The Trade and Environment Debate

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I. INTRODUCTION

Trade and environment is not a new issue in the international trade regime. In the past, the issue was limited to the effect of environmental policies on international trade.[1] Over the years, however, environmental concerns have gained increased attention and the focus of the trade and environment discussion has shifted to the effect of international trade on environmental protection.[2] The main text of international trade law has yet to be modified to reflect this change.

Environmentalists consider international trade as an accelerating factor, if not a proximate cause, of natural resource over-exploitation and ecological degradation.[3] Their claim is based on what they see as the apathy of the international trade regime toward environmental consequences of economic activity.[4] These critics urge that the World

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1. *See* WTO Committee on Trade and Environment, *Early Years: Emerging Environment Debate in GATT/WTO*, *at* http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm (last visited Jan. 24, 2002).

2. *See id.*

3. Nick Johnstone, *International Trade and Environmental Quality*, *in* THE ECONOMICS OF ENVIRONMENTAL DEGRADATION: TRAGEDY OF THE COMMONS? 143 (Timothy M. Swanson ed., 1996); William J. Snape III & Naomi B. Lefkovitz, *Searching for GATT's Environmental* Miranda*: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777, 779 (1994).

4. *See* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 104 (1994); Snape & Lefkovitz, *supra* note 3, at 779.

Trade Organization (WTO) should permit trade restrictions that pursue environmental objectives.[5] Countries are generally discouraged from unilaterally imposing trade restrictions, even for environmental purposes.[6] But when trade measures are formulated through multilateral agreements to protect the natural environment, there is a stronger argument for the WTO to allow the use of trade restrictions for environmental purposes.

At the Ministerial Conference November 2001, WTO members finally committed themselves to negotiations on the question of the relationship between WTO rules and multilateral environmental agreements (MEAs) in the next round of trade negotiations.[7] This would certainly touch on the status of trade obligations set out in the MEAs within the WTO framework. Compared to the 1996 Ministerial Conference, this could be considered a serious step by the WTO in trying to ease the tension between trade liberalization and environmental protection.[8]

It is only logical that the WTO supports the MEAs in solving the trade and environment conflict.[9] Principle 12 of the Rio Declaration reflects the international community's preference for negotiated solutions over unilateral actions.[10] The decisions in the *Tuna/Dolphin* and the

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5. ESTY, *supra* note 4, at 67; Snape & Lefkovitz, *supra* note 3, at 782. Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994), *reprinted in* WTO, THE LEGAL TEXTS: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994).

6. As Principle 12 of Rio Declaration on Environment and Development states, "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." UN Doc. A/CONF.151/26 (Vol. I) (1992).

7. WTO Ministerial Conference, Fourth Session, *Ministerial Declaration*, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001), ¶ 31, *available at* http://docsonline.wto.org.

8. On the issue of trade and environment at the Singapore Ministerial Conference, the WTO only reiterated the roles of its Committee on Trade and Environment. *See* WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC/W/1 (Dec. 13, 1996), ¶ 16, *available at* http://docsonline.wto.org.

9. A GATT Dispute Panel in a 1991 case expressed disapproval of the unilateral nature and extraterritorial application of trade-related environmental measures:

> The Panel considered that if . . . each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement . . . [the] General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

GATT Dispute Panel Report, *U.S.—Restrictions on Imports of Tuna*, 30 I.L.M. 1594, ¶ 5.27 (Sept. 3, 1991 unadopted) [hereinafter *Tuna/Dolphin I*].

10. *See supra* note 6.

Shrimp/Turtle cases also support this view.[11] Existing WTO rules, however, do not provide an exception for trade obligations set out by MEAs. Trade-related measures that aim to address environmental effects pursuant to MEAs could theoretically be found to have violated the General Agreement on Tariffs and Trade (GATT).[12] Although the GATT provides an exceptions clause which could save those trade measures from being found in violation, potential conflict between WTO rules and MEAs could deter states from agreeing to include trade-related measures in future MEAs.

While there has been a consensus among Member States that the WTO can accommodate MEAs, defining the relationship between the international trade regime and MEAs can be complex.[13] This Comment seeks to explore how MEAs could fit in the international trade law context. Part I considers MEAs in the context of the trade and environmental conflict. Part II explores the issue of like products in international trade law. Part III examines the prospect that the trade regime gives deference to MEAs in interpreting article III. Part IV examines article XX as interpreted by the WTO Appellate Body in the *Shrimp/Turtle* decision. The last Part assesses this latest response of the WTO to environmental concerns.

II. THE TRADE AND ENVIRONMENT CONFLICT

When the issue of trade and environment is discussed, some environmentalists call for cost internalization, criticizing that market price of traded products does not reflect the environmental externalities of the products.[14] The concept of externalities often is a justification for environmental regulation, but itself does not offer a solution to environmental degradation. No environmental standard has claimed to fully internalize externalities because of the many practical obstacles.[15] Presenting the conflict of trade and environment as a failure to take into

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11. *See Tuna/Dolphin I*, *supra* note 9; WTO Appellate Body Report, *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), *available at* http://docsonline.wto.org [hereinafter *Shrimp/Turtle*].

12. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. There is a possibility of violating articles I, III, XI, and XIII. *See* OECD, *Trade Measures in Multilateral Environmental Agreements: Synthesis Report of Three Case Studies*, COM/ENV/TD(98)127 final at 33-35 (Feb. 15, 1999).

13. *See* WTO, Committee on Trade and Environment's Meeting on 27-28 June 2001, TE/036 (July 6, 2001).

14. ESTY, *supra* note 4, at 65-66.

15. *See* WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY 2 (2d ed. 1988).

account environmental costs ignores the abstraction of internalization and the practical considerations in environmental rulemaking.

The theory of externalities describes environmental problems as a classic case of market failure.[16] The problem of environmental degradation occurs when "economic agents imposed external costs upon society at large in the form of pollution."[17] "With no 'prices' to provide the proper incentives for reduction of polluting activities, the inevitable result was excessive demands on the assimilative capacity of the environment."[18] It seems, therefore, that the obvious solution is to place an appropriate "price" on polluting activities so as to internalize the environmental costs.

How to measure environmental externalities and achieve cost internalization is an on-going debate. Determining the appropriate level of cost internalization has always been a question. For example, a wide variation exists in the levels of internalization through environmental taxes: gasoline tax was up to eighty percent of the fuel price in Britain during the year 2000, roughly seventy percent in France and Germany, sixty percent in Spain, and twenty-five percent in the United States.[19] This variation cannot be justified by the degree of externalities alone. The fiscal and political imperatives of each government often play a crucial role in deciding how much to internalize, not the environmental externalities.

Inadequate information and scientific uncertainty make it impossible to determine the full environmental cost of a given economic activity. Full internalization may even be considered to be undesirable.[20] The optimal level of internalization has been theorized to be where cost is equal to social benefit, but numerous qualifications make such a level

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16. NICK HANLEY, JASON F. SHOGREN, & BEN WHITE, ENVIRONMENTAL ECONOMICS IN THEORY AND PRACTICE 29 (1997). Other overlapping rationales that explain environmental problems include the Coase theorem (the failure or inability of institutions to establish well-defined property rights results in lack of economic incentives to prevent environmental degradation); "tragedy of the common" (when it is impossible or costly to deny access to an environmental resource, the preservation/conservation of the common resource is likely to be ignored); and Samuelson's public goods theory (since everyone benefits from the services provided by a pure public good such as clean air, it is easy for a "free rider" to enjoy the benefits without paying for them). *Id.* at 22-57.

17. BAUMOL & OATES, *supra* note 15, at 1.

18. *Id.*

19. *See* Alan Cowell, *Gas Taxes Send Europe Drivers on Road Trips*, N.Y. TIMES, July 6, 2000, at A1.

20. *See* Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 29 (1996).

unattainable.[21] Increasingly, policymakers shift toward alternative strategies that allow them to avoid having to decide the level of internalization; for instance, the least-cost approach of the tradable pollution permits scheme.[22]

It is far from clear how cost internalization can be implemented in the trade context. But it should be noted that in the discussion of the relationship between trade and environment, cost internalization often carries the connotation of a well-defined corrective measure that can be applied objectively across the board:

> Increasingly, economists and environmentalists agree that the way to respond to this [market] failure is through full-cost pricing and adherence to the polluter pays principle. Moving in this policy direction would align economic forces and environmental protection needs. It would, more pointedly, help to ensure that the market incentives brought to bear by freer trade would also help to protect ecological values.[23]

This argument is flawed because cost internalization lacks a broadly accepted implementation scheme. Environmental externalities are not an easily verifiable, objective factor that can serve as a basis for differential treatment of like products in the context of international trade.

The lack of a coherent strategy to internalize environmental costs may explain why WTO member countries are permitted to impose environmental requirements on some imports similar to those on domestic products but not on others. The WTO recognizes the legitimacy of import restrictions to enforce environmental requirements involving "product characteristics or their related processes and production methods."[24] These environmental requirements address the environmental damages that are caused by the products themselves or by

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21. *See* BAUMOL & OATES, *supra* note 15, at 2.

22. *See* HANLEY, SHOGREN & WHITE, *supra* note 16, at 137.

23. *See* ESTY, *supra* note 4, at 68-69; David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1 (1998); Jeff L. Lewin, *Which Externalities Should We Internalize? Comment on the Role of Law in Defining Sustainable Development: NEPA Reconsidered by Professor David Hodas*, 3 WIDENER L. SYMP. J. 327 (1998); *cf.* Butler & Macey, *supra* note 20.

24. *See* Agreement on Technical Barrier to Trade [hereinafter TBT Agreement], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, WTO, THE LEGAL TEXTS: THE RESULT OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994). Article 2.2 of the TBT Agreement requires that such requirements must not be more restrictive than necessary to fulfill legitimate environmental or health and safety objectives. *See also* OECD, PROCESSES AND PRODUCTION METHODS (PPMS): CONCEPTUAL FRAMEWORK AND CONSIDERATIONS ON USE OF PPM-BASED TRADE MEASURES 11 (1997) [hereinafter OECD].

substances physically incorporated into them.[25] Such environmental effects manifest themselves at the distribution and marketing stage or when goods are consumed and disposed of after consumption.[26] The WTO's recognition of product-based environmental measures conforms to the sovereign right of nations to regulate the importation of products whose consumption has detrimental effects on the environment within their own territories.

It is more problematic for the WTO to permit import restrictions that address environmental damage caused by the way a product is produced, as opposed to damage caused by the product itself. For trade measures that aim at production externalities, "[t]he problem is how to agree on a suitable sharing among the parties concerned of the required internalization of externalities. Because the import requirements for internalization of production externalities usually shift the responsibility to the exporting country, one single authority cannot decide for all responsible parties."[27] When the environmental benefit is global, multilateral negotiations are a means to distribute costs and burdens. When an international agreement cannot be reached, unilateral trade measures have been rare and generally discouraged.[28]

It is most problematic for the international trading regime when an importing country imposes import restrictions that intend to address the production externalities in exporting countries. There is no international commitment for internalization. An importing country with high environmental standards might want to adjust the market conditions for the costs of domestic environmental protection against imported products out of the concern for international competitiveness for its producers. In such a case, import restrictions often involve processes and production methods (PPMs) whose environmental effects occur in the exporting countries where the production takes place. International trade law does not recognize either the desire to protect foreign environments or the competitiveness concern as legitimate grounds to restrict market access.

From the perspective of international law, import restrictions that involve environmental conditions in foreign countries are strongly

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25. *See* OECD, *supra* note 24, at 12; Paul Demaret & Raoul Stewardson, *Environmental Taxes and Border Tax Adjustments*, 28 J. WORLD TRADE 3 (1994), *reprinted in* RICHARD A. WESTIN, ENVIRONMENTAL TAX INITIATIVES AND MULTILATERAL TRADE AGREEMENTS: DANGEROUS COLLISIONS 102-03 (1997); Christian Pitschas, *GATT/WTO Rules for Border Tax Adjustment and the Proposed European Directive Introducing a Tax on Carbon Dioxide Emissions and Energy*, 24 GA. J. INT'L COMP. L. 479, 490-93 (1995).

26. *See* OECD, *supra* note 24, at 10.

27. *See id.* at 14, 16.

28. *See id.* at 16; *supra* note 6.

opposed because of their unilateral aspect and extra-jurisdictional application. Such unilateral trade measures are likely to produce a sharp reaction from the country affected because (1) a country exercises sovereignty over its domestic environment and (2) it has not participated in the decision-making process leading to the adoption of the import restrictions in question.[29]

From environmental and economic perspectives, countries should set their own environmental standards as appropriate to their environmental preference and level of development.[30] Environmental standards imposed from outside might not fully take into account local concerns or priorities. It is debatable whether a country is justified in considering the environmental assimilative capacity as part of its comparative advantage.[31] The fact remains, however, that it is easy for one country to set high environmental standards for other countries when it does not have to pay the costs.[32]

Lastly, environmental rulemaking is not immune to protectionist interests. Formulated through domestic political processes, environmental regulations may or may not reflect the commercial interests of foreign producers who have little or no representation in the democratic institutions of the importing country that adopts the regulations.[33] Some environmentalists might be willing to support protectionist environmental measures if such measures make domestic producers "less likely to oppose higher domestic environmental standards."[34]

The challenge is how the WTO can distinguish legitimate environmental measures from protectionism disguised as environmental protection. If MEAs could help address these concerns, they would make WTO rules less controversial by reducing the over-inclusiveness of the international trade rules in disallowing trade-related environmental

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29. *See* Phillips Sands, *'Unilateralism,' Values, and International Law*, 11 E. J. INT'L L. 291, 292 (2000).

30. *See* WTO Committee on Trade and Environment, *How Environmental Taxes and Other Requirements Fit In*, *at* http://www.wto.org/english/tratop_e/envir_e/cte03_e.htm (last visited Jan. 24, 2002).

31. *See* Gareth Porter, *Pollution Standards and Trade: The "Environmental Assimilative Capacity" Argument*, 4 GEO. PUB. POL'Y REV. 49, 65-67 (1998) (rejecting the argument that developing countries have superior environmental assimilative capacity and arguing that these countries should adopt higher environmental standards); *cf.* David W. Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 CAN. BUS. L.J. 63, 99 (1996).

32. *See* Butler & Macey, *supra* note 20, at 30.

33. *See* Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L L. 619, 619 (1998); *see also* Sands, *supra* note 29, at 292.

34. Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1, 5 (1996).

measures that distinguish products based on how they are produced. Specifically, MEAs would be most appropriate to resolve the trade and environment conflict over the PPM issue as they provide internationally negotiated solutions to environmental problems. Multilateralism would take care of the problems of extraterritoriality and protectionism. The following Sections discuss the roles of MEAs in the international trade framework as well as difficulties facing the WTO.

III. "LIKE PRODUCTS" AND THE PRODUCT-PROCESS DISTINCTION RULE

The trade concept of like products is one of the most controversial issues in the trade and environment conflict. "Like products" is a term of art in the GATT. While this Comment is concerned with the interpretation of like products in article III of the GATT, it must be noted that the term "like products" appears in a variety of different GATT provisions and several covered agreements of the WTO.[35] The interpretation of like products in each provision depends on the context, object, and purpose of that provision, and the object and purpose of the covered agreement in which the provision appears.[36] By far, article III has been the most fruitful source for GATT/WTO disputes on the term like products.[37] Like products under article III also has an important

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35. For example, "like products" is referenced in articles I:1, II:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4, and XIX:1 of the GATT, the Agreement on Subsidies and Countervailing Measures, the Agreement on Implementation of article VI of the GATT 1994 (the Anti-Dumping Agreement), and the Agreement on Safeguards. *See* WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001), ¶ 88.

36. *See supra* note 35 and accompanying text.

37. *See* Working Party Report, *Brazilian Internal Taxes*, adopted June 30, 1949, BISD II/181 (article III:2 of the GATT 1947); Working Party Report, *The Australian Subsidy on Ammonium Sulphate* (*Australia—Ammonium Sulphate*), adopted Apr. 3, 1950, BISD II/188 (articles I and III:4 of the GATT 1947); Panel Report, *EEC—Measures on Animal Feed Proteins* (*EEC—Animal Feed*), adopted Mar. 14, 1978, BISD 25S/49 (articles I, III:2 and III:4 of the GATT 1947); Panel Report, *Spain—Measures Concerning Domestic Sale of Soyabean Oil* (*Spain—Soyabean*), L/5142, June 17, 1981, unadopted (article III:4 of the GATT 1947); Panel Report, *Canada—Measures Affecting the Sale of Gold Coins*, L/5863, Sept. 17, 1985, unadopted (article III:2 of the GATT 1947); Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, adopted June 17, 1987, BISD 34S/136 (article III:2 of the GATT 1947); Panel Report, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (*1987 Japan—Alcoholic Beverages*), adopted Nov. 10, 1987, BISD 34S/83 (article III:2 of the GATT 1947); *Tuna/Dolphin I*, *supra* note 9 (article III:4 of the GATT 1947); Panel Report, *United States—Restrictions on Imports of Tuna (Tuna/Dolphin II)*, 33 I.L.M. 893, June 16, 1994, unadopted (article III:4 of the GATT 1947) [hereinafter *Tuna/Dolphin II*]; Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, adopted June 19, 1992, BISD 39S/206 (article III:2 and III:4 of the GATT 1947); Panel Report, *United States—Taxes on Automobiles*, DS31/R, Oct. 11, 1994, unadopted (article III:2 and III:4 of the GATT 1947); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*,

impact on environmental rulemaking.[38] Article III of GATT states, in relevant part:

> 2. The products of the territory of any 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. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
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> 3. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering of sale, purchase, transportation, distribution or use.[39]

A tax conforming to the requirements of the first sentence of paragraph two would be considered inconsistent with the provisions of the second sentence only in cases where competition involved, on one hand, the taxed product and, on the other hand, a directly competitive or substitutable product that was not similarly taxed.

One rule used in interpreting like products under article III is the product-process distinction. "The only kind of product distinction that can be recognized under Article III is a distinction based on the qualities of the products themselves" or the characteristics that govern product

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WT/DS2/R, adopted May 20, 1996, *as modified by* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (article III:4 of the GATT 1994); Panel Report, *Japan—Taxes on Alcoholic Beverages (Japan—Alcoholic Beverages*), WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted Nov. 1, 1996, *as modified by* Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125 (article III:2 of the GATT 1994); Appellate Body Report, *Japan—Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, DSR 1996:I, 97 (article III:2 of the GATT 1994); Panel Report, *Canada—Periodicals*, WT/DS31/R, adopted July 30, 1997, *as modified by* the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481 (articles III:2 and III:4 of the GATT 1994); Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WTDS64/R, adopted July 23, 1998 (articles I:1 and III:2 of the GATT 1994); Panel Report, *Korea—Taxes on Alcoholic Beverages* (*Korea—Alcoholic Beverages*), WT/DS75/R, WT/DS84/R, adopted Feb. 17, 1999, *as modified by* Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R (article III:2 of the GATT 1994); Appellate Body Report, *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted Feb. 17, 1999 (article III:2 of the GATT 1994); Panel Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted Jan. 12, 2000, *as modified by* Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R (article III:2 of the GATT 1994); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 35 (article III:4 of the GATT 1994).

38. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 397 (2d ed. 1999).

39. GATT, *supra* note 12, art. III.

qualities.[40] Product distinctions based on characteristics of the production process or of the producer that are not determinants of product characteristics are viewed as illegitimate.[41]

The primary rationale of the product-process distinction is administrative. It is difficult to keep protectionism in check if imports and like domestic products can be treated differently based on characteristics of their production processes. Such differential treatment may result from nonprotectionist, environmental considerations as well as from the concerns for domestic producers who perceive themselves losing competitive advantages to foreign producers who are not required to conform to the same environmental standards. Moreover, the method of assessing whether a production process conforms to domestic standards often depends on policy judgments by local decision-makers who may or may not take into account the interests of foreign producers. To avoid examining its members' nontrade policy judgments, the WTO simply disallows production characteristics as a basis for distinguishing physically similar products with comparable end use.

Article III:2, which covers border tax adjustments, does not permit WTO members to impose border taxes on imported products to adjust for domestic environmental taxes on the production process.[42] The provision allows internal taxes, which are imposed on domestic products, to be imposed on like imported products. But not all internal taxes may be imposed on imports. Only taxes *on products*, such as sales, excise, franchise, and value added taxes, are eligible.[43] Taxes imposed *on producers*, such as income, social security, payroll, and property taxes, are not eligible as internal taxes that can be imposed on imported goods.[44]

Article III:4, which covers regulatory measures, does not permit WTO members to condition market access based on regulation of production processes. In the often cited case *Tuna/Dolphin I*, the United States banned imports of tuna from Mexico, where the deployment of tuna fishing technology based on purse-seine net caused incidental taking of dolphins.[45] The panel in this case concluded that the United States violated its national treatment obligations under article III because imported tuna was the same product as domestic tuna but was treated

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40. Hudec, *supra* note 33, at 624.
41. *See id.*
42. Demaret & Stewardson, *supra* note 25, at 69-73.
43. *Id.*
44. Demaret & Stewardson, *supra* note 25, at 73.
45. *Tuna/Dolphin I*, *supra* note 9, ¶¶ 2.1-2.11.

less favorably.[46] According to the panel, by using the method of catching tuna as a basis for differential treatment of imports, the U.S. measures attempted to regulate the method of catching tuna rather than the product and were not justified under GATT.[47] Three years later, a new GATT panel in *Tuna/Dolphin II* made the same conclusion on the same facts:

> Article III calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation. The panel found therefore that the Note at Article III could only permit the enforcement, at the time or point of importation, of those laws, regulations and requirements that affected or were applied to the imported and domestic products considered as products. The Note therefore could not apply to the enforcement at the time or point of importation of laws, regulations or requirements that related to policies or practices that could not affect the product as such, and that accorded less favourable treatment to like products not produced in conformity with the domestic policies of the importing country.[48]

Similar rationale can be seen in subsequent dispute settlement decisions of the GATT and WTO with regard to the interpretation of like products.

One of the disputed measures in *United States—Measures Affecting Alcoholic and Malt Beverages* involved tax credits and state excise taxes provided by Kentucky, Minnesota, Ohio, and Wisconsin to small domestic breweries based on annual production of these breweries below certain limits.[49] These states did not make tax credits available to imported beer, with the exception of Minnesota.[50] The panel in this case considered that the production volume of breweries does not affect the nature of the beer produced or otherwise affect beer as a product.[51] According to the panel, even if Minnesota granted the tax credits on a nondiscriminatory basis to domestic and foreign small breweries, imported beer from large breweries would be subject to internal taxes in excess of those applied to like domestic products from small breweries and there would still be an inconsistency with the first sentence of article III:2.[52]

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46. *Id.* ¶¶ 5.8-5.16. The unilateral nature and the extraterritorial application of the U.S. import ban were another grounds for objection by the panel.

47. *Id.* ¶¶ 5.14.-5.15.

48. *Tuna/Dolphin II*, *supra* note 37, ¶ 5.15.

49. *See* Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, *supra* note 37, ¶ 5.18.

50. *Id.* ¶¶ 5.18-5.19.

51. *Id.* ¶ 5.19.

52. *See id.*

In *United States—Taxes on Automobiles*, among the measures in question was the Corporate Automobile Fuel Efficiency regulation (CAFE), which required that the average fuel economy for passenger automobiles manufactured by any manufacturer not fall below a certain level.[53] Falling within the scope of CAFE were "all automobiles manufactured by persons who control, are controlled by, or are under common control with, the manufacturer, less those automobiles that are exported."[54] Failure to attain the CAFE standard resulted in a civil penalty.[55] The panel found that the CAFE standard was based on factors relating to the control or ownership of producers/imports, and was not related to cars as products.[56] It therefore concluded that differential treatment on products under the CAFE measure was not permitted under article III:4.[57]

The first WTO dispute, *United States—Standards for Reformulated and Conventional Gasoline*, involved regulations on the composition and emissions of gasoline in order to improve air quality in the most polluted areas of the United States by reducing vehicle emissions of toxic air pollutants and ground-level ozone.[58] The regulations set a minimum level of "cleanness" for domestically produced gasoline on the basis of a refinery-specific, individual specific, or average 1990 U.S. gasoline quality.[59] Foreign refiners were assigned to comply with the standard of the average 1990 gasoline quality, which was the most stringent.[60] The United States argued that the mandatory baseline for foreign refiners was necessary because it was difficult to verify the data on past gasoline quality of foreign refineries.[61] The panel noted that the wording of article III:4 does not allow less favorable treatment to depend on the characteristics of the producer and the nature of data held by them because the treatment of the imported and domestic goods concerned should be assured on the objective basis of their likeness as products and should not be exposed to a highly subjective and variable treatment according to extraneous factors.[62]

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53. Panel Report, *United States-Taxes on Automobiles*, *supra* note 37, ¶ 5.39.
54. *Id.*
55. *Id.*
56. *Id.* ¶¶ 5.53-5.55.
57. *Id.* ¶ 5.54.
58. Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, *supra* note 37, ¶ 2.1.
59. TREBILCOCK & HOWSE, *supra* note 38, at 413.
60. *See id.* at 414.
61. *See* Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 37, ¶ 6.11.
62. *See id.* ¶¶ 6.11—6.13.

Of the three measures challenged in *Canada—Certain Measures Concerning Periodicals*, the Canadian Excise Tax Act imposed an excise tax of eighty percent on the value of advertisements directed to the Canadian market in periodicals with the same or similar editorial content as those published in foreign countries (spilt-run periodicals).[63] Canada made a distinction between "spilt-run" periodicals and domestic periodicals.[64] The panel rejected such distinction of periodicals on the basis of "factors external to the Canadian markets, [that is] whether the same editorial content is included in a foreign edition and whether the periodical carries different advertisements in foreign editions."[65]

Reviewing Canada's excise tax measure under article III, the Appellate Body in *Canada—Certain Measures Concerning Periodicals* reiterated the relevant factors used by the panel in examining like products: the product's end-uses in a given market; consumers' tastes and habits; and the product's properties, nature, and quality.[66] The Appellate Body considered instead whether Canada violated its obligations under article III:2, second sentence, because "spilt-run" and non spilt-run could be considered "directly competitive or substitutable products."[67]

It is debatable whether there is textual language to support the existing interpretation of like products. It has been argued that there is no "justifiable text" in the GATT to support the product-process distinction rule.[68] Article III does not define "like products" and its wording does not prohibit product distinction based on how goods are produced. It is maintained that not all measures that have discriminatory impact are intended to protect domestic producers.[69] The goal of article III, which can be found in the text of paragraph 1, is to limit protectionism, not to stop any discriminatory effect.[70] If a regulation or law has a legitimate, nonprotectionist objective, it should not be struck down just because there are incidental discriminatory effects on imports.[71]

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63. Panel Report, *Canada—Certain Measures Concerning Periodicals*, *supra* note 37, ¶ 5.1.

64. *Id.* ¶ 5.21.

65. *Id.* ¶¶ 5.24-5.25.

66. Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, *supra* note 37, at 20.

67. *See id.* at 22-27.

68. Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 E.J. INT'L L. 249, 249 (2000).

69. *Id.* at 268; *see also* Hudec, *supra* note 33, at 635.

70. *See* Howse & Regan, *supra* note 68, at 268.

71. *See id.*

On the other hand, the GATT as a whole and the WTO treaty were negotiated on products, not on production process or how goods should be produced.

> [T]he very word "product" (occurring in many parts of the WTO agreements, including Article III of the GATT) is text upon which an interpretation [to support the essence of the product-process distinction] could be justified. Such an interpretation would require focus on the characteristics of a *product*, instead of the *process* of producing the product.[72]

Any change to the existing interpretation of like products could affect the negotiated deals and tariff bindings under the WTO agreements.[73]

Perhaps the argument can go either way on the textual support for the interpretation of like products. Administrative feasibility, however, supports the existing interpretation of like products in article III. It is difficult to implement regulatory measures that employ a distinction based on production processes because such a distinction cannot always be verified by the physical appearance of the product or its intrinsic characteristics. There is no practical means for customs officials, upon importation, to identify products that, for example, are produced by an environmentally unacceptable method.[74] Only internal taxes on products may permissibly be imposed on imports because they are easier to adjust than internal taxes on producers.[75]

If the primary purpose of article III is to limit protectionism, the means by which to achieve that purpose must be workable. MEAs might not serve as a bright line for the trade regime when it comes to administrative aspects. However, as with any rulemaking, the fairness of international trade law cannot be increased without sacrificing some of the administrative ease. Similar to the product-process distinction rule, MEAs could serve as a safeguard against protectionism. If internationally negotiated, any product distinction made by an MEA on the basis of their PPM environmental performance would not be a result of protectionism. It could be argued that trade measures set out pursuant to MEA obligations should be exempted from the traditional interpretation of like products and the product-process distinction rule.

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72. John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 E.J. INT'L L. 303, 303-04 (2000).

73. *See* Panel Report, *United States—Taxes on Automobiles*, *supra* note 37, ¶ 5.53.

74. *See* OECD, *supra* note 24, at 31.

75. *See* Pitschas, *supra* note 25, at 485.

IV. THE AIM AND EFFECTS TEST

The national treatment provision operates on the premise that differential treatment between imported and like domestic products is susceptible to protectionist interests. This premise does not always hold because justifiable policy rationales exist that differentiate similar products that are not protectionist. Specifically, the differences between PPMs justify different treatment of products; for example, bona fide environmental measures should be allowed to accord different treatment to products based on their PPM environmental performance. Several authors advocate that the issue presented by article III should not be the matter of distinguishing the determinants of product characteristics and the aspects of the production process, but rather deciding the policy purposes behind the product-process distinction rule.[76] This approach is known as the aim and effects approach.

Consideration of regulatory purposes was first suggested in the GATT panel report in *United States—Measures Affecting Alcoholic and Malt Beverages*.[77] In this case, the panel examined whether the U.S. state regulations that contained more onerous point-of-sale restrictions on beer with alcohol levels exceeding 3.2% violate the national treatment requirement.[78] Instead of accepting Canada's claim that all beer was a like product and should be treated alike, the panel considered the regulatory purposes and competitive effects of the regulations.[79] The panel stated that the distinction in various U.S. laws between low-alcohol and high-alcohol beer was made for purposes of protecting social welfare, and that such "product distinction did not create adverse conditions of competition for Canadian brewers because Canadian brewers produced both types of beer."[80] Accordingly, the panel found that the state regulations on beer did not violate the national treatment obligations.[81] The GATT panel in *United States—Measures Affecting Alcoholic and Malt Beverages* observed:

> The treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations

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76. *See* Snape & Lefkovitz, *supra* note 3, at 796; Hudec, *supra* note 33, at 626; Howse & Regan, *supra* note 68, at 268.

77. Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, *supra* note 37.

78. Hudec, *supra* note 33, at 627.

79. *Id.*

80. *Id.*; Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT*, 27 J. WORLD TRADE 43, 64 (1993).

81. Hudec, *supra* note 33, at 627.

> under the General Agreement and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, become inconsistent with Article III even if the regulation is not "applied . . . so as [to] afford protection to domestic production." In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.[82]

According to the *United States—Taxes on Alcoholic and Malt Beverages* panel report, some products should not be considered like products, despite their similarity of physical characteristics, because product distinctions are made for legitimate regulatory purposes.[83]

The aim and effects approach was further discussed in *Japan—Taxes on Alcoholic Beverages*. In this case, the Appellate Body suggested that a bona fide regulatory measure should be examined objectively by inquiring into a measure's "protective application" rather than a search for regulatory aim.[84] The Appellate Body continued:

> [W]e believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure and its overall application to ascertain whether it is applied in a way that affords protection to domestic products. [ ] Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.[85]

Accordingly, when deciding on like products, the analysis of article III:2 needs to focus on a measure's design, the architecture, and the revealing structure in examining whether such measure has a protective application that affords protection to domestic products.

The aim and effects test has been positively received.[86] Some commentators express that "sensible consideration of aim and effects is essential to identify protectionism, and limiting protectionism is what the

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82. Panel Report, *United States—Taxes on Alcoholic and Malt Beverages*, *supra* note 37, ¶ 5.72.

83. *See* Petersmann, *supra* note 80, at 64.

84. Appellate Report, *Japan—Taxes on Alcoholic Beverages*, *supra* note 37.

85. *Id.* at 27; *see* Howse & Regan, *supra* note 68, at 265.

86. *See, e.g.*, Hudec, *supra* note 33, at 626-38; Howse & Regan, *supra* note 68, at 264-68.

[WTO] treaty is about."[87] The aim and effects approach would "bring the criteria government WTO legal restraints on domestic regulatory measures closer to recognized GATT policy goals."[88] Accordingly, the product-process distinction is considered a mechanical rule that should not substitute for contextual judgment, which the aim and effects approach allows where competing legitimate interests need to be taken into account.[89]

However, the scope to which the aim and effects approach is applicable remains subject to debate. *United States—Taxes on Alcoholic and Malt Beverages* and *Japan—Taxes on Alcoholic Beverages* involve internal taxation under article III:2. This provision is structured differently from article III:4, which governs domestic regulations. The Appellate Body in *European Communities—Regime for the Importation, Sale and Distribution of Bananas* may have rejected the extension of the aim and effects approach to article III:4.[90] In this report, the Appellate Body maintained that the text of article III:4 contains no explicit reference to the general principles of article III:1.[91] The second sentence of article III:2, which the Appellate Body in *Japan—Taxes on Alcoholic Beverages* interpreted and applied the protective application analysis, explicitly contains this reference to article III:1:[92]

> 2. The products of the territory of any 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 access of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to *the principles set forth in paragraph 1.*
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> . . . .
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> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering of sale, purchase, transportation, distribution or use.[93]

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87. Howse & Regan, *supra* note 68, at 268.

88. Hudec, *supra* note 33, at 626.

89. *See* Howse & Regan, *supra* note 68, at 253-68.

90. *See* Hudec, *supra* note 33, at 632-33; Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

91. Hudec, *supra* note 33, at 632-33; *EC—Regime for the Importation, Sale and Distribution of Bananas*, *supra* note 90, ¶¶ 215-216.

92. Hudec, *supra* note 33, at 632-33.

93. GATT, *supra* note 12, art. III.

This textual difference between the two paragraphs may create a discrepancy between the meaning of like products of paragraph two and that of paragraph four.

If applicable to the article III:2 scrutiny of internal taxes, the aim and effects approach should perhaps be equally applied to the analysis of regulatory measures under article III:4.[94] Article III would be more coherent if both paragraphs, two and four, are interpreted in light of the general policy of the national treatment provision set forth in paragraph one.[95] The primary purpose of article III is to limit protectionism. The words "like products," mentioned in paragraph four and elsewhere in article III, should be interpreted in light of this same policy.[96]

Nevertheless, two inconsistencies are likely to develop if the aim and effects approach replaces the traditional like product analysis and the product-process distinction.[97] First, problems can arise where a product distinction has a bona fide regulatory purpose but also has protective market effects.[98] Such cases would require a balancing between the trade interests of one member country and the legitimate regulatory claims of another, which may prove to be more than what the text of article III could offer.[99]

In the 1994 GATT panel report in *United States—Taxes on Automobiles*, the U.S. "gas guzzler" tax distinguished automobiles according to their fuel efficiency.[100] Accordingly, heavier charges fell on the predominantly larger European made cars.[101] The gas guzzling sport utility vehicles, however, were exempt from the same tax scheme.[102] This excise tax on European cars was estimated to be as much as $100 million a year.[103] Employing the aim and effects approach, the panel found that the distinction made under the gas guzzler tax pursued the legitimate objective of conserving fossil fuels. The panel then decided that imported cars that did not meet the fuel efficiency standard set by the tax scheme and domestic cars that met the standard were not like products.[104]

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94. *See* Howse & Regan, *supra* note 68, at 268.
95. *Id.*
96. *Id.* at 267.
97. Hudec, *supra* note 33, at 628.
98. *Id.* at 629.
99. *Id.* at 628-29.
100. Panel Report, *United States—Taxes on Automobiles*, *supra* note 37.
101. ESTY, *supra* note 4, at 269.
102. *See* I.R.C. § 4064(b)(1)(B) (1998).
103. Panel Report, *United States—Taxes on Automobiles*, *supra* note 37; ESTY, *supra* note 4, at 128.
104. Panel Report, *United States—Taxes on Automobiles*, *supra* note 37; TREBILCOCK & HOWSE, *supra* note 38, at 412.

Therefore, the United States was allowed to impose the gas guzzler tax on European cars even though it did not charge the same tax on some of its domestically produced cars. This case poses an important question of how to reach an acceptable decision under article III when the disproportionate effect on foreign goods is inherent in the nature of the regulation.[105] The European Communities vigorously objected to the panel decision and eventually blocked the adoption of the *United States—Taxes on Automobiles* report.[106]

It may be true that adoption of a dispute settlement report is less likely to be blocked in the context of the WTO than in that of the GATT. It may also be true that the TBT Agreement, which may provide a more comprehensive balancing mechanism than is now in place, was not available at the time of the *United States—Taxes on Automobiles* decision. But given that not all PPM-based measures are covered by the TBT Agreement, it is important to ask if article III can appropriately be interpreted to deal with bona fide PPM-based regulations that also have protectionist effects.[107] This also questions the suitability of using article III to respond to environmental challenges.

The second problem of the aim and effects test is the possible textual inconsistency between article III and article XX. By using the aim and effects approach in interpreting article III, article XX could be rendered redundant.[108]

> If panels were required to consider the regulatory purpose of a measure . . . when deciding the issue of violation under Article III, all of the regulatory justifications provided in Article XX would already have been considered and disposed of in the fist-stage of determination of violation leaving no reason to conduct the same inquiry again under Article XX.[109]

However, it has been suggested that article XX justifications are still available for de jure discriminatory measures.[110] Thus, article XX need not be meaningless if the aim and effects test is adopted.[111] For example, it has been stated:

> It is a general principle of treaty interpretation that every clause should have a function, but it is not a general principle of interpretation that every clause should require a new substantive decision in every case where it is

105. *See* Hudec, *supra* note 33, at 629.
106. *Id.*
107. *See* TBT Agreement, *supra* note 24, art. 2; Howse & Regan, *supra* note 68, at 289.
108. Hudec, *supra* note 33, at 628.
109. *Id.*
110. Howse & Regan, *supra* note 68, at 266.
111. *Id.*

> formally relevant. So consideration of 'aims and effects' creates no problem in conjunction with Article XX.[112]

It is debatable whether disproportionate trade impact on imports caused from de facto discrimination needs further justification once the measure in question can be proven to have no protective application.

For example, bona fide regulatory measures with discriminatory effects could face further challenge under article XXIII.[113] Nonviolation nullification or impairment has been invoked in situations where "a GATT-consistent domestic subsidy for the producer of a product has been introduced or modified following the grant of a tariff concession on that product."[114] The nonviolation remedy protects the expectations of competitive relationships by providing "a right to redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement."[115] Therefore, even if it passed article III scrutiny, a bona fide PPM-based regulatory measure could arguably violate the GATT because of its discriminatory or disproportionate trade effects that might offset tariff concessions between the disputing parties.

Because MEA trade measures are internationally negotiated, parties to the agreements must have taken into account costs and benefits. Arguably, the disproportionate trade impact from MEA trade measures would be less likely to occur. Moreover, it is preferable as a policy matter that trade measures taken pursuant to an MEA would not be found in violation of WTO rules at all, and would not be subject to additional analysis under the article XX exceptions. As some have suggested, there is a "philosophical objection" to relegating international environmental concerns into a trade exception.[116] No violation of WTO rules should be found in the first place, at least when both sides of the dispute are MEA parties.

V. THE BALANCING APPROACH

The discussion in the preceding Part focuses on the textual constraint of article III in dealing with the legitimate differentiation employed in environmental measures. The aim and effects approach

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112. *Id.*

113. *See, e.g.*, Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 35, ¶ 8.255.

114. Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, Mar. 31, 1998, ¶ 10.38.

115. *Id.* ¶ 10.35.

116. Snape & Lefkovitz, *supra* note 3, at 797.

nonetheless directs the attention to article XX for an answer to the same concern that the WTO should not prohibit evenhanded, bona fide regulatory measures. Compared to article III, article XX provides a better textual framework for reconciling bona fide environmental measures of one WTO member with trade interests of another member.[117] In relevant part, the exceptions clause of article XX states 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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> . . . .
>
> (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 or consumption.[118]

Article XX(g) has been interpreted broadly. The *Shrimp/Turtle* appellate decision strengthens the right of the state to adopt conservation measures by a liberal interpretation of "exhaustible natural resources."[119] The Appellate Body in *United States—Reformulated Gasoline* emphasizes the difference between the term "relating to" in paragraph (g) and the term "necessary" in paragraph (b).[120] This provision can provide a justification for a bona fide regulatory measure that discriminates against imports in violation of article III, provided that the measure in question satisfies two qualifications.

First, it must be "primarily aimed at" the conservation of exhaustible natural resources.[121] To decide this, the WTO tribunals would examine the relationship between the general structure and design of the measure at stake and the policy goal the measure purports to serve.[122] Also, the

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117. *See* Jackson, *supra* note 72, at 306.

118. GATT, *supra* note 12, art. XX.

119. *Shrimp/Turtle*, *supra* note 11, ¶ 130.

120. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 37, part III.B.

121. *Id.* The opinion nonetheless notes 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(g)." *Id.*

122. *See Shrimp/Turtle*, *supra* note 11, ¶ 137. For example, the court would determine whether there is a close and substantial relationship between the measure and the legitimate policy of conserving exhaustible natural resources, as well as whether the regulatory structure is "fairly narrowly focused." *Id.* ¶¶ 138, 141.

environmental requirement must not be disproportionately wide in its scope and reach in relation to the policy objective of conservation.[123]

The second qualification is "a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[124] The measure in question must be applied in conjunction with restrictions on domestic production or consumption and uniformly applied to different exporting countries where the same conditions prevail.[125] After a regulatory measure is found (1) to be evenhanded and proportionate and (2) to pursue a legitimate policy goal, the WTO tribunals would only scrutinize the measure for abuse of the exceptions of article XX.[126]

The *Shrimp/Turtle* appellate decision reaffirms this trend toward a liberal interpretation of article XX(g).[127] The need to reconcile competing legitimate interests of WTO members under the exceptions clause is underscored in *Shrimp/Turtle*:

> [A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members.[128]

Article XX would allow the WTO to achieve the same result as the aim and effects approach: an internal measure that is evenhanded in its application and pursues the legitimate policy objective.

An MEA would fit well with the analysis of article XX in the *Shrimp/Turtle* appellate decision. The Appellate Body refers to several international environmental agreements before finding that measures taken for preservation of sea turtles fall within exception (g) of article XX.[129] It is arguable that, in effect, WTO jurisprudence has implicitly

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123. *Id.* ¶ 142.

124. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 37, at 20-21.

125. GATT, *supra* note 12, art. XX(g) and Chapeau.

126. *Shrimp/Turtle*, *supra* note 11, ¶ 150.

127. *See* Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory, and Treaty Interpretation*, 31 COLUM. H.R. L. REV. 1, 79 (1999); Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31, 32 (2000).

128. *Shrimp/Turtle*, *supra* note 11, ¶ 156.

129. *Id.* ¶ 168.

recognized MEAs such that national measures implementing MEA policy goals can be deemed legitimate given that they conform to the requirements of nondiscrimination and proportionality discussed above.

Article XX has been a leading subject of the theory on the relationship between WTO rules and MEAs.[130] There have been suggestions that the GATT be amended to extend the exemptions of article XX to include trade provisions of MEAs.[131] In the *Shrimp/Turtle* decision, the WTO Appellate Body interpreted article XX of the GATT with reference to international environmental agreements. It is argued that the WTO should focus on determining whether specific measures constitute arbitrary or unjustifiable discrimination against countries where similar conditions prevail, or whether the regulation is really a disguised restriction on international trade.[132] The international trade regime should not try to decide whether an environmental goal pursued by an MEA is legitimate or whether a measure taken to implement an MEA is necessary.[133] Deference should be accorded to MEAs as to legitimacy and necessity of implementation measures.

VI. MULTILATERAL ENVIRONMENTAL AGREEMENTS IN THE TRADE CONTEXT

With regard to the relationship between WTO rules and MEAs, a question arises as to how to set an inter-institutional framework so that the international trade regime could grant the MEAs some deference without jeopardizing its own mandates. An inter-institutional framework could prove difficult for the WTO. First, it might find it challenging to confine the regime to environmental aspects of production. Additionally, an argument can be made for a case of trade measures that enforce labor

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130. Veit Koester, *Cartagena Protocol: A New Hot Spot in the Trade-Environment Conflict*, 31 ENVTL. POL'Y & L. 82, 86 (2001).

131. *See* WTO, *Communication from the Secretariat for the Vienna Convention and the Montreal Protocol, UNEP*, WT/CTE/W/115 (June 25, 1999); WTO, *Submission by the European Union on Item 1*, *at* http://www.wto.org/english/tratop_e/envir_e/cte_docs_list_e.htm (Feb. 19, 1996). Similar exemptions can be provided through article XXV waiver clause; on a case by case basis, WTO members could exempt trade obligations under a certain MEA from WTO rules. *See* WTO, *Communication from the Secretariat for the Vienna Convention and the Montreal Protocol*, *supra*.

132. *See* WTO, *Submission by Switzerland*, WT/CTE/W/139 (June 8, 2000); WTO, *Submission by the European Union*, *supra* note 131.

133. WTO, *Submission by Switzerland*, *supra* note 132.

standards and minimum wages set by the International Labor Organization.[134]

In addition, how to define MEAs would be an important issue. Arguably, the definition should not be limited to existing MEAs as states should be able to incorporate trade measures into future MEAs without the uncertainty of whether there could be a violation of WTO rules. It has been proposed that an MEA be defined as an international written instrument that creates legal obligations among parties and aims at solving environmental problems, the solution of which requires action at the international level.[135] This would not include a number of "soft-laws," which form a significant part of international environmental law.[136]

For trade measures taken pursuant to a specific provision of an MEA to be presumed "necessary" under article XX, it is suggested that the MEA in question must (1) be open to participation by all parties concerned about the environmental objectives of the agreement and (2) reflect, through adequate participation, the interests of parties concerned, including parties with relevant significant trade and economic interests.[137] It is not clear whether this requires a certain number of ratifying states or if general support would be adequate.[138]

To date, there has not been a dispute between WTO rules and MEAs. However, there seems to be a preference that mechanisms available under MEAs should be the forum for dispute settlement. WTO members have expressed the view that "if a dispute arises between WTO members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they would consider trying to resolve it through the dispute settlement mechanisms available under the MEA."[139] Nevertheless, the MEA dispute settlement framework is likely to be weaker and less efficient than that available under the WTO. Moreover, when one of the two parties to a WTO dispute is not party to the MEA, a WTO panel may have to decide the question on trade measures taken pursuant to the MEA concerned. In such a case, the dispute settlement panel can request assistance from

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134. *See* Michael Lennard, *The World Trade Organization and Disputes Involving Multilateral Environmental Agreements*, 1996 EUR. ENVTL. L. REV. 306, 312. *See generally* Blackett, *supra* note 127.

135. WTO, *Submission by the European Union*, *supra* note 131.

136. Lennard, *supra* note 134, at 311.

137. *See* WTO, *Submission by the European Union*, *supra* note 131.

138. Lennard, *supra* note 134, at 312.

139. OECD, *supra* note 12, at 32-33.

technical experts as stated by article 13 of the WTO Dispute Settlement Understanding.[140]

On the other hand, some suggest that the relationship between the multilateral trade regime and MEAs should be in the form of consultative mechanisms in order to avoid the conflicts.[141] This approach focuses on the utility of consultation as a means for identifying alternatives and the least trade restrictive policies.[142] Some MEAs, including the Montreal Protocol, already contain detailed consultative mechanisms.[143] Under the TBT Agreement, WTO members are required to notify and consult on draft technical regulations.[144] The consultative approach would fit well within the existing schemes, in addition to encouraging constructive dialogue between the international trade regime and the MEAs.

VII. CONCLUSION

The negotiations on the relationship between the international trade rules and MEAs may prove to be just a political gesture by WTO members. An international environmental agreement such as the Kyoto Protocol, which does not include trade measures, only commits industrialized countries to elaborate domestic policies and measures to achieve their legally binding targets for the reduction of greenhouse gases.[145] Countries that are not bound by the Kyoto Protocol would gain competitive advantages because they would not incur the costs of combating greenhouse gas emission through a significantly higher energy price. In order to avoid possible conflict, trade implications that may arise from the national implementation of measures to meet commitments under agreements, such as the Kyoto Protocol, would have to be addressed. For example, these could include whether parties to the Kyoto Protocol could take adjustment measures, such as imposition of carbon taxes at the borders on imports from countries that are not parties to the Kyoto Protocol but are members of the WTO. Perhaps this could be done outside the WTO forum. However, it would be only a matter of time before the WTO would have to examine its substantive rules, such as the like products doctrine, if that is where the real solutions lie.

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140. WTO, *Submission by the European Union*, *supra* note 131.
141. WTO, *Communication from New Zealand*, WT/CTE/W/162 (Oct. 10, 2000).
142. *Id.*
143. *Id.*
144. *Id.*
145. *See* WTO, *Communication from the Secretariat of the United Nations Framework Convention on Climate Change*, WT/CTE/W/123 (July 8, 1999).