining whether a measure is "primarily aimed at" conservation has been viewed favourably,[45] and may be seen as an indication of greater environmental awareness by the Appellate Body. And, the Appellate Body's statement in *Reformulated Gasoline* that "WTO Members have a large measure of autonomy to determine their policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement"[46] reinforces that image.

But, while it may appear that the Appellate Body has opened the door to the acceptance of environmental exceptions through its interpretation of paragraph (g), its interpretation of the chapeau to Article XX indicates that in fact it has closed that door much more firmly than was ever done under the GATT.

(ii) The "disguised restriction on international trade" issue

The exceptions relating to human, animal or plant life or health, and conservation of exhaustible natural resources, are both subject to the provisos of the chapeau to Article XX. This requires that measures that would be justified under one of the specific heads of Article XX must not be applied in a manner that would constitute "a means of arbitrary or unjustified discrimination between countries

43 *Reformulated Gasoline*, supra n38 at 18-19.

44 Ibid at 19.

45 Thomas J. Schoenbaum, "International Trade and Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91 AJIL 268 at 277-279.

46 Supra n 38 at 30.

where the same conditions prevail or a disguised restriction on international trade." It is the interpretation placed on the second of these requirements, that the measure concerned not be a "disguised restriction on international trade", that is significant in this context.

On its face, the requirement that a measure not be a "disguised restriction on international trade" might appear to go to motive or intent in the adoption of the measure. However, making a determination about the motives of a government in adopting a particular measure is extraordinarily difficult, and this may have led GATT panels to avoid giving any real substantive content to the notion of a "disguised" restriction. One panel had given the words a quite trivial interpretation, indicating that if a measure had been made public it could not constitute a "disguised" restriction.[47] In the *Salmon and Herring* case the panel established under the Canada-United States Free Trade Agreement took the view that a measure would be a disguised restriction if it had no true conservation purpose,[48] adopting thereby a relatively high threshold for proving that a measure is a disguised restriction on international trade.

In the *Reformulated Gasoline* case, however, the Appellate Body sought to give substantive content to the chapeau to Article XX. In doing so it has made a significant change to GATT law and made environmental exceptions to trading obligations extremely difficult to establish. The Appellate Body rejected the idea that a "disguised restriction" was limited to "unannounced" restrictions, and stated that the "fundamental theme" of the chapeau was of "avoiding abuse or illegitimate use" of the exceptions in Article XX.[49]

Again, under the guise of clarification there has been simply a further transposition in the interpretative process. The question now becomes what is "abuse or illegitimate use"? In *Reformulated Gasoline* the United States had argued that it had to adopt differential measures for domestic and foreign refiners because it was unable to check data from foreign refineries in the same way it could check data from domestic refineries. However, the Appellate Body took account of other, alternative approaches open to the United States for checking or verifying data on which baselines were determined. It took the view that the United States could have entered into collaborative arrangements with Venezuela and Brazil in order to deal with any problems of verifying data from refineries in those countries.[50] In short, it looked to see whether there were other less trade-restrictive or less discriminatory means available for the United States to establish baselines for gasoline quality for foreign suppliers.

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47 *United States - Prohibition on Imports of Tuna and Tuna Products from Canada* 29th Supp. BISD 91 (1983).

48 *Salmon and Herring*, supra n41 at para. 7.04. See also para. 7.1 1.

49 *Reformulated Gasoline*, supra n38 at 25.

50 Ibid at 17. This approach may be contrasted with that of the Canada-United States Free Trade panel in *Salmon and Herring* where the view was taken that Canada could not be expected to condition its environmental regime — monitoring the impact of the salmon and the herring fisheries — on agreement with the United States to grant access to its ports to verify catches: *Salmon and Herring*, at paras 7.15-7.16. The difficulty with the Appellate Body's approach is that the ability of the United States to pursue its environmental objectives within its own territory is made dependent on agreement with other states, Venezuela and Brazil.

In other words, the test applied by the Appellate Body for determining whether there had been "abuse or illegitimate use" and thus a "disguised restriction on international trade" is indistinguishable from the test that is to be applied in deciding whether a measure is "necessary" under Article XX(b). In the result, the Appellate Body has applied a standard to the chapeau to Article XX that had never been applied by a GATT panel — a standard that appears to be even more stringent than any version of the "primarily aimed at" test. The Appellate Body has, thus, come perilously close to saying that all environmental measures that discriminate have to be shown to be "necessary" — in effect rewriting Article XX(g) and rendering the term "disguised restriction on international trade" meaningless in the context of those heads of Article XX (paragraphs (a), (b) and (d)) that already require that a measure must be "necessary" to be justifiable. In doing so, the Appellate Body may have established a standard that makes it next to impossible for environmental measures ever to meet the requirements of Article XX.

This is not to suggest that the ultimate result in the *Reformulated Gasoline* case was wrong. The United States had admitted that it would not have imposed the system for determining baselines applied to foreign refineries to its domestic refiners, because *inter alia* that would have been too expensive.[51] This might well have been treated by the Appellate Body as clear evidence that the measure was not "primarily aimed at conservation." In determining whether a measure was "primarily aimed at" conservation, the panel in the *Salmon and Herring* dispute under the Canada-United States Free Trade Agreement took into account whether a government would have adopted the measure if the burden had fallen entirely on its own producers.[52] A measure that placed the costs solely on foreign producers carried the implication that it was not "primarily aimed at" conservation. However, this approach was not adopted by the Appellate Body in *Reformulated Gasoline* and it appears to be inconsistent with the approach taken in that case.

There are, nevertheless, some advantages in focusing attention, as the Appellate Body has done in *Reformulated Gasoline*, on the chapeau to Article XX. After all, it does express what is the primary concern in this area. Environmental measures should be taken because they have legitimate environmental objectives. They should not be taken as a covert means of providing trade preferences for one's own nationals. Moreover, the term "disguised restriction" does have a degree of intuitive transparency about it. Where legislators did in fact intend to use an environmental measure for a protectionist purpose, a decision that the measure is a "disguised restriction on international trade" should be readily understandable to them, because a disguised restriction on trade was their precise objective.

But, balanced against this are the values of certainty and predictability that any dispute settlement system must have as its objective. The present approach of the Appellate Body to the question of what constitutes a "disguised restriction on international trade" appears deficient in this regard. Furthermore, if the test for a disguised restriction is in fact the "necessary" test, there seems little

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51 Supra n38 at 28.

52 Supra n41 at para. 7.10.

likelihood that discriminatory measures that meet the requirements of Article XX(g) will ever overcome the hurdle of the chapeau. Yet this would undermine the whole purpose of that provision. However, the Appellate Body may already be backing away from the position it took on "disguised restriction" in *Reformulated Gasoline*. In the *Hormones* case[53] the Appellate Body said that because of "the structural differences" between the wording of the chapeau to Article XX and the wording of Article 5.5 of the WTO Sanitary and Phytosanitary (SPS) Agreement the reasoning in *Reformulated Gasoline* could not be imported automatically to interpret the term "disguised restriction" in Article 5.5 of the latter Agreement.[54] Unfortunately, the Appellate Body did not elaborate upon this statement and it determined that Article 5.5 was not applicable on other grounds.

III The Adequacy of WTO Law

1 The Capacity for Change

The treatment of environmental matters by GATT and WTO panels must be placed in context. GATT was not designed with environmental protection in mind, and although the WTO provisions indicate a greater awareness of the problem,[55] there has been no change to the fundamental obligations in the GATT. Moreover, these obligations are being interpreted by specialists in trade law and trade policy, individuals who are perceived as being reluctant to allow environmental considerations to be taken into account in the interpretation of international trade obligations for fear of undermining the trading system.

Nevertheless, there is considerable scope for WTO panels to interpret those provisions of the GATT that have an impact on the ability of governments to take environment measures in a way that might better reflect environmental concerns. For example, the recognition in the preamble to the WTO of the importance of the optimal use of the world's resources in accordance with the principles of sustainable development and of the need to protect and preserve the environment, might be employed in appropriate circumstances as an interpretative device to justify a different approach. Such an opportunity was not taken in the *Reformulated Gasoline* case where the Appellate Body took a somewhat formalistic approach to interpretation, opting for a relatively strict application of the principles of treaty interpretation as set out in Article 31 of the Vienna Convention on the Law of Treaties.

The *Hormones* case, however, might be taken as an indication that a different approach is emerging. The case arose out of a ban imposed by the European Communities on the importation of beef produced through the use of certain artificial growth hormones. This ban was challenged under the SPS Agreement

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53 *EC Measures Concerning Meat and Meat Products (Hormones)* Report of the Appellate Body, 16 January 1998, WT/DS48/AB/R.

54 Ibid at para. 239.

55 For example, the preamble to the Agreement establishing the WTO recognizes that relations in the field of trade should allow for "the optimal use of the world's resources in accordance with the objective of sustainable development." Article 2.2 of the Standards Code recognizes that the protection of the environment is a "legitimate objective" that could justify a trade restrictive measure.

on the ground that it did not conform with any international standards nor was there any scientific justification for it. Although the Appellate Body ultimately concluded that the EC had not complied with its obligations under the SPS Agreement, it did recognize the broad role played by the precautionary principle both in specific provisions of the Agreement and as a background principle for some of the other provisions of the Agreement.[56] In short, the Appellate Body seemed to be indicating that states should be able to protect themselves from a harm that is potential, but not yet clear, by the use of trade-restrictive measures. If that is so, then it could have implications for the adoption of trade-restrictive environmental measures.

Moreover, the Appellate Body also drew back from a strict interpretation of the SPS Agreement that would have required states to ensure that any health standards they adopt are in strict conformity with international standards.[57] At the same time, the Appellate Body appeared to reduce the burden that the panel had imposed in respect of the requirement in the SPS Agreement that a risk assessment be undertaken where a state wishes to impose standards that are higher than international standards.[58] In other words, at least in the area of sanitary and phytosanitary standards, the Appellate Body appears to perceive a need to allow states some flexibility in determining their domestic policies even though those policies might constitute a restriction on trade. Again, it remains to be seen whether the decision in the *Hormones* case will presage similar flexibility where environmental regulation is in issue.[59]

2 The Need for Technical Expertise

In respect of both environmental and sanitary or phytosanitary regulation, the question arises of the competency of panelists with expertise on trade law or trade policy to deal with matters that are technical or scientific in nature. As mentioned earlier, a determination under Article XX(b) whether a measure is "necessary" requires a decision on viability of a proposed alternative measure and on whether a government might reasonably be expected to adopt such an alternative. Article XX(g) involves determining whether environmental regulation really has environmental objectives. These are questions that seem to require technical expertise in respect of the measures in question or in respect of the matter with which these measures are dealing. The lack of such expertise on the panel established under the Canada-United States Free Trade Agreement in the *Salmon and Herring* case was a basis on which the panel was criticised. How, it was asked, could a panel made up of trade lawyers, trade policy experts and fisheries managers, make any determination about the merits or demerits of a governmental conservation measure?

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56 *Hormones*, supra n53 at para. 124.

57 Ibid at paras 160-168.

58 Ibid at paras 178-209.

59 It should be noted that the SPS Agreement has its own particular provisions which do not parallel precisely those that are relevant in the context of environmental regulation. However, what is significant about the *Hormones* case is not the specific interpretations adopted by the Appellate Body, but rather the flexibility of the Appellate Body in its approach to the interpretation of the obligations imposed on states.

The possibility of turning to technical or scientific expertise is recognized in the DSU. Article 13 provides that a panel "may request an advisory report" from an expert review group "with respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute." This expert review group, composed of "persons of professional standing and expertise in the field in question" are to be appointed by the panel and are advisory to it. The SPS Agreement goes further, providing that where a dispute under the Agreement involves scientific or technical issues, a panel "should seek advice from experts."[60] This can entail the formation of an advisory technical experts group or consultation with a relevant international organization.

In *Reformulated Gasoline*, the Panel did not consult technical experts and no adverse comment was made on this by the Appellate Body. In *Hormones*, rather than establishing a technical experts group, the panel compiled a list of individual experts who met together with the panel with the parties present. Both the panel and the parties thus had an opportunity to pose questions to the experts. Although on appeal the EC challenged the process adopted by the panel, the Appellate Body concluded that the approach of the panel was in conformity with the SPS Agreement.[61]

Notwithstanding the difficulties inherent in the use of experts by trade panels, as the *Hormones* case demonstrated, a number of the issues that come before panels in the guise of legal interpretation are really issues on which some technical expertise may well be necessary. These include the question of whether an "alternative measure is reasonably available" for the purposes of the "necessary" test in GATT Article XX(b), and circumstances where the relationship of an environmental measure to the goal sought to be achieved has to be considered, such as for a "like product" determination under GATT Article III or for a determination under GATT Article XX whether a measure constitutes a "disguised restriction" on international trade. In all of these circumstances, a panel could benefit from having technical expertise available. Panels confronted with Article XX(b) or Article XX(g) defences should, therefore, as a matter of course, convene an expert review group.

Conclusions

Notwithstanding these criticisms of the developing WTO law in respect of environmental regulation, it is difficult to argue on the basis of the cases that have come before GATT and WTO panels so far that in fact international trade law has had a serious impact on the ability of governments to adopt environmental regulation. The cases before panels involving environmental considerations have not been particularly compelling, either because they appear to be patent attempts to use environmental regulation for protectionist purposes[62] or they have been cases that have pushed a legitimate environmental objective to the point that the environmental value being upheld was disproportionate to the trade-restrictive effect of the measure in question.[63]

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60 SPS Agreement, Article 11(2).

61 Supra n53 at para. 149.

62 For example, *Reformulated Gasoline*.

63 For example, *Tuna/Dolphin* and *Salmon and Herring*.

Where the environmental element in a regulatory measure is little more than a facade for a protectionist objective, this does not provide a good basis for the development of a comprehensive jurisprudence on trade and the environment. Bad cases can make bad law. The danger is that in rejecting claims to justify such measures on environmental grounds, panels or the Appellate Body will develop a jurisprudence that is not sensitive enough to deal with legitimate claims to environmental protection. Equally, cases that do not appear to have any environmental element at all may result in interpretations of GATT law that have adverse implications for the ability of states to adopt environmental regulation. In this regard, both the *Reformulated Gasoline* case and the *Japan Alcohol* case give some cause for concern.

There is, of course, scope for change. There is no doctrine of precedent in the WTO dispute settlement system. Although panels and the Appellate Body tend to follow their earlier decisions, they are not bound by them. In effect, under the WTO dispute settlement system a "common law" approach is emerging with the law being developed case-by-case.[64] Thus, there remains within the WTO system the opportunity to develop a jurisprudence that is sensitive to claims to discriminate between domestic and foreign products where to do so serves a legitimate environmental objective.

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[64] The approach taken by the Appellate Body to the apparent difference in meaning between "disguised restriction on international trade" in GATT Article XX and "disguised restriction on international trade" in Article 5.5 of the SPS Agreement, referred to earlier, is an indication of this.