Responding to national concerns

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CHAPTER 9

RESPONDING TO NATIONAL CONCERNS

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I. Introduction

II. Comparing the Disciplines of the SPS Agreement, the TBT Agreement, and the GATT 1994
   A. Non-Discrimination: National Treatment and Most-Favoured-Nation
   B. Necessity Tests
   C. Appropriate Level/Scientific Basis
   D. Harmonization, Conformity with International Standards
   E. (Mutual) Recognition and Equivalence
   F. Internal Consistency
   G. Permission for Precautionary Action
   H. Balancing
   I. Product/Process Issues and the Territorial–Extraterritoriality Divide

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Free trade and regulatory autonomy are often at odds with one another. National measures of an importing State may impose costs on international trade, for example, by regulating goods in ways that vary from home market regulation. National measures may restrict market access of imported goods but may or may not be intended to act as protectionist measures favouring domestic industry to the detriment of imports. At the same time, domestic regulation may protect important values. The distinction between a protectionist measure—condemned for imposing discriminatory or unjustifiable costs—and a non-protectionist measure restricting trade incidentally (and thus imposing some costs) is difficult to make.

The search for the right balance between disciplining protectionist measures and allowing Members to maintain regulatory autonomy has characterized the evolution of the GATT rules—namely Articles I, III, XI, and XX GATT 1994, the TBT Agreement, and the SPS Agreement. This chapter compares the disciplines on domestic regulation contained in each of these agreements, and provides an analysis of the conditions for application of each agreement.

While the WTO Agreement and its annexes is today a single treaty, its provisions were originally negotiated through 15 different working groups, which may not have been sufficiently coordinated with one another. In grouping under a framework agreement various negotiated texts, without any extensive discussion of the internal organization and hierarchy of WTO norms, negotiators may have hoped that the flexibility inherent in some of the WTO treaty provisions would suffice to reconcile all tensions among its various provisions. The wording of some WTO provisions does not always support such hope. It thus becomes very difficult to define clearly and precisely the legal parameters of the relationships among the provisions of different WTO agreements.

This chapter focuses mainly on a comparison among (i) Articles III, XI, and XX GATT 1994, (ii) the TBT Agreement, and (iii) the SPS Agreement, all of which impose different regulatory constraints on government actions relating to standards, technical and sanitary regulations, etc. The text identifies disciplines inherent and common to each set of provisions, it compares them, discusses their interaction, and suggests some understandings.
II. Comparing the Disciplines of the SPS Agreement, the TBT Agreement, and the GATT 1994

The SPS and the TBT Agreements and the GATT 1994 each contain a number of different disciplines on national regulation. This section discusses selected disciplines under the following categories:

1. Non-discrimination: national treatment and most-favoured-nation
2. Necessity tests
3. Appropriate level/scientific basis
4. Harmonization; conformity with international standards
5. (Mutual) recognition and equivalence
6. Internal consistency
7. Permission for precautionary action
8. Balancing
9. Product/process issues and the territorial-extraterritorial divide

To some extent these disciplines relate to each other. Often they are specifically addressed in those WTO Agreements and the jurisprudence has had to deal with them. They represent different aspects of the WTO disciplines on the domestic normative autonomy of Members. These disciplines work in varying combinations within each of these three sources of WTO law. They also work together from the broader perspective of general WTO law. To a great extent, the TBT and SPS Agreements can be seen as an evolution of GATT provisions.

A. Non-Discrimination: National Treatment and Most-Favoured-Nation

Obligations of non-discrimination in internal regulation, including the application of internal regulation at the border, occupy a primary position in the GATT 1994, and in the SPS and TBT Agreements. Discrimination between products and between situations is condemned. In this section the obligation of non-discrimination is examined as between domestic and imported products: national treatment (NT).

1. GATT

(a) Article III GATT – National Treatment Obligation

Article III GATT 1994 has been interpreted in several GATT and WTO cases. In its first report, Japan—Alcoholic Beverages, the WTO Appellate Body declared that
the broad purpose of Article III is to prohibit 'protectionism', a concept that it did not define. It also rejected the 'aims-and-effects' approach to the obligation of NT, at least as a search for subjective intent. It refused to see any issue of the subjective intent of the Member in Article III determinations:

It does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, applied to imported or domestic products so as to afford protection to domestic production. This is an issue of how the measure in question is applied.2

The Appellate Body stated that 'it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application, to ascertain whether it is applied in a way that affords protection to domestic products'.3 For a violation of Article III:4 to be established, the complaining Member must prove that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; that the imported and domestic products at issue are 'like products'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.4

The prohibition against discrimination in the NT obligation can apply only when imported and domestic products are 'like', interpreted to be as broad a concept as products 'directly competitive' in Article III: 2 (FNT) Appellate Body report, EC-Asbestos, at para. XX. The majority of the Appellate Body in EC - Asbestos found that 'likeness' under Article III:4 is, 'fundamentally, a determination about the nature and extent of a competitive relationship between and among products'.5 To perform such an assessment, the Appellate Body recalled that the four classic, and basic, criteria, derived from the Border Tax Adjustment report— (i) the physical properties of the products in question; (ii) their end uses; (iii) consumer tastes and habits vis-à-vis those products; and (iv) tariff classification6— are to be used as tools in the determination of this competitive relationship between products. These criteria do not exhaust inquiry.

The less favourable treatment criterion involves an 'effects test'. In Korea - Various Measures on Beef, the Appellate Body reversed the Panel, which had concluded that a regulatory distinction based exclusively on the origin of the product necessarily violated Article III GATT 1994. The Appellate Body emphasized the fact that 'differential treatment' may be acceptable, so long as it is 'no less favourable'. Article III

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1 Appellate Body Report, Japan - Alcoholic Beverages II, at 16.
2 Ibid at 28 (emphasis added).
3 Ibid at 29.
4 Appellate Body Report, Korea - Various Measures on Beef, at para 133.
5 Appellate Body Report, EC - Asbestos, at para 99. Note the different opinion with regard to the very specific aspects mentioned in para 154.
only prohibits discriminatory treatment, which 'modifies the conditions of competition in the relevant market to the detriment of imported products'.

In *EC – Asbestos*, the Appellate Body made the following statement:

A complaining Member must still establish that the measure accords to the group of 'like' imported products 'less favourable treatment' than it accords to the group of 'like' domestic products. The term 'less favourable treatment' expresses the general principle, in Article III:4, that internal regulations 'should not be applied ... so as to afford protection to domestic production'.

And as it had stated in *Korea – Various Measures on Beef*, 'a formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4'. Whether or not imported products are treated less favourably than like domestic products should be assessed, instead, by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products. Thus, it is not enough to find a single foreign like product that is treated differently from a domestic like product. The class of foreign like products must be treated less favourably than the class of domestic like products. In order for this to occur, it would seem necessary that the differential regulatory treatment be predicated, either intentionally or unintentionally, on the foreign character of the product.

Indeed, the Appellate Body Report in *EC – Asbestos* first stated that '... a member may draw distinctions between products which have been found to be “like”, without, for this reason alone, according to the group of “like” imported products “less favourable treatment” than that accorded to the group of “like” domestic products.'

In *Dominican Republic – Cigarettes*, the Appellate Body clarified that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case". The *EC – Approval and Marketing of Biotech Products* Panel reports also suggested that discrimination would not create less favourable treatment when the difference is justified by non-protectionist policies based on government/consumers' perceptions. The Panel concluded that there was no need to determine whether biotech and non-biotech were like products since 'if it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin rather than, for instance, a perceived difference between biotech and non-biotech

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8 Appellate Body Report *EC – Asbestos*, at para 100.
products in terms of their safety . . . . 11 The Panel rejected the claim of violation of national treatment.

(b) Most-Favoured-Nation Principle

Article I GATT 1994 provides that for all matters referred to in paragraphs 2 or 4 of Article III GATT 1994, any advantage, favour, privilege, or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

Article 2.3 SPS Agreement and Article 2.1 TBT Agreement provide similar MFN obligations. Interestingly, both Article 4 SPS Agreement and Article 6.3 TBT Agreement encourage ‘mutual recognition’ agreements. Mutual recognition agreements (MRAs), of course, reduce barriers to imports of goods from beneficiary States, but they may provide inferior treatment to imports of goods from non-beneficiary States. This could arguably violate the MFN obligation 12 depending on the ‘architecture’ and functioning of the specific MRA. These MRAs are part of the positive integration exercise, along with harmonization discussed below.

2. TBT Agreement

Article 2.1 TBT Agreement, following closely Articles III and I GATT 1994, requires that ‘treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country’. However, it is worth noting that the TBT Agreement has no equivalent of Article XX GATT 1994, providing an exemption under certain circumstances.

Problems may occur if the scope of the term ‘like products’ is the same as that under Article III:4, while justifications under Article XX are not available to violations of Article 2.1 TBT Agreement. It is conceivable that the ‘accordion’ of like products 13 may allow a distinction between ‘like’ products of Article III (or I) GATT 1994 and that of 2.1 TBT Agreement. The emphasis of the Appellate Body on the ‘no less favourable’ language may serve as a defence for non-protectionist domestic regulation and therefore reduce the need to invoke Article XX to justify measures based on listed non-protectionist policy goals. Otherwise, an incongruous situation could appear where for instance many environment-based technical regulations could be inconsistent with Article 2.1 while the same regulations would be authorized by Article XX (after a prior determination that it was prima facie inconsistent with Article III:4 GATT 1994).


13 Appellate Body Report, Japan – Alcoholic Beverages II, at 23.
3. **SPS Agreement**

Two provisions of the SPS Agreement concern discrimination directly: Articles 2.3 and 5.5. The SPS Agreement should be understood, to some extent, as an expansion of Article XX GATT 1994, and its drafters were concerned with the need to (1) expand the scientific and procedural requirements for a Member to impose an SPS measure, and (2) encourage reliance on and participation in international standard-setting bodies. Although both these provisions seem to have adapted their operative language from the chapeau of Article XX GATT 1994, the Panel in *Australia – Salmon (Article 21.5 – Canada)*, was of the view that Article 2.3 SPS Agreement prohibits discrimination between both similar and different products. 14 The scope of Article 2.3 would thus be much broader than that of Article 5.5 which was said to be ‘but a complex and indirect route’ 15 to proving the discrimination prohibited by Article 2.3. Article 5.5, which imposes a form of internal consistency requirement, and the Guidelines on Article 5.5 adopted by the SPS Committee, are further discussed below.

The test under the SPS Agreement is different from that under Articles III, XI, and XX GATT 1994; there is no like products analysis or product-process distinction *per se* (as with Article III GATT 1994) in the SPS Agreement. The focus of the analysis is the justification for discrimination between situations under the SPS prohibition itself.

**B. Necessity Tests**

One important general discipline on domestic regulation in WTO law is the necessity test, which, until the reports in *EC – Asbestos and Korea – Various Measures on Beef*, was generally interpreted as requiring that the domestic regulation be the least trade restrictive method of achieving the desired goal. The TBT and SPS Agreements have made it a ‘positive requirement’ for all relevant regulations while the GATT 1994 keeps it, under Article XX, as a ‘justification’ for restrictions found to violate other provisions, including basic market access rights.

1. **The Necessity Test in the GATT 1994**

Since its inception, the GATT 1994 has always recognized that legitimate government policies may justify measures contrary to its basic market access rules. Traditionally under the GATT 1994, the exceptional provisions of Article XX(b) and (d) are available to justify measures—otherwise incompatible with other GATT provisions—if they are ‘necessary’. This has been interpreted to require that the country invoking

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15 On the relationship between Articles 2.3 and 5.5 SPS Agreement, see Appellate Body Report, *Australia – Salmon*, at para 252.
these exceptions demonstrate that no other WTO-compatible or less restrictive alternative was reasonably available to pursue the desired policy goal.16

The WTO jurisprudence has changed the traditional reading of Article XX GATT 1994, including the parameters of the so-called ‘necessity test’. First, in US–Gasoline, the Appellate Body determined that compliance with Article XX is now to be demonstrated in a two-prong test: first, whether the challenged measure is covered by one of the sub-paragraphs of Article XX and, second, whether or not the measure is ‘applied’ in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade. While Members have a right to invoke the exceptions, the exceptions should not be applied so as to unjustifiably frustrate the legal obligations owed to other Members under the GATT 1994.17

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

In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.18

After reiterating that WTO Members have the right to determine for themselves the level of enforcement of their domestic laws19 (a concept close to the ‘appropriate level of protection’ referred to in the SPS Agreement), the Appellate Body called for an authentic balancing and weighing of (at least) these variables: ‘[t]he more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument’;20 ‘[t]he greater the contribution [to the realization of the end pursued], the more easily a measure might be considered to be “necessary”’;21 or ‘a measure with a relatively slight impact upon imported products might more easily be considered as “necessary” than a measure with intense or broader restrictive effects’.22

In EC–Asbestos, the Appellate Body tried to reconcile its new balancing test with the traditional least trade restrictive alternative test. For the Appellate Body, the balancing referred to in Korea – Various Measures on Beef is part of the determination

18 Appellate Body Report, Korea – Various Measures on Beef, at para 164. See also chapter 6 of this Handbook.
19 Ibid at para 177.
20 Ibid at para 162.
21 Ibid at para 163.
22 Ibid.
of whether a WTO-compatible or less trade restrictive alternative exists to obtain the end pursued (as called for by the traditional necessity test of Article XX(b)).

The Appellate Body noted that the protection of human life is vital and important to the highest degree. It is not yet clear what the impact of such a policy of the highest importance has had on the rest of the determination. But it seems that Panels and the Appellate Body are asked to assess the reasonableness and importance of the values at the basis of the challenged measure. In EC – Asbestos, Appellate Body concluded that 'the remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition'. Once the respondent has made a prima facie case that the challenged measure is 'necessary' with this new test, it is for the complainant to raise a WTO-consistent alternative measure that, in its view, the responding party should have taken.

In Brazil – Retreaded Tyres, the Appellate Body clarified that in order to be necessary a measure needs to bring about a 'material contribution' to the achievement of its objective and that a contribution exists when there is a genuine relationship of ends and means between the objective and the measure.

Importantly, it also confirmed that while the responding party must demonstrate that a measure is necessary – in contributing materially to its legitimate goal – its does not have to show, in first instance, that there are no reasonably available alternative measures to achieve its objective. Rather it is for the complaining party to submit WTO-consistent alternative measures that would allow the respondent to reach the desired level of protection and achieve the same objectives.

It is important at this stage to note the similarity between the wording of the necessity tests under Article XX GATT 1994, that of Article 2.2 TBT Agreement, and that of Article 5.6 SPS Agreement and its footnote, although of course Article XX GATT 1994 operates as a defence. The possibility for common interpretation is discussed below.

(a) The Test Under Article XX(g) GATT 1994

In its US – Gasoline report, although the parties had both relied on the GATT 'primarily aimed at' test, the Appellate Body noted that the threshold of Article XX(g) did not contain a requirement that the measure be 'primarily aimed at', but only a requirement that the measure be 'related to'. The Appellate Body examined whether 'the means (the challenged regulations) are, in principle, reasonably related to the ends' and whether 'such measures are made effective in conjunction with restrictions

24 Ibid.
26 Ibid at para 172.
29 FNT Brazil – Retreaded Tyres, at para. 156.
on domestic production or consumption' (‘...a requirement of even-handedness in
the imposition of restrictions’). 31 In *US - Shrimp*, the Appellate Body focused on the
means-ends relationship between the measure and the goal pursued. 32

(b) The Chapeau of Article XX GATT 1994

In *US - Shrimp*, the Appellate Body stressed the fact that the chapeau of Article XX
is a recognition of the need to maintain a balance between the right of a Member to
invoke one of the exceptions in Article XX GATT 1994 and the substantive rights of
other Members under the GATT 1994. It noted that the task of applying the chapeau
is a delicate one of finding and marking out a ‘line of equilibrium’ 33 between these
two sets of rights in such a way that neither will cancel out the other.

The chapeau of Article XX GATT 1994 establishes three standards regarding the
application of measures for which justification under Article XX may be sought:
first, there must be no ‘arbitrary’ discrimination between countries where the same
conditions prevail; second, there must be no ‘unjustifiable’ discrimination between
countries where the same conditions prevail; and, third, there must be no ‘disguised
restriction on international trade’. 34

2. TBT Agreement

The exceptional provisions of Article XX GATT 1994 only become relevant after
a violation of another provision of the GATT 1994 is found. This is a significant
distinction from both the SPS Agreement and the TBT Agreement, which apply
requirements of least trade restrictiveness independently. Thus, whether a specific
measure is an SPS measure or technical regulation under the TBT Agreement, or
rather another type of measure under Article XX GATT 1994 (say a measure adopted
for environmental purposes) will determine which Member bears the burden of
proof in case of a challenge. An important distinction between Article 2.2 TBT
Agreement and Article XX GATT 1994 is that the former does not contain a closed
list of policies. Rather, any ‘legitimate’ policy may be the basis for a TBT regulation.

3. SPS Agreement

The SPS Agreement also contains in Article 5.6 a necessity test, subject to a ‘rea-
sonable availability’ qualification, requiring that SPS measures be ‘not more trade
restrictive than required to achieve their appropriate level of protection, taking into
account technical and economic feasibility’. 35 In *Australia - Salmon*, the Appellate

31 Ibid at 20–22.
33 Ibid.
35 Art 5.6, fn 3 SPS Agreement: ‘For purposes of paragraph 6 of Article 5, a measure is not more
trade-restrictive than required unless there is another measure, reasonably available taking into
Body stated that Article 5.6 clearly provides a three-pronged test to establish a violation. The complaining party must prove that there is a measure that: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.

Article 5.4 SPS Agreement exhorts (but does not require) WTO Members, 'when determining the appropriate level of sanitary or phytosanitary protection, [to] take into account the objective of minimizing negative trade effects'. Arguably this is similar to (or even less stringent than) the third variable (impact on trade) of the balancing test developed in Korea - Various Measures on Beef. A Member must ensure that its appropriate level of protection is consistently applied to the extent required by Article 5.5 SPS Agreement. The jurisprudence has confirmed that 'the level of protection deemed appropriate by the Member establishing a sanitary... measure, is a prerogative of the Member concerned'\(^{36}\)

C. Appropriate Level/Scientific Basis

1. SPS Agreement

Article 2.2 SPS Agreement provides that SPS measures must be based on scientific principles and may not be maintained without sufficient scientific evidence, except as permitted under Article 5.7. It requires Members to ensure that any measure is applied only to the extent necessary to protect human, animal or plant life or health. The interpretive question here relates to the significance of the term 'applied'. This term appears here, and also in the chapeau of Article XX GATT 1994. In US - Shrimp and US - Gasoline,\(^{37}\) the Appellate Body suggested that the chapeau's requirements relate not to the substance of the measure itself but to the way in which it is applied, for example, whether it is applied in a way that constitutes arbitrary or unjustifiable discrimination. Article 5.6, also imposing a 'least trade restrictive alternative' requirement, does not limit itself to the manner in which the measure is applied, but addresses measures themselves.

Article 3.3 SPS Agreement permits Members to introduce measures that result in a higher level of protection than international standards, if (a) there is scientific justification, or (b) as a consequence of the Member's appropriate level of account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade'. This is necessity testing subject to a 'reasonably available' qualification. See also Art 2.2: 'Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health...'.

\(^{36}\) Appellate Body Report, Australia - Salmon, at para 199.

protection. Under Article 3.3, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.

In all cases where a standard other than an international standard is used, the Member imposing an SPS measure must be able to rely on a relevant risk assessment pursuant to Articles 5.1 to 5.4 SPS Agreement. In Australia – Salmon, the Appellate Body stated:

On the basis of [the] definition [prescribed in the first part of paragraph 4 of Annex A], we consider that, in this case, a risk assessment within the meaning of Article 5.1 must: (1) identify the diseases whose entry, establishment, or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment, or spread of these diseases; (2) evaluate the likelihood of entry, establishment, or spread of these diseases, as well as the associated potential biological and economic consequences; and (3) evaluate the likelihood of entry, establishment, or spread of these diseases according to the SPS measures which might be applied.

These requirements were interpreted in each of the three cases under the SPS Agreement: EC – Hormones, Australia – Salmon, and Japan – Agricultural Products II.

2. **TBT Agreement**

The Preamble of the TBT Agreement also makes clear that each Member may determine the level of protection it considers appropriate. This 'appropriate' level will be reflected in the choice of a specific measure that itself is subject to Article 2.2 TBT Agreement, concerned with less trade restrictive measures reasonably available to attain the end pursued. The TBT Agreement does not explicitly regulate risk assessments or require scientific bases for regulation.

3. **The GATT 1994**

In EC – Asbestos, the Appellate Body noted 'that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'. It equally noted that 'a Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority

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38 Note 2 to Article 3.3 explains that a scientific justification exists if, on the basis of scientific evidence, the regulating State determines that international standards are insufficient to achieve appropriate level of protection.


40 Appellate Body Report, Australia – Salmon, at para 121.

scientific opinion’. Relevant to this regulatory autonomy is the Appellate Body’s conclusion in US – Shrimp, which affirms that a Member may unilaterally determine its policy within the parameters of Article XX:

It appears to us... that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. 43

While this right to determine an (appropriate) level of protection is absolute, pursuant to Article XX, the measure chosen to implement the end pursued and the appropriate level of protection can be challenged and set aside by WTO adjudicating bodies. 44 Moreover, since the specific level of protection is not always clearly stated by a Member, the Appellate Body seems to reserve to the Panel or itself the right to identify the ‘authentic’ level of protection desired by the concerned Member.

D. Harmonization, Conformity with International Standards

One of the core problems facing the WTO is the imbalance between its new (since 1994) dispute settlement authority, on the one hand, and its extremely limited legislative capacity, on the other hand. While this chapter describes certain negative integration powers (the power of the WTO to strike down domestic regulations) available in WTO dispute settlement, to be exercised through the application of general standards, the WTO has much more limited powers of positive integration (the power of the WTO to ‘re-regulate’ at a multilateral level) available to be exercised through the legislation of specific rules. Positive integration has two main potential components: harmonization (international legislation or standardization) and recognition. While these agreements contain no requirements of harmonization, they provide some incentives for States to formulate and conform to international standards developed in other fora.

1. SPS Agreement

In the Uruguay Round, in the area of SPS measures, certain quasi-legislative authority was referred to certain other functional organizations. That is, the definition of ‘international standards’ contained in Annex A to the SPS Agreement appoints the Codex Alimentarius Commission (Codex), the International Office of Epizootics (OIE), and the International Plant Protection Convention (IPPC) as ‘quasi-legislators’ of these standards in relevant areas. What is the meaning of ‘quasi-legislators’?

43 Ibid at para 121.
44 Ibid at paras 161–64.
First, the standards developed by Codex, OIE, and IPPC for human, animal, and plant health, respectively, are, under the terms of their own constitutive documents, non-binding. However, Article 3.1 SPS Agreement provides that ‘Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3’. Moreover, Article 3.2 states that SPS measures of WTO Members that are in conformity with international standards, guidelines, or recommendations shall be ‘presumed to be consistent with the relevant provisions of this Agreement’. In EC – Hormones, the Appellate Body found that the terms ‘based on’ in Article 3.1 and ‘in conformity with’ in Article 3.2 have different meanings. ‘Based on’ means simply derived from, and provides greater flexibility to Members.\(^{45}\) However, reversing the Panel, the Appellate Body found that while Article 3.2 was a safe harbour, it did not establish the converse presumption; the Panel erred in presuming that measures that did not conform to international standards were inconsistent with the SPS Agreement. Members can always adopt norms above international standards as long as they comply with the SPS Agreement, including Article 5 on risk assessments.\(^{46}\) This is true also for Article 2.5 TBT Agreement.

2. **TBT Agreement**

Article 2.4 TBT Agreement requires Members to use international standards as a basis for their technical regulations, unless the international standards are an inappropriate or ineffective means to achieve legitimate objectives, so deviation from international standards is discouraged.

This provision was interpreted in EC – Sardines. The Appellate Body determined that a Codex Alimentarius standard was a ‘relevant international standard’ within the meaning of Article 2.4, despite the fact that it was not adopted by consensus. Thus, Members may find that standards that they did not accept—that they in fact rejected—need to be taken into account and have other legal significance under Article 2.4 TBT Agreement. Article 2.4 requires that Members use ‘relevant international standards’ as a basis for their technical regulations. The Appellate Body found that for a standard to be used ‘as a basis for’ a technical regulation, it must be ‘used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation’.\(^{47}\) Furthermore, one thing cannot be the basis for another if the two are contradictory.\(^{48}\) The Appellate Body found no general rule-exception.

\(^{45}\) In EC – Hormones, at para 165, the Appellate Body rejected the Panel’s finding that ‘based on’ and ‘conform to’ have the same meaning.

\(^{46}\) Therefore, Article 3.3 permits Members to introduce measures, which result in a higher level of protection than international standards, if (a) there is scientific justification, or (b) as a consequence of Member’s appropriate level of protection. Members can always adopt norms above international standards as long as they comply with the SPS Agreement including Article 5 on risk assessment.


\(^{48}\) Ibid at para 248.
relationship between the first and second parts of Article 2.4. Therefore, it was for Peru to bear the burden of proving a violation of Article 2.4 as a whole.

3. The GATT 1994

The GATT 1994 does not specifically require the use of international standards, though the least trade restrictive alternative requirements under Article XX and/or the good faith requirement under the chapeau of Article XX may include a requirement to attempt to create an international or regional standard before applying a unilateral one.

Clearly, and ‘as far as possible’, a multilateral approach is strongly preferred. Yet it is one thing to prefer a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the conclusion of a multilateral agreement as a condition of avoiding ‘arbitrary or unjustifiable discrimination’ under the chapeau of Article XX. There is, in this case, no such requirement. 49

Reliance on international or even regional standards may provide a de facto presumption of good faith as required by Article XX.50

E. (Mutual) Recognition and Equivalence

1. SPS Agreement

Article 4.1 SPS Agreement requires recognition of other Members’ regulations. In 2001, the SPS Committee adopted a decision on the implementation of Article 4 on equivalence to ‘make operational the provisions of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures’. 51 It imposes an obligation on an importing Member, upon the request of the exporting Member, to explain the objective and rationale of the SPS measure, to identify clearly the risks that the relevant measure is intended to address, and to indicate the appropriate level of protection, which its SPS measure is designed to achieve. In addition, the exporting Member must provide reasonable access, upon request, to the importing Member for inspection, testing, and other relevant procedures for the recognition of equivalence. Such requests should proceed rapidly, especially with traditional imports, and should not in themselves disrupt or suspend ongoing imports.

2. **TBT Agreement**

The requirement of the SPS Agreement is stronger than the more hortatory obligation of Article 2.7 TBT Agreement, which simply requires Members to give positive consideration to accepting foreign regulation as equivalent, if the foreign regulation fulfils the importing Member’s objectives. Since Article XX GATT 1994 requires that Members maintain an appropriate level of flexibility in the administration of their regulatory distinctions,\(^5^2\) it is probable that Article 2.7 (or Article 2.2 in a manner parallel to Article XX) will be interpreted as requiring sufficient flexibility in normative determinations and good faith consideration of the alternative and equivalent standards suggested by the exporting country.

3. **The GATT 1994**

The GATT 1994 contains no explicit equivalency requirement or facility of recognition. However, it is possible that necessity requirements under Article XX (b) or (d) could require recognition. In addition, the Appellate Body in *US – Shrimp (Article 21-5 – Malaysia)* seems to have identified such an embryonic requirement in the chapeau of Article XX, when writing that ‘an approach based on whether a measure requires essentially the same regulatory programme...as that adopted by the importing Member...[does] not meet the requirements of the chapeau of Article XX’. A measure requiring US and foreign regulatory programmes to be ‘comparable in effectiveness’, as opposed to being ‘essentially the same’ would comply with the prohibition against a disguised restriction on trade.\(^5^3\) This appears to function as a ‘soft’ equivalency requirement.

F. **Internal Consistency**

1. **SPS Agreement**

Article 5.5 SPS Agreement requires a regulating Member to ‘avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different

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\(^5^3\) Ibid at para 144: ‘In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme comparable in effectiveness. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. The Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid ‘arbitrary or unjustifiable discrimination’.
situations, if such distinctions result in discrimination or a disguised restriction on international trade'. This provision adds a specific route to be followed to demonstrate discrimination generally prohibited by Article 2.3 SPS Agreement. In EC – Hormones, the Appellate Body identified three elements that cumulatively must be demonstrated for a violation of Article 5.5 and pointed to 'warning signals':

The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those levels of protection exhibit arbitrary or unjustifiable differences ('distinctions' in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction on international trade. We understand the last element to be referring to the measure embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade...54

The Appellate Body in Australia – Salmon found that an unexplained distinction in the levels of protection imposed by Australia ('internal inconsistency') resulted in a disguised restriction on international trade, in violation of Article 5.5 SPS Agreement, and by implication, Article 2.3.55 The test under Article 5.5 is definitely more sophisticated than that under the chapeau of Article XX. Members have a right to take SPS measures, but it is a conditional right and the conditions are stringent. Under Article XX GATT 1994, Members have an exceptional right to take measures based on policies therein listed. The conditions attached are less stringent but this right has to be balanced against the market access rights of other WTO Members.

2. TBT Agreement

The TBT Agreement does not contain any explicit consistency requirement but, as discussed hereafter, the Article XX GATT 1994 necessity test appears to contain a soft consistency requirement. A similar requirement could thus exist in the operationalization of the Article 2.2 necessity test.

3. The GATT

Although there is no formal consistency requirement in Article XX(d) GATT 1994, the Appellate Body in Korea – Various Measures on Beef seems to have read some soft consistency requirement into it, or at least considered that the absence of consistency may be evidence of the lack of objective necessity of the measure.56

G. Permission for Precautionary Action

1. SPS Agreement

The precautionary principle has been the subject of extensive debate, which cannot be replicated here. However, it is worth pointing out that the precautionary principle is stated in a very specific, and limited, form in Article 5.7 SPS Agreement. It is available to allow provisional measures where scientific evidence is insufficient, where the Member acts on the basis of available information, and where the Member seeks to obtain the additional information needed for a more objective assessment of risk within a reasonable period of time. In EC - Hormones, the Appellate Body did not reach any conclusion whether the 'precautionary principle' had indeed crystallized to become a general principle of law. For the Appellate Body, various elements, including the right of Members to determine the level of protection they want, confirmed that aspects of the precautionary principle were already reflected in different provisions of the SPS Agreement.

In Japan - Agricultural Products II, the Appellate Body found that Article 5.7 is available subject to the satisfaction of four cumulative requirements: (i) relevant scientific evidence is insufficient, (ii) the measure is adopted on the basis of available pertinent information, (iii) the Member seeks to obtain the additional information necessary for a more objective assessment of risk, and (iv) the Member reviews the measure accordingly within a reasonable period of time. In the instant case, the Panel made a finding only as to the insufficiency of relevant scientific evidence, determining that there was indeed sufficient scientific evidence on the issues at hand.

2. TBT Agreement

The preamble of the TBT Agreement also confirms the right of Members to determine the level of risk and protection they want to follow. Under the TBT Agreement, there is no requirement of any form of specific evidence and no provision for situations where scientific evidence would be insufficient to justify a norm. Yet Article 2.2, in requiring that measures be no more restrictive than necessary, will call for some demonstration that some objective necessity exists. Scientific evidence may be called for.

57 It is reported that Article 5.7 SPS Agreement was initially drafted to be used in emergency situations where, for example, the spread of a disease had to be stopped urgently before it may be feasible to complete a risk assessment. Discussion with Gretchen Stanton, Secretary of the SPS Committee.
58 The Appellate Body in EC - Hormones, at para 123, stated that ‘the status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators, and judges. […] We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question’.
3. **The GATT 1994**

If Members' rights to determine their own level of protection, to be prudent and to rely on minority opinion, are expressions or indications of the precautionary principle—as the Appellate Body seems to have established—one may argue that the interpretation of Article XX GATT 1994 has already taken into account aspects of a precautionary principle. As with the SPS Agreement, the crystallization of the precautionary principle would not reduce the requirements contained in Article XX nor could it be enforced autonomously before a WTO adjudicating body. However, it could be used in the interpretation of WTO provisions. For the Appellate Body, Article XX GATT 1994 and Article II DSU have to be interpreted in line of this right of democratic government to be responsible and prudent:

In the context of the SPS Agreement, we have said previously, in *European Communities—Hormones*, that responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.\(^{60}\)

In *EC – Asbestos*, the Panel had also stated that 'to make the adoption of health measures concerning a definite risk depend upon establishing *with certainty* a risk... would have the effect of preventing any possibility of legislating in the field of public health'.\(^{61}\)

**H. Balancing**

To many commentators, the idea of balancing tests in contexts where domestic regulation is subject to international scrutiny has been anathema to judicial restraint and national sovereignty. The GATT 1994 has no specific language authorizing a balancing test. The SPS and TBT Agreements, while providing for least trade restrictive alternative analysis, also avoid specific reference to balancing tests. And yet, dispute settlement has often turned to balancing.

1. **The GATT 1994**

As noted above, the classic 'least trade restrictive alternative' test has been challenged by the Appellate Body's decisions in *Korea – Various Measures on Beef* and *EC – Asbestos*. In *Korea – Various Measures on Beef*, the Appellate Body first examined the definition of 'necessity' under Article XX(d) GATT 1994, finding that it could

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comprise something less than absolute indispensability. Indeed, the Appellate Body set up, rather explicitly, a balancing test. It considered the degree to which the measure contributes to the realization of the end pursued: 'the greater the contribution, the more easily a measure might be considered to be “necessary”'. It also considered the 'extent to which the compliance measure produces restrictive effects on international commerce'. The Appellate Body’s statement will be breathtaking to some:

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

This statement constitutes a significant shift towards a greater role of the WTO adjudicating bodies in weighing regulatory values against trade values. Interestingly, in its decision regarding EC – Asbestos, the Appellate Body referred to its decision in Korea – Various Measures on Beef to the effect that in determining whether another alternative method is reasonably available, it is appropriate to consider the extent to which the alternative measure 'contributes to the realization of the end pursued'. Although the Appellate Body in US – Gambling referred extensively to such balancing and weighing exercise under the necessity test, it seems to have deliberately avoided the use of such a concept in the latest Brazil – Retreaded Tyres and concluded that a measure is necessary if it 'contributes materially' to the achievement of the objective policy invoked (FNT Appellate Body Report, Brazil – Retreaded Tyres, at para. 210). It nonetheless stated that '[t]he weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement' (FNT Appellate Body Report, Brazil – Retreaded Tyres, at para. 182).

Even after possible balancing under the 'necessity' provisions of Article XX, there is also a broader balancing of rights and obligations called for by the chapeau of Article XX. In US – Shrimp, the Appellate Body stated that the chapeau of Article XX 'embodies the recognition of the... need to maintain a balance of rights and obligations' between the right of a Member to invoke the exceptions of Article XX, on the one hand, and the rights of the other Members under the GATT 1994, on the other hand. This interpretation and application of Article XX requires 'locating and marking out a line of equilibrium between the right of a Member to invoke

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63 Ibid (citation omitted). 64 Ibid at para 164.
66 The chapeau requires that measures exempted under Article XX must not be applied in a manner that would constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...'.

an exception under Article XX and the rights of the other Members under varying substantive provisions' and 'the location of the line of equilibrium is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ'.

2. **TBT Agreement**

It seems reasonable to expect that the interpretation of the positive requirements of Article 2.2 TBT Agreement for a measure not more trade restrictive than necessary will be parallel to that developed under the necessity test of Article XX GATT 1994.

3. **SPS Agreement**

The criteria identified by the SPS jurisprudence seem to call for a necessity/balancing test under Article 5.6 SPS Agreement fairly similar to that developed in *Korea – Various Measures on Beef* and *EC – Asbestos*, discussed above. Yet, contrary to Article XX, the test under Article 5.6 SPS Agreement does not appear to call for an assessment of the degree of the measure's contribution to the end. As with the classic least trade restrictive alternative 'reasonably available', the degree of contribution to the end seemed before to be inviolable: Members were entitled to complete accomplishment of the end reflected in their regulation.

**I. Product/Process Issues and the Territorial-Extraterritoriality Divide**

Finally, an area of great importance is the territorial scope of application of the national measures, that is, to what extent can a Member take action under its domestic law to protect health or other domestic regulatory values outside its own territory? This issue has arisen explicitly in connection with the application of Article XX(b) and (g) GATT 1994, but has also arisen implicitly, in the form of the product-process distinction.

1. **The GATT 1994**

The legal issue is whether GATT/WTO law authorizes Members to maintain regulatory distinctions based on process and production methods (PPMs) of imported

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products. In particular the debate has focused on whether products that comply with specified PPM criteria and those that do not are 'like' for the purpose of the non-tariff obligations of Article III GATT 1994.

Various elements support the view that Article III does not apply to regulatory distinctions based on extraterritorial policy considerations not affecting the products. Article III refers to measures affecting 'internal sales'; its concern is the internal market of the importing Member. The wording of Articles I, II, III, and XI GATT 1994 only refer to 'products'. Annex 1A covers rules applicable to trade in goods. Moreover, the Appellate Body has recognized that when determining whether two products are directly competitive or substitutable for the purpose of Article III GATT 1994, Article 4 Agreement on Safeguards, or Article 6.1 ATC, it is looking at the 'product characteristics'.

The determination of likeness requires consideration of any evidence that indicates whether the products are in a competitive relationship in the marketplace. For the Appellate Body, evidence relating to health risks (carcinogenicity, or toxicity) associated with the product can be examined under the existing Border Tax Adjustment report categories of physical properties, consumer tastes and habits and products' end-use. This fuelled the argument that consumer preferences could legitimate the examination of PPM distinctions under the like product test in Article III.

To summarize, the WTO jurisprudence has not yet clarified whether Article III applies to or covers PPM-type regulatory distinctions. If Article III does not cover PPM-type regulations, then, under Ad Article III, PPM regulations will be viewed as border import restrictions (a ban on products not respecting the PPM prescriptions) controlled by Article XI. If Article III covers PPM-type regulations, the Appellate Body's application of a competition-based test in EC - Asbestos suggests that in most cases, different PPMs would be insufficient to make products 'un-like'. The test under Article III would then prohibit treating like products differently on the basis of PPM considerations. In this sense the product/process distinction may often serve as a proxy to control the extraterritorial application of national measures, which is perhaps exceptionally permitted under the circumstances set forth in Article XX.

2. TBT Agreement

Annex 1 of the TBT Agreement defines 'technical regulation' as a 'document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions with which compliance is mandatory'. Many developing countries have argued that the TBT Agreement does

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70 Note the inconsistency between this perspective and the economic theory of regulation, which assumes that the reason for regulatory intervention is because the health risks are not sufficiently reflected in the market place.
not 'cover' PPM regulations and have politically challenged notifications of labeling requirements based on social considerations\(^{72}\) and timber process\(^{73}\) that have no physical impact on the product traded. It is important to note that the non-application of the TBT Agreement to PPM-type regulations would not make such PPM regulations incompatible with WTO law. If the TBT Agreement does not cover or apply to PPM regulations, such regulations will be examined under Articles III/XI GATT 1994 and may find justification under Article XX. To remove PPM-type regulations from the coverage of the TBT Agreement would exempt them from the other requirements of the same TBT Agreement, including those on notification, harmonization, and mutual recognition. Furthermore, unlike the case of the SPS Agreement, the TBT Agreement contains no presumption of compliance with GATT 1994.

3. SPS Agreement

Annex A to the SPS Agreement contains a definition of ‘sanitary and phytosanitary measures’ that includes only measures that protect health within the territory of the regulating Member. It therefore excludes from its coverage measures addressing health outside the regulating Member’s territory. This leaves importing state regulation seeking to regulate PPMs in the exporting Member, with the goal of protecting health outside the territory of the importing Member, outside the coverage of the SPS Agreement, but potentially subject to the GATT 1994 or the TBT Agreement. Importantly, it includes measures of importing Members regulating PPMs outside of their territory, where the goal is to protect health within the territory; for example, regulation of foreign slaughterhouse practices may be considered to be SPS measures.

III. APPLICATION OF THE AGREEMENTS

The purpose of this Chapter has been to outline certain critical rules applicable under the GATT 1994 and the SPS and TBT Agreements. Due to lack of space, a full analysis of the scope of application of these various provisions cannot be provided, but several relevant issues have already been raised. In the following paragraphs, the scope of application of each of the agreements is summarized.

\(^{72}\) See TBT Committee, Notification by Belgium, G/TBT/N/BEL/2 (16 January 2001); TBT Committee, Minutes of the Meeting Held on 30 March 2001, G/TBT/M/23 (8 May 2001); TBT Committee, Minutes of the Meeting Held on 29 June 2001, G/TBT/M/24 (14 August 2001).

\(^{73}\) See TBT Committee, Notification by The Netherlands, G/TBT/Notif.98.448 (2 September 1998); TBT Committee, Minutes of the Meeting Held on 15 September 1998, G/TBT/M/13 (15 September 1998); TBT Committee, Minutes of the Meeting Held on 20 November 1998, G/TBT/M/14 (10 February 1999); TBT Committee, Minutes of the Meeting Held on 30 March 2001, G/TBT/M/23 (8 May 2001); TBT Committee, Minutes of the Meeting Held on 29 June 2001, G/TBT/M/24 (14 August 2001).
A. The GATT 1994 Versus the SPS Agreement

Article 2.4 SPS Agreement provides that:

Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994, which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

This provision has two conditions: first, it addresses sanitary or phytosanitary measures, and second, those measures must not violate the SPS Agreement. If these conditions are met, this provision establishes a presumption that the relevant measures comply with the GATT 1994.

This presumption is probably best understood as rebuttable. As a presumption, it would operate in the same way as Article 3.2 SPS Agreement, as interpreted by the Appellate Body in EC – Hormones, shifting the burden of proof to the complaining party, but not providing any substantive support to the defending party. It is possible to imagine circumstances where a difficult question arises. For example, the SPS Agreement would apply to PPM regulations that are intended to safeguard health in the importing Member. If a panel or the Appellate Body were to hold that such measures conform to the SPS Agreement, this provision would raise a presumption that they also conform to the GATT 1994. If the analysis is continued under Article XX GATT 1994, the challenged Member would carry the benefits of this presumption in its Article XX analysis (as a factual matter) and its measure would be presumed to be justified under Article XX. It would be for the challenging Member to reverse this presumption and demonstrate that less trade-restrictive alternatives were reasonably available to the importing Member to ensure the same reasonable level of protection. It is doubtful that a Member that did not succeed in demonstrating the existence of such less trade restrictive alternatives in its SPS claim would manage to do so to rebut the application of Article XX GATT 1994.

So long as the necessity tests in Article 5.6 SPS Agreement and Article XX GATT 1994 are similar (or at least so long as Article XX is not more stringent), and the two disputing parties have exactly the same evidence for both legal analyses, a Member who managed to avoid a violation under the SPS Agreement should not be caught under Article XX. It may, however, be concluded that the new test under Article XX calls for an actual balancing of the degree to which the challenged measure

74 If the intent were to deem such measures to comply with the GATT 1994, the treaty could have said so, or could have stated that the presumption is irrebuttable. In any event, the plain language of ‘presumption’ will likely be taken to mean nothing more. See Appellate Body Report, EC – Hormones, at para 170 (terming the unqualified presumption in Article 3.2 SPS Agreement ‘rebuttable’). However, see Article 3.8 DSU, clearly stating that the presumption there is rebuttable. On the parallel application of the TBT Agreement and the GATT 1994, see R Howse and E Tuerk, “The WTO Impact on Internal Regulations – A Case Study of the Canada – EC Asbestos dispute” in G de Búrca and J Scott (eds), The EU and the WTO: Legal and Constitutional Aspects (London: Hart Publishing, 2001) 283.
contributes to the end pursued, while Article 5.6 SPS Agreement does not. If this were the case, it would be possible that an SPS measure that passes Article 5.6 could be found inconsistent with Article XX. Of course, a measure would only be required to comply with Article XX if it violates another provision of the GATT 1994.

B. The GATT 1994 Versus the TBT Agreement

The TBT Agreement lacks an explicit provision relating it to the GATT 1994. As with the SPS Agreement, it would be best if compliance with the TBT Agreement gave rise to a presumption of compliance with the GATT 1994. In addition, compliance with an international standard (Articles 2.4 and 2.5 TBT Agreement) should lead to a presumption of compliance with Article 2.2 TBT Agreement, and not simply the presumption of necessity provided for by Article 2.5. The use of such international standards should also de facto lead to the conclusion that the domestic TBT measure is necessary for the purpose of Article XX. The same should generally be true for any measure that complies with Article 2.2 TBT Agreement. Since the TBT Agreement adds different obligations to those of the GATT 1994, does it mean that a single measure may be in violation of the TBT Agreement while compatible with the GATT 1994? Possibly.

Another interesting issue is the coverage of Article 2.1 TBT Agreement and its relationship with Articles I, III, and XX GATT 1994. If the scope and meaning of Article 2.1 is similar to that of Articles III and I, a single technical regulation could be a prima facie violation of Article III but be justified under Article XX GATT 1994, while also in violation of Article 2.1 TBT Agreement without any possibility of justification—even if the same regulation were found not to be in violation of Article 2.2 TBT Agreement. One may argue that Article XX GATT 1994 could be invoked as a defence to a violation of Article 2.1 and this seems to have been accepted by the Appellate Body in EC – Asbestos when it concluded that the TBT Agreement was applicable to the measure at issue but decided not to complete the analysis under that agreement (for various reasons including judicial economy). Its findings were that the measure could in any case be justified under Article XX GATT 1994. But Canada had made a claim under Article 2.1 TBT Agreement. If there was a possibility that the French measure violated Article 2.1 without any acceptable defence—in the TBT Agreement or in the GATT 1994—the Appellate Body would have committed a denial of justice against Canada in refusing to address its claim under Article 2.1 TBT Agreement.

Another interesting issue is the fact that the TBT Agreement allows Members to base their TBT regulations on ‘any legitimate governmental policies’ while Article XX contains a closed list of policies. Therefore it is conceivable that a measure based on a policy not listed in Article XX (say the protection of the French language) could be considered not more restrictive than necessary pursuant to Article 2.2 TBT
Agreement, while not being able to find any provisional justification under any of the sub-paragraphs of Article XX GATT 1994. Unless the TBT Agreement is understood as lex specialis to the exclusion of the GATT 1994, the GATT 1994 provisions continue to apply while the TBT Agreement may also be applicable.

C. The SPS Agreement Versus the TBT Agreement

Article 1.5 TBT Agreement provides that the TBT Agreement does not apply to SPS measures, as defined in the SPS Agreement. Thus it covers all technical regulations, other than those that are SPS measures as defined in the SPS Agreement. This means that the purpose of a measure—whether or not it is applied to protect against pests and diseases, as well as food-borne dangers—75—is central to the division of jurisdiction between the TBT Agreement and the SPS Agreement.

However, there are measures, such as some extraterritorial ones, that would not be included as SPS measures by virtue of their extraterritorial protective purpose, but which are intended to protect health. If the TBT Agreement covers PPMs or extraterritorial considerations, some of these measures may be covered by the TBT Agreement even if the SPS Agreement does not apply to them. The possibility depends on whether ‘technical regulations’ include measures intended to protect extraterritorial human, animal or plant life that specify ‘product characteristics or their related processes and production methods’. This of course depends on how these words are interpreted.

Article 1.4 provides that nothing in the SPS Agreement affects rights under the TBT Agreement, with respect to measures not covered by SPS Agreement. Article 1.5 TBT Agreement provides that the TBT Agreement does not apply to SPS measures. Thus, where the SPS Agreement applies by its terms, the TBT Agreement would be inapplicable and vice versa. It is however possible that aspects or components of a specific measure could be covered by the SPS Agreement while others would be covered by the TBT Agreement or the GATT 1994, depending on how one defines the measure.

IV. Conclusion

Each of the bases for evaluation of domestic regulation considered above, and some of them as applied together, has the same purpose—to distinguish between national product regulation that is permissible, and national product regulation that is impermissible. Members agreed on these tests not because they are opposed to

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75 See the definition of 'sanitary or phytosanitary measure' in Annex A to the SPS Agreement.
their own domestic regulation, but because they wished reciprocally to agree not to impose excessive costs on one another through their domestic regulation. The bases for evaluation discussed in this chapter must be understood in this context.

With greater international economic integration—greater trade—it becomes easier and in some ways more attractive for States to formulate their regulation in ways that impose costs on foreign producers. These are costs of adjustment or costs of lost profits due to barriers to market access. Yet Members recognize that there are good purposes to be served and do not wish to establish legal rules that will hamper the achievement of these purposes. The tests we have reviewed—complex and sometimes indeterminate as they are—are those that have been developed over time to minimize costs imposed on foreigners while minimizing also the loss of local autonomy to regulate. Thus, the right to trade and the right to regulate—both important for individual and national welfare, are reconciled. Will these evaluations sometimes seem wrong, and indeed be wrong? Of course. It may be possible over time and with careful analysis to improve on these bases for evaluation. It may be that Members decide, through harmonizing measures or recognition measures, to remove certain measures from the scope of these evaluations. This has already happened in some areas, and may be expected to continue happening. As these bases for evaluation are revised over time, and as Members engage in harmonization and mutual recognition agreements, they constantly revise the scope of national autonomy—of sovereignty. It is important to recognize that it is not the WTO that decides to do these things, but the Members of the WTO, in the exercise of their sovereignty.

Selected Bibliography


R Howse, ‘From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime’ 2002 American Journal of International Law 96(1) 94


PC Murray, 'The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Global Environmental Policy?’ 1997 University of Pennsylvania Journal of International Economic Law 18(2) 557


A Porges and J Trachtman, 'Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects' 2003 Journal of World Trade 37(4) 783


J Trachtman, 'Trade and... Problems, Cost-Benefit Analysis and Subsidiarity' 1998 European Journal of International Law 9(1) 32


WTO CTE, Secretariat Note for the Committee on Trade and Environment, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, WT/CTE/W/10 (29 August 1995)

WTO TBT Committee, Decision on Principles for the Development of the International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9 Annex 4 (13 November 2000)