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## FUTURE CHALLENGES: NEW SUBSTANTIVE AREAS

### Environment and Health Under WTO Dispute Settlement

STEVE CHARNOVITZ\*

#### I. Introduction

A few years ago, E.U. Petersmann pointed out that “the GATT dispute settlement system has been used more frequently for the settlement of ‘environmental disputes’ between States than any other international dispute settlement mechanism.”<sup>1</sup> This trend continues in the World Trade Organization (WTO). Thus, the first decision under the WTO’s Dispute Settlement Understanding (DSU) was, not surprisingly, an environmental dispute. In addition, the WTO issued a health-related decision and will soon resolve an environmental dispute regarding sea turtles. In just three years, the environmental jurisprudence of the General Agreement on Tariffs and Trade (GATT) put forth important changes. These changes involve both substance—that is, the trade disciplines to be applied—and process—how panels reach decisions.

The core issue before WTO panels is the acceptability of *laissez-régler*. This term, introduced by Joel Trachtman, captures the underlying question of WTO adjudication.<sup>2</sup> That is, when will the trading system override national autonomy in choosing environmental and health policy? The question can be reformulated to one about federalism: what is the appropriate level of governmental decisions to regulate or not to regulate?<sup>3</sup>

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1. ERNST-ULRICH PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND 22 (1995).

2. Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, EUR. J. INT’L L. 32, 37 (1998).

3. See Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

Part II of this article examines the substantive impact of WTO jurisprudence on environmental issues. Part III examines procedural points involved in environmental dispute settlement and makes several recommendations.

## II. Substantive Implications for the Environment

The first two sections of Part II discuss how the WTO oversees domestic environmental and health policy. Although there is no fine line between environment and health, it is useful to separate these sections in view of the different WTO agreements involved. Section three briefly looks at WTO constraints on international environmental policy.

### A. WTO CONSTRAINTS ON DOMESTIC ENVIRONMENTAL POLICY

Public interest groups are concerned that WTO rules place too much constraint on domestic environmental policy.<sup>4</sup> In 1992, the GATT Secretariat opined that: "GATT rules, therefore, place essentially no constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported products."<sup>5</sup> Subsequent GATT and WTO panel decisions, however, have rendered that statement less credible.

#### 1. Article III

Environmental protection is carried out through environmental policy—namely through the instruments—taxes and regulations.<sup>6</sup> GATT article III places limits on when these instruments can be applied to imported products. Article III:2's first sentence states that imported products shall not be subject to internal taxes in excess of those applied, directly or indirectly, to like domestic products. Article III:2's second sentence states that internal taxes shall not be applied in a manner inconsistent with article III:1—that is, not applied to imported products "so as to afford protection to domestic production."<sup>7</sup> Moreover, this second sentence is triggered not only to compare like products, but also to compare imported products "directly competitive or substitutable" with domestic products "not similarly taxed."<sup>8</sup> Article III:4 states that imported products 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 for sale, purchase, transportation, distribution or use.

4. See, e.g., Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order*, in *THE WTO AS AN INTERNATIONAL INSTITUTION* 221-25 (Anne O. Krueger ed., 1998).

5. 1 INT'L TRADE 1990-91 at 23 (General Agreement on Tariffs and Trade, 1992). See also *WTO Chief Says Body Will Not Impinge on Members' Rights to Protect Environment*, 20 INT'L ENV'T. REP. 1114 (1997).

6. See generally R. KERRY TURNER ET AL., *ENVIRONMENTAL ECONOMICS* (1993).

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, article III [hereinafter GATT].

8. GATT, article III(2).

Before the advent of the WTO, GATT jurisprudence was well settled that an explicitly discriminatory measure violates article III.<sup>9</sup> However, several unsettled points exist. For example, when does an implicitly discriminatory measure violate article III?<sup>10</sup> In addition, how should panels decide whether two similar products are like or unlike?

WTO jurisprudence has clarified article III in some ways. In the U.S. *Gasoline* decision, the panel declared that article III:4 "does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it."<sup>11</sup> The panel did not explain article III:4's failure to allow this treatment. Presumably it believed that gasoline from Producer A with a lot of data is a "like" product to gasoline from Producer B with no data. The panel characterizes producer characteristics as "extraneous" to the ascertainment of product likeness.<sup>12</sup> Therefore, by giving this broad interpretation to article III:4, the WTO makes it harder for governments to design workable regulatory measures. Environmental regulators may have many reasons to treat gasoline differently depending on a refinery's pollution profile, its compliance records, and the quality of its recording-keeping. Similarly, trade regulators or customs agencies may want to treat products differently depending on whether the producer has a license to use a trademark or a copyright.

The WTO *Gasoline* decision may also have implications for GATT article III:2. In the U.S. *Automobile Taxes* case, the panel considered a gas guzzler tax linked to the fuel economy of the model type, not the individual automobile.<sup>13</sup> The panel concluded that, contrary to the argument put forth by the plaintiff European Commission, an imported automobile whose model type had a fuel economy below 22.5 miles per gallon was not a like product to a domestic automobile whose model type had a fuel economy above 22.5. Moreover, this was the result even if the actual fuel economy of a particular domestic automobile (rather than its model type) was below 22.5.<sup>14</sup> The panel's report was not adopted by the GATT Council because of opposition by the European Commission. If the European Commission were to lodge the same complaint before the WTO today,

9. See, e.g., WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE 150, 169 (1995) [hereinafter GUIDE TO GATT LAW AND PRACTICE] (discussing the *Petroleum* and Section 337 decisions). Explicit discrimination is also called facial or de jure discrimination.

10. Other terms that are used for implicit discrimination include de facto and origin neutral. For a discussion of this issue under GATT law, see Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 76-80 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

11. *United States—Standards for Reformulated and Conventional Gasoline*, May 30, 1997, para. 6.11, 35 I.L.M. 274 (1996) [hereinafter *Gasoline Panel Report*]. This particular ruling was not appealed by the U.S. government.

12. *Id.* para. 6.12.

13. *United States—Taxes on Automobiles*, Nov. 1, 1994, para. 5.18, 33 I.L.M. 1397 (1994) [hereinafter *Taxes on Automobiles*].

14. *Id.* para. 5.32.

after *Gasoline*, a panel might consider the fuel economy of the model type to be an "extraneous factor" under article III:2.

Another issue involved in the gas guzzler dispute was whether the zero tax rate on domestic light trucks with low fuel economy violated article III:2 when imported automobiles with the same fuel economy had a high tax rate. To ascertain whether these two products were "like," the *Automobile Taxes* panel looked at the "aim and effect" of the tax measure in dispute.<sup>15</sup> According to the panel, "Article III should be analyzed primarily in terms of whether less favourable treatment was taken so as to afford protection to domestic production."<sup>16</sup> This accorded with the U.S. *Alcoholic Beverages* panel's statement that "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."<sup>17</sup> Because the *Automobile Taxes* panel found that the U.S. government's policy of treating light trucks and regular automobiles differently did not have the "aim" of affording protection or the "effect" of altering competitive conditions between imported and domestic products, the panel concluded that light trucks and regular automobiles were not like products.

This GATT jurisprudence has been altered by the WTO. A key issue in the Japan *Alcoholic Beverages* case was whether chemically different alcoholic beverages were like products.<sup>18</sup> Both plaintiff Japan and defendant United States used the so-called aim-and-effect test to argue their position.<sup>19</sup> But, the panel rejected the aim-and-effect test<sup>20</sup> and then ruled that shochu and vodka were like products.<sup>21</sup> According to the panel, likeness should not be conditioned on "whether domestic

15. *Id.* para. 5.9. "Aim" was to be ascertained through the wording of the legislation as a whole. *Id.* para. 5.12. The panel should ask whether a change in competitive conditions in favor of domestic products was a desired outcome and not merely an incidental consequence. *Id.* para. 5.10. "Effect" was to be ascertained by examining the market for a change in the conditions of competition. *Id.* paras. 5.13-5.14. It is unclear whether the panel intended the test to be conjunctive or disjunctive.

16. *Id.* para. 5.9.

17. United States—Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206, 294, para. 5.72 (1992).

18. Japan—*Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS8/R, WT/DS10/R, WT/DS11/R (July 11, 1996) (visited June 29, 1998) <<http://www.wto.org/wto/online/ddf.htm>> [hereinafter *Alcoholic Beverages Panel Report*].

19. *Id.* para. 6.15.

20. *Id.* para. 6.17. The panel explained its decision by suggesting that if a government alleged a non-protectionist reason for a measure, say health, then the standard of proof required in article XX would be circumvented by using an aim-and-effect test in article III. In other words, article III would be permitting a measure that might be disallowable under article XX. The panel suggested that this would render article XX redundant. *Id.* para. 6.17 & n. 89. The panel's analysis is circular. Article XX will only be potentially useful for discriminatory health measures. Non-discriminatory health measures do not violate article III. See JOHN JACKSON, *THE WORLD TRADING SYSTEM* 206 (1992). Of course, panels have to ascertain whether particular health measures are discriminatory, but the existence of article XX should not make it easier for panels to find article III violations.

21. *Alcoholic Beverages Panel Report*, *supra* note 18, para. 7.1(i). This conclusion was affirmed by the Appellate Body.

legislation operates so as to afford protection to domestic production.’’<sup>22</sup> This revised interpretation of likeness has important implications for environmental disputes. Future panels might consider a beer can to be a like product to a beer bottle, a non-refillable container to be a like product to a refillable one,<sup>23</sup> or a biodegradable package to be a like product to a non-biodegradable package. If so, reasonable environmental taxes and regulations could be held in violation of article III.<sup>24</sup>

The Canada *Periodicals* decision also considered the interpretation of GATT III.<sup>25</sup> Canada imposes an eighty percent excise tax on split-run periodicals—that is, on magazines that share editorial content with a non-Canadian version and that contain advertising not appearing in non-Canadian versions.<sup>26</sup> The panel considered whether imported split-run periodicals are a like product to domestic non-split-run periodicals. It concluded that these two types of periodicals were like products because the differentiating factors were ‘‘external to the Canadian market.’’<sup>27</sup> As the Appellate Body vacated the panel’s decision on this point, however, this article III judgment is not legal precedent.<sup>28</sup>

Another issue considered by the *Periodicals* panel was whether Canada’s higher postal charges for imported magazines violates article III:4. The panel began its analysis by stating that ‘‘article III:1 constitutes part of the context of Article III:4.’’<sup>29</sup> The panel then concluded that the postal charges were affording domestic production. This finding cemented a conclusion that the charges violate article III:4.<sup>30</sup> Thus, this transformation of article III:1 from a precatory to mandatory requirement (in the context of article III:4) is a significant development in WTO/GATT

22. *Id.* para. 6.18.

23. In the Canada *Alcoholic Drinks* case, the panel concluded that a tax solely on non-refillable containers did not violate GATT article III:2. Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 27, paras. 5.33, 6.1(h), (1992).

24. Note that these taxes and regulations might be permitted by GATT article XX if the panel determines that the measure fits a specific exception and that the discrimination is not arbitrary or unjustifiable. This latter determination would involve an analysis very similar to the aim-and-effect test.

25. *Canada—Certain Measures Concerning Periodicals—Report of the Panel*, WT/DS31/R (Mar. 14, 1997) [hereinafter *Canada Periodicals Panel Report*] (visited June 28, 1998) <<http://www.wto.org/wto/online/ddf.htm>> [hereinafter *WTO Website*].

26. *Id.* para. 5.24.

27. *Id.* paras. 5.24, 5.26.

28. *Canada—Certain Measures Concerning Periodicals—AB-1997-2—Report of the Appellate Body*, WT/DS31/AB/R (June 30, 1997), at *WTO Website*, *supra* note 25 [hereinafter *Appellate Body Periodical Decision*].

29. *Canada Periodicals Panel Report*, *supra* note 25, para. 5.37. The panel cited the Appellate Body for the proposition that ‘‘the purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III. . . .’’ *Id.* para. 5.37 n. 152. While it is not clear what the Appellate Body was referring to do, it seems likely that they were referring to the specific paragraphs of article III that reference article III:1, not to all parts of article III.

30. *Id.* para. 5.38. This finding was not reviewed by the Appellate Body.

jurisprudence. Indeed, it may make it harder for governments to apply environmental regulations that have an incidental effect of protecting domestic markets.

Before 1995, the discipline in article III:2's second sentence (regarding directly competitive or substitutable products) had received little attention by GATT panels.<sup>31</sup> This discipline became an issue in the Japan *Alcoholic Beverages* case when the panel concluded that Japan's different taxes on various alcoholic beverages violated this provision.<sup>32</sup> Upon review, the Appellate Body criticized the panel's legal conclusion because the panel had blurred the issue of dissimilar taxation with the issue of whether the taxation was being applied so as to afford protection to domestic production.<sup>33</sup> Nevertheless, the Appellate Body agreed with the panel's conclusion that Japan's excise tax structure violated article III:2's second sentence.<sup>34</sup>

Two aspects of the Appellate Body's decision in *Alcoholic Beverages* have implications for environmental taxes. First, the Appellate Body clarified that a tax on an imported product could be in excess of a tax on a competitive domestic product without necessitating a legal conclusion that the products are not similarly taxed.<sup>35</sup> This avoids a new WTO constraint on national taxes. Second, the Appellate Body clarified that a determination under article III:1 and III:2 as to whether a tax is "applied so as to afford protection to domestic production" does not depend upon the intent of the taxing authorities.<sup>36</sup> Rather, the analysis should be objective: looking at the structure of the tax, the magnitude of the differential, and whether the tax differential has trade-distorting effects.<sup>37</sup> The Appellate Body agreed with the panel that Japan's taxes do afford protection to domestic production.<sup>38</sup>

In a subsequent report, the Appellate Body came out differently on the question of whether the intent of the taxing authorities matters.<sup>39</sup> In *Periodicals*, the Appellate Body made a factual finding that the high excise tax on split-run periodicals was applied so as to afford protection to domestic production.<sup>40</sup> The Appellate Body based this finding on the size of the tax, a legislative task force report, a governmental official's statement, a Governmental statement, and debate by a minister in Parliament.<sup>41</sup>

31. GUIDE TO GATT LAW AND PRACTICE, *supra* note 9, at 159-60.

32. *Alcoholic Beverages* Panel Report, *supra* note 18, para. 7.1(ii).

33. *Japan—Taxes on Alcoholic Beverages—AB-1996-2—Report of the Appellate Body*, WT/DS8/AB/R (Oct. 4, 1996), at WTO Website, *supra* note 25 [hereinafter Appellate Body Alcohol Decision].

34. *Id.* at 31.

35. *Id.* at 26, 27, 30.

36. *Id.* at 27-28 (noting that it is irrelevant that protectionism was not an intended objective).

37. *Id.* at 28-29.

38. *Id.*

39. None of the members of the division of the Appellate Body that decided the Japan *Alcoholic Beverages* case were part of the division that decided the Canada *Periodicals* case.

40. Appellate Body Periodical Decision, *supra* note 28, at 30-32.

41. *Id.* Although a WTO litigant cannot appeal a panel's factual determination, no rule prevents the Appellate Body from making factual findings. See Understanding on Rules and Procedures Governing the Settlement of Disputes, (Apr. 15, 1994) Marrakesh Agreement; Establishing the World Trade Organization, Annex 2, article 17.6, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1226 (1994) [hereinafter DSU].

The Appellate Body's interpretation of article III:2 can open new doors to challenging policy-related taxes.<sup>42</sup> Given two products—an imported A and a domestic B—a plaintiff need only show the following: (1) A and B are competitive, (2) A and B are not similarly taxed, and (3) the tax differential has a trade distorting effect. A non-protectionist intent would probably not be a defense. For example, suppose A is a high-polluting automobile and B a low-polluting one. Would a government be able to tax A higher than B? In *Alcoholic Beverages*, the Appellate Body found that domestic production was being protected because Japan was isolating domestically produced shochu from foreign competition.<sup>43</sup> Yet in the U.S. *Automobile* case, the fact that European automobiles bore most of the burden of the gas guzzler tax did not persuade that panel that this tax afforded protection to U.S. domestic production.<sup>44</sup> If the gas guzzler dispute comes to the WTO in light of *Alcoholic Beverages*, it seems likely that the WTO panel would find the U.S. gas guzzler tax to be a violation of GATT article III: 2's second sentence.

Before the advent of the WTO, it was unclear whether different production methods could be used to demonstrate that products were unlike rather than like. Although both Tuna-Dolphin decisions ruled that article III did not permit this, these decisions were not adopted.<sup>45</sup> The *Automobile Taxes* panel ruled that "Article III:4 does not permit treatment of an imported product less favourable than that accorded to a like domestic product, based on factors not directly relating to the product as such."<sup>46</sup> But this decision was also not adopted. The only adopted decision on this point was *Alcoholic Beverages*—ruling that a Minnesota alcohol excise tax credit for micro breweries did not meet the requirements of article III:2 even though the credit was available to micro breweries in Canada.<sup>47</sup> According to the panel, beer from these breweries was a like product to beer from large breweries.

The new WTO jurisprudence builds on these adopted and unadopted rulings. As noted above, the *Gasoline* panel rejected efforts by the U.S. government to

42. See Steve Charnovitz, *WTO's "Alcoholic Beverages" Decision*, 6 REV. EUR. COMMUNITY & INT'L ENVTL. L. 198, 201 (1997).

43. Appellate Body Alcohol Decision, *supra* note 33, at 31.

44. Taxes on Automobiles, *supra* note 13, para. 5.25

45. United States—Restrictions on Imports of Tuna, Apr. 30, 1992, GATT B.I.S.D. (39th Supp.) at 155, 195, para. 5.14, (1992) (stating that article III "covers" only products "as such"); United States—Restrictions on Imports of Tuna, July 1, 1994, paras. 5.8-5.9, 33 I.L.M. 839 (1994); Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 RECUEIL DES COURS 287, 322-23 (1995).

46. United States—Taxes on Automobiles, *supra* note 13, para. 5.54.

47. United States—Measures Affecting Alcoholic Beverages, *supra* note 17, para. 5.19. It is unclear whether the U.S. government tried to defend this Minnesota statute. In an earlier GATT case, the panel had viewed "manufacturing processes of products" as an objective criterion relevant for ascertaining likeness under article III:2. See Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, Nov., 10, 1987, GATT B.I.S.D. (34th Supp.) at 83, 116, para. 5.7 (1987).



distinguish gasoline based on characteristics of the producer.<sup>48</sup> According to the panel, this would be contrary to the "ordinary meaning" of article III:4.<sup>49</sup> This ruling is troubling because environmental policymaking relies on an ecosystem approach that is not indifferent to how products are made. For example, virgin paper is environmentally different from recycled paper, and wild-caught birds are different from captive-bred birds.

At this time, GATT law on process-related distinctions remains unsettled. It is now clear that producer characteristics are not allowable factors in determining article III product likeness. There is no caselaw on characteristics of the exporting country under article III, but it is reasonably clear that government policy of the exporting country is not a factor in determining product likeness under GATT article I.<sup>50</sup> Whether article III likeness can be contingent on the way a specific product is made is an open question. This issue of "odious" products did not arise in the *Gasoline* or *Alcohol* cases.

## 2. Article XX

Before the advent of the WTO, several points had been settled in article XX jurisprudence.<sup>51</sup> By its terms, article XX(b) requires that a qualifying measure be "necessary." The Thailand *Cigarette* panel explained that a measure would be considered necessary "only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."<sup>52</sup> In other words, this test requires governments to use the least-GATT-inconsistent measure that is reasonably available to achieve therein article XX(b) objective.<sup>53</sup>

48. See text accompanying *supra* note 11. But in a later paragraph, the panel suggested that so long as gasoline was not distinguished by the country of origin, a regulatory scheme using foreign refiner baselines would not necessarily contravene GATT article III:4. *Gasoline* Panel Report, *supra* note 11, para. 6.25.

49. *Id.* para. 6.12. The panel takes no note of the fact that article III discusses mixing and processing regulations.

50. *Belgian Family Allowances*, Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59, paras. 3, 8, (1952). But there is a more recent contrary ruling. In the *Fruits and Vegetables* case, the European Commission was exempting tomato importers from paying a security deposit if the country of export guaranteed a minimum import price and guaranteed to avoid trade deflection. The U.S. government considered this regulation a violation of article I since it treated parties differently. The panel ruled that since the Commission was imposing the same requirement on all countries, there was no discrimination contrary to GATT article I. *EEC—Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*, Oct. 18, 1978, GATT B.I.S.D. (25th Supp.) at 68, 89-90, 105-06, paras. 3.64-3.67, 4.19 (1978). It seems likely that a WTO panel would follow *Family Allowances*.

51. See, e.g., Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37 (1991).

52. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT B.I.S.D. (37th Supp.) at 200, 222, para. 75 (1990) [hereinafter *Taxes on Cigarettes*].

53. In a recent speech, the WTO Director General suggested that the WTO mandates that trade measures for environmental purposes meet basic requirements relating to "least-trade-restrictiveness." See Renato Ruggiero, *A Shared Responsibility: Global Policy Coherence For Our*

It had also been settled that article XX(g) applied to both the importation or exportation of exhaustible natural resources and that, contrary to the technical meaning of the term "exhaustible," fisheries could be considered exhaustible resources.<sup>54</sup> In the Canada *Herring and Salmon* case, the panel explained that "relating," per article XX(g), meant that the measure had to be "primarily aimed" at conservation and "primarily aimed" at rendering effective the parallel domestic restrictions on production or consumption.<sup>55</sup> In the *Automobile Taxes* case, the panel found that the use of origin-based fleet accounting to calculate automotive fuel efficiency was not primarily aimed at the conservation of natural resources.<sup>56</sup> To the surprise of many observers, however, the panel also found that the use of fleet averaging (which was dependent on facts unrelated to the automobile as a product) was "primarily related" to conservation.<sup>57</sup>

Although sparse, the article XX headnote has some pre-WTO jurisprudence.<sup>58</sup> In one case, a panel suggested that a trade measure was not "disguised" since it was "publicly announced as such."<sup>59</sup> In another case, the panel suggested that a trade measure was not "disguised" since the exclusion order had been published and there was due process.<sup>60</sup> These decisions have been criticized by commentators as being too permissive of protectionism.<sup>61</sup>

In the WTO *Gasoline* case, the panel considered whether the unwillingness of the U.S. Environmental Protection Agency (EPA) to recognize foreign refinery baselines was necessary under article XX(b). The panel concluded that it was not necessary because allowing foreign baselines would be both feasible and

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*Global Age*, WTO PRESS RELEASE, Dec. 9, 1997, at 3. It is unclear from GATT and WTO caselaw where the Director-General finds this requirement. Given that an environmental case is currently before a WTO panel, one wonders whether the Director-General is trying to persuade the panel to tighten the WTO disciplines on environmental measures.

54. See United States—Prohibition of Imports of Tuna and Tuna Products from Canada, GATT B.I.S.D. (29th Supp.) at 91, 108-09, paras. 4.9, 4.12 (1990); Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, GATT B.I.S.D.(35th Supp.) at 98, 113, para. 4.4 (1987). In both cases, the panel ultimately concluded that the trade measure did not qualify for the article XX(g) exception. During the drafting of the Charter of the International Trade Organization in 1947, it had been agreed that the term "exhaustible natural resources" would cover fisheries and wildlife; see Charnovitz, *supra* note 51, at 46.

55. Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, GATT B.I.S.D. (35th Supp.) at 98, 113, para. 4.6 (1987). For further discussion, see Charnovitz, *supra* note 51, at 50-51.

56. Taxes on Automobiles, *supra* note 13, paras. 5.60—5.61. For further discussion, see Steve Charnovitz, *The GATT Panel Decision on Automobile Taxes*, 17 INT'L ENV'T. REP. 921-25 (1994).

57. Taxes on Automobiles, *supra* note 13, para. 5.65.

58. The article XX headnote is also referred to as the "preamble" and the "chapeau."

59. United States—Prohibition of Imports of Tuna and Tuna Products from Canada, *supra* note 54, para. 4.8.

60. Imports of Certain Automotive Spring Assemblies, GATT B.I.S.D. (30th Supp.) at 107, 125, para. 56 (1993).

61. See, e.g., Aaditya Matoo & Petros Mavroidis, *Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Article XX of GATT*, in INTERNATIONAL TRADE LAW AND THE GATT/ WTO DISPUTE SETTLEMENT SYSTEM 334 (Ernst-Ulrich Petersmann ed., 1997).

less-GATT-inconsistent than the approach used by EPA.<sup>62</sup> At no time did the panel suggest that distinguishing gasoline according to the characteristics of the producer would fail to meet article XX(b). With regard to article XX(g), the panel found clean air to be an exhaustible natural resource.<sup>63</sup> Without explaining its reasoning, the panel also reached the conclusion that the less favorable treatment of foreign gasoline was not primarily aimed at conservation.<sup>64</sup>

The Appellate Body disagreed with the panel's conclusion and provided some useful modifications of article XX(g) doctrine. First, the Appellate Body found that the discriminatory baseline rules were primarily aimed at the conservation of natural resources.<sup>65</sup> Second, the Appellate Body interpreted article XX(g) as requiring even-handedness regarding restrictions on imports versus domestic production or consumption.<sup>66</sup> Third, the Appellate Body expounded that the "made effective" clause in article XX(g) does not require an "empirical *effects test*."<sup>67</sup> At the end of its analysis, the Appellate Body found that the EPA baseline rules met the requirements of article XX(g).

Nevertheless, the Appellate Body concluded that the U.S. measure did not qualify for article XX because it did not meet the terms of the headnote. This decision provides several new and controversial interpretations regarding the headnote.<sup>68</sup> First, the Appellate Body declared that the article XX exceptions "should not be applied as to frustrate or defeat the legal obligation of the holder of the *right* under the substantive rules" of the GATT.<sup>69</sup> Second, it stated that to qualify for an exception, a trade measure "must be applied reasonably."<sup>70</sup> Third, it suggested that the burden of persuasion for the headnote falls on the party invoking the exception.<sup>71</sup>

Unfortunately, the Appellate Body offers no analysis or evidence in support of these treaty interpretations. For example, it does not explain how a legal right for exporters to export can exist without regard to the legal right of importers not to import. In other words, the Appellate Body's reasoning is circular in

62. Gasoline Panel Report, *supra* note 11, paras. 6.25-6.28.

63. *Id.* para. 6.37.

64. *Id.* para. 6.40. For criticism of this ruling, see Steve Charnovitz, *The WTO Panel Decision on U.S. Clean Air Regulations*, 19 INT'L ENV'T. REP. 191, 194 (1996).

65. United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, May 20, 1996, 35 I.L.M. 603, 623 (1996) [hereinafter Appellate Body Gasoline Decision]. The Appellate Body also suggested that the "primarily aimed at" test was not treaty language and should not be a litmus test.

66. *Id.* at 624.

67. *Id.* at 625. The *Tuna—Dolphin II* panel had suggested an effects test. See Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVTL. L. REP. 10567, 10580 (1994).

68. For further discussion, see Steve Charnovitz, *New WTO Adjudication and its Implications for the Environment*, 19 INT'L ENV'T. REP. 851-54 (1996).

69. Appellate Body Gasoline Decision, *supra* note 65, at 626 (emphasis added).

70. *Id.*

71. *Id.* at 626-27.

suggesting that article XX must be interpreted to preserve legal rights (or maintain legal obligations) which themselves can only be determined by article XX.<sup>72</sup>

The Appellate Body also interpreted the conditions of the headnote. In one constructive move, the Appellate Body apparently repudiated past adjudication<sup>73</sup> that had taken the teeth out of the headnote.<sup>74</sup> Less constructively, the Appellate Body conflates the terms "arbitrary discrimination," "unjustifiable discrimination," and "disguised restriction" by suggesting that they are coincident.<sup>75</sup> In the instant case, the Appellate Body concluded that the EPA baseline rule did not qualify for Article XX because it entailed "unjustified discrimination" and a "disguised restriction" on international trade.<sup>76</sup> The Appellate Body pointed to two failures by the EPA that underlay this conclusion. One was that the EPA did not adequately explore cooperation with the plaintiff governments.<sup>77</sup> The other was that the EPA did not take into account the costs of its regulation to foreign refiners.<sup>78</sup>

This conclusion was unsatisfactory for three reasons. First, the Appellate Body provided no evidence in support of its factual findings.<sup>79</sup> Second, the Appellate Body did not explain a legal basis for requiring the counting of foreign costs. Finally, the Appellate Body did not explain why either of these failures demonstrated that the EPA's regulation was a disguised restriction on trade.

### 3. Technical Barriers

On top of these constraints, the WTO Agreement on Technical Barriers to Trade (TBT) imposes even more constraints on national environmental standards.<sup>80</sup> The main disciplines are: (1) that imported products be accorded treatment no less favorable than like products of national origin, and (2) that technical regulations be no more trade-restrictive than necessary to fulfill a legitimate objective such as protection of the environment.<sup>81</sup> It should be noted that GATT article XX is

72. See Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L. J. 2131, 2194 (1995) (pointing out that in joining the GATT, importing nations may have retained the right to use environmental trade measures).

73. See *supra* text accompanying notes 59-61.

74. Appellate Body Gasoline Decision, *supra* note 65, at 629.

75. *Id.*

76. *Id.* at 633.

77. *Id.* at 631-32.

78. *Id.* at 632.

79. Charnovitz, *supra* note 68, at 853. Because the panel had not discussed the headnote, there was no factual record for the Appellate Body to draw upon.

80. Agreement on Technical Barriers to Trade (TBT), available in LEXIS, Itrade Library, Gatt File [hereinafter TBT]. These apply to only to regulations, not to taxes or import bans.

81. *Id.* arts. 2.1, 2.2. The first discipline is analogous to the GATT article III:4 national treatment requirement. Thus, if a future panel interprets article III:4 so as to prohibit regulations that distinguish products based on the way the product is made, this interpretation could carry over into TBT adjudication. If so, such regulations would violate TBT even though such regulations might not violate the GATT because of the saving force of article XX. The legal situation is unclear because TBT only applies to regulations on "product characteristics or their related processes and production methods."

not available as a defense for violations of these TBT disciplines.<sup>82</sup> So far, no WTO panel has interpreted the TBT disciplines.

#### 4. Summary

The new article XX jurisprudence provides good news and bad news for environmentalists. The good news is that it will be easier to meet the terms of section (g). The bad news is that it will be very hard to meet the terms of the headnote.<sup>83</sup> The Appellate Body has shown a willingness to invent new requirements for the headnote that do not exist in the text and to apply them arbitrarily. Looking at this jurisprudence as a whole, there would seem to be little basis for the conclusion that GATT rules place essentially no constraints on a country's right to protect its own environment.

#### B. WTO CONSTRAINTS ON DOMESTIC HEALTH POLICY

Before the advent of the WTO, trade jurisprudence had recognized that article XX(b) allows governments "to give priority to human health over trade liberalization."<sup>84</sup> The new WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),<sup>85</sup> however, has the potential to change this priority. The SPS Agreement contains several new disciplines on national health measures (applying to imports) that are less *laissez-régler* than the GATT.<sup>86</sup>

In the first SPS dispute to come before the WTO, the EU *Hormone* case, the Appellate Body found that a European Commission food safety measure violates

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*Id.* Annex 1.1 (emphasis added). Some analysts have inferred that this definition means that TBT does not apply to regulations on processes and production methods that are "unrelated" to the product qua product. Others assume that TBT disallows such regulations. See, e.g., *World Business Council for Sustainable Development*, THE TRADE AND ENVIRONMENT BULLETIN, March 1998, at 3.

82. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, (1994) [hereinafter WTO Agreement] Annex 1 (stating that Agreements like TBT would prevail over the GATT to the extent they are in conflict).

83. See Anna Beth Snoderly, *Clearing the Air: Environmental Regulation, Dispute Resolution, and Domestic Sovereignty Under the World Trade Organization*, 22 N.C. J. INT'L L. & COM. REG. 241, 296 (1996) (suggesting that domestic environmental sovereignty may be encroached by the WTO).

84. See *Taxes on Cigarettes*, *supra* note 52, at 200, 222.

85. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994) [hereinafter SPS].

86. For a discussion of these disciplines, see John J. Barcel, *Product Standards to Protect the Local Environment—The GATT and the Uruguay Round Sanitary and Phytosanitary Agreement*, 27 CORNELL INT'L L.J. 755 (1994); Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L BUS. 1, 71-73 (1994) (comparing the SPS provisions in the WTO with those in the NAFTA). Note that SPS only governs health measures applied to imports. In practice, this establishes a discipline for all health measures since it would be pointless for a government to ban a health risk from a domestic product if the government allows the same risky product to be imported.

SPS because it was not "based on" a risk assessment.<sup>87</sup> The case involved complaints by the Canadian and U.S. governments about an EU import ban on meat produced from animals fattened with growth hormones. Given the factual record of the case, the Appellate Body's decision to uphold the first-level panel seems justified.<sup>88</sup> Yet the Appellate Body makes several legal rulings that may make it harder for governments to safeguard domestic health.<sup>89</sup>

A key issue before the Appellate Body was the appropriate standard of review, that is, whether deference should be given to the EU's regulatory determination. The European Commission argued that the panel should have accorded deference.<sup>90</sup> In deciding that no deference is required, the Appellate Body points to the directive in the Dispute Settlement Understanding that panels make an "objective assessment of the facts,"<sup>91</sup> and concludes that deference is incompatible with this responsibility.<sup>92</sup> Since the WTO Anti-Dumping Agreement requires deference by dispute panels,<sup>93</sup> the WTO is in the odd position of deferring to national judgments of economic interest, but not to national judgments of health interest.

The Appellate Body also holds that using international standards does not provide a shield against an SPS challenge. The SPS Agreement states that national measures that conform to international standards "shall be *deemed* to be necessary to protect human, animal or plant life or health, and *presumed* to be consistent with the relevant provisions of this [SPS] Agreement and of GATT 1994."<sup>94</sup> Without analysis, the Appellate Body interprets "presumed" as denoting merely

87. *GATT Report of the Appellate Body on EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/12, WT/DS48/10, para. 253(l) (Jan. 16, 1998) at WTO Website, *supra* note 25 [hereinafter Appellate Body Hormone Decision].

88. *See GATT Report of the Panel EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997), at WTO Website, *supra* note 25 [hereinafter Hormone Panel Report]. For commentary on this panel report, see Steve Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 INT'L TRADE REP. 1781 (1997); Hiranya Fernando Senadhira, *Appellate Body Report of the Beef Hormone Case: A Brief Legal Analysis*, 2 BRIDGES 9 (Jan.-Feb. 1998), available on <<http://www.ictsd.org>>.

89. The Appellate Body also considered whether the precautionary principle had matured into a customary rule of international law. The representatives from the European Commission claimed that it had, while the representatives from Canada and the United States denied that it had. Given that difference of view, the Appellate Body concluded that the status of the precautionary principle in international law still awaits authoritative formulation. *See Appellate Body Hormone Decision, supra* note 87, paras. 120-25. The decision by the Canadian and U.S. governments to shun the precautionary principle contributed to their victory in this case. But one wonders whether this tactic will pay off in the long run as these two governments try to persuade developing countries to take action to head off global warming.

90. *Id.* para. 110.

91. DSU, *supra* note 41, article 11.

92. Appellate Body Hormone Decision, *supra* note 87, paras. 117, 119.

93. *Id.* para. 114; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, article 17.6(i), April 15, 1994, available in LEXIS, Itrade Library, Gatt File.

94. SPS, *supra* note 85, para 3.2 (emphasis added).

a rebuttable presumption.<sup>95</sup> This interpretation will enable challenges to international health standards seeking to rebut this presumption.

In other areas, the Appellate Body takes a more *laissez-régler* approach. Most notably, it overrules a decision of the *Hormone* panel that would have undercut national health regulation.<sup>96</sup> This decision involved SPS article 5.5 on regulatory harmonization, which requires each member government to “avoid arbitrary or unjustifiable distinctions in the levels [of health protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.”<sup>97</sup> After comparing the way the EU regulates the use of hormones for animal growth to the way it regulates other substances, the panel concluded that article 5.5 was being violated.<sup>98</sup> The panel found that in regulating growth hormones differently than the antimicrobial Carbadox, the EU was engendering “discrimination or a disguised restriction on international trade.”<sup>99</sup> This finding was criticized by commentators because the panel offered no basis for it.<sup>100</sup> The Appellate Body reversed the panel’s finding as being unjustified and erroneous.<sup>101</sup>

Unfortunately, the Appellate Body failed to reverse a related finding by the panel that there is an arbitrary or unjustifiable difference in the EU’s chosen levels of protection against hormones and Carbadox.<sup>102</sup> Instead, the Appellate Body affirmed the panel after reviewing and rejecting the seven justifications offered by the European Commission.<sup>103</sup> This outcome is perplexing. In an earlier section of its decision, the Appellate Body clearly stated that the *complaining* party has the burden of proving a violation of any SPS provision, including article 5.5.<sup>104</sup> Indeed, the Appellate Body concluded that the panel misallocated this burden and held this to be an error in law.<sup>105</sup> But, in affirming the panel’s application of the arbitrary and unjustifiable test, the Appellate Body seems to overlook the fact that the panel reached its conclusion by assigning the burden of proof to the *defending* party, that is, the European Commission.<sup>106</sup> According to the panel, “the European Communities has not met *its* burden of justifying the distinc-

95. Appellate Body *Hormone* Decision, *supra* note 87, para. 170. The Appellate Body takes no note of the fact that a similar provision in the Agreement on Technical Barriers to Trade uses the term “rebuttably presumed” to signify a rebuttable presumption. See TBT, *supra* note 80, article 2.5.

96. Appellate Body *Hormone* Decision, *supra* note 87, para. 253(m).

97. *Hormone* Panel Report, *supra* note 88.

98. *Id.* para. 9.1(ii).

99. *Id.* para. 8.241.

100. See, e.g., Charnovitz, *supra* note 88, at 1783-86.

101. Appellate Body *Hormone* Decision, *supra* note 87, para. 246.

102. *Id.* para. 235; *Hormone* Panel Report, *supra* note 88, para. 8.238. The Appellate Body is slightly narrower in finding only an unjustifiable difference.

103. Appellate Body *Hormone* Decision, *supra* note 87, paras. 226-35.

104. *Id.* para. 109.

105. *Id.* para. 108.

106. *Hormone* Panel Report, *supra* note 88, paras. 8.227-8.238.

tion it makes in levels of protection.”<sup>107</sup> Had the panel assigned the burden to the plaintiffs, the outcome might have been different.

Another important Appellate Body judgment involved the SPS rule that measures be “based on” a risk assessment. The panel enforced this rule by looking for procedural evidence that the European Commission had actually taken a risk assessment into account.<sup>108</sup> This line of inquiry was rejected by the Appellate Body as not in accord with the SPS.<sup>109</sup> In addition, the Appellate Body correctly rejected this line of inquiry because the panel’s approach is very meddlesome to national decisionmaking.

The Appellate Body gave a different gloss to “based on” than the panel. The panel looked at whether the health measures “conform” to the risk assessment.<sup>110</sup> The Appellate Body suggested a more lenient test—namely, whether there is a “rational relationship” between the measure and the risk assessment.<sup>111</sup> Applying this test, the Appellate Body found that the available risk assessments “do not rationally support the EC import prohibition.”<sup>112</sup>

The Appellate Body also seems to take a more *laissez-régler* position than the panel on the issue of whether a government may regulate in the absence of an identifiable risk greater than zero.<sup>113</sup> This portion of the Appellate Body’s decision is not clear. The Appellate Body might be saying that there is no required minimum quantitative showing of risk.<sup>114</sup> Alternatively, the Appellate Body might be restating the obvious by saying that unquantifiable risks may be part of a risk assessment.<sup>115</sup>

Finally, the Appellate Body throws in a wild card by stating that SPS article 3 recognizes and safeguards the “right and duty” of WTO member governments

107. *Id.* para. 8.238 (emphasis added).

108. *Id.* paras. 8.113-8.116. For criticism, see Charnovitz, *supra* note 88, at 1782.

109. Appellate Body Hormone Decision, *supra* note 87, paras. 188-91. For example, the panel had pointed out that the preambles to EU directives did not mention scientific studies. The Appellate Body makes clear that preambles are not normally used to demonstrate that a government has complied with its international obligations. *Id.* para. 191.

110. Hormone Panel Report, *supra* note 88, paras. 8.137, 8.156.

111. Appellate Body Hormone Decision, *supra* note 87, para. 193. In reaching this conclusion, the Appellate Body points to a principle of international law (*dubio mitius*) holding that if a meaning of a treaty term is ambiguous, the preferred meaning is the one that is less onerous to the party assuming an obligation. *Id.* para. 165 n. 154. Yet the Appellate Body’s citations are selective. Compare H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, BRIT. Y.B. INT’L L. 48, 59-63 (1949) (suggesting that continued reference to *dubio mitius* is a source of confusion that deserves greater discouragement than it has received), with Lord McNair, *Treaties and Sovereignty*, in THE LAW OF TREATIES, 765-66 (1961) (suggesting that the rule of restrictive interpretation is of declining importance and of doubtful value). See also Layla Hughes, *Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision*, 10 GEO. INT’L ENVTL. L. REV. 915, 921-22 (1998) (criticizing the Appellate Body’s use of *dubio mitius*).

112. Appellate Body Hormone Decision, *supra* note 87, para 197.

113. See Charnovitz, *supra* note 88, at 1782.

114. See Appellate Body Hormone Decision, *supra* note 87, paras. 184, 186.

115. See *id.* paras. 185, 187.



to protect the life and health of their people.<sup>116</sup> It is unclear whether the Appellate Body is suggesting that governments whose trade-related health standards are too low have an article 3 duty to raise those standards. Although little attention has been given to this provision, the requirement in article 3.1 that sanitary and phytosanitary measures be based on international standards, can be read to imply an obligation of upward harmonization.<sup>117</sup>

The growing public concern over food safety suggests that there will be more SPS cases in the next few years.<sup>118</sup> Panels will face the challenge to provide trade justice while avoiding decisions that turn food safety and consumer groups against the WTO. The sensitivity of governments to WTO supervision can be seen in the U.S. and EU press releases following the Appellate Body's *Hormone* decision—both sides claimed victory.<sup>119</sup> Depending on how WTO adjudication evolves, there may be a need to change SPS rules.<sup>120</sup>

### C. WTO CONSTRAINTS ON INTERNATIONAL ENVIRONMENTAL POLICY

Both *Tuna-Dolphin* panels suggested that governments could not use unilateral trade measures to pursue international environmental policy objectives.<sup>121</sup> This issue is now before the *Turtle—Shrimp* panel considering a U.S. law barring the importation of shrimp in certain situations so as to protect migratory sea turtles. No WTO panel reports have discussed international environmental policies.

Such policies may come up in the context of disputes about eco-labeling. The Agreement on Technical Barriers to Trade contains new disciplines that apply to labeling; however, these have yet to be interpreted.<sup>122</sup> While the WTO is amenable to labels indicating the country of origin, some analysts think it would be less amenable to labels indicating a product's cradle-to-grave impact.<sup>123</sup>

116. *Id.* para. 177 (emphasis added).

117. This situation would raise interesting issues of standing to enforce such an obligation.

118. See Stephanie Hall, *Food Fight: Safety Fears Grow Along With Trade*, J. COM., Jan. 5, 1998, at 1A.

119. Appellate Body Finds EC Hormone Ban Inconsistent with WTO Obligations under SPS Agreement, Jan. 15, 1998, USTR Press Release No. 98-02 (1998); WTO Ruling on EU Hormone Ban is a Victory for European Consumers, Jan. 16, 1998, European Commission Delegation Press Release No. 4/98 (1998).

120. But see U.S. Will Oppose Any EU Bid to Reopen WTO SPS Pact to Address Consumer Fears, 15 INT'L TRADE REP. 267 (1998).

121. See generally Chang, *supra* note 72, at 2139-2209 (summarizing these panel reports and critiquing them).

122. See generally Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205 (1996).

123. See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 244 (1997) (noting that many developing countries favor restricting the use of eco-labeling); DAVID VOGEL, *BARRIERS OR BENEFITS? REGULATION IN TRANSATLANTIC TRADE* 50 (1997) (stating the U.S. government is firmly convinced the EU eco-labeling program violates international trade law). See also Thomas J. Schoenbaum,

### III. Procedural Issues in Environmental Disputes

Disputes about the environment and health are different than typical trade disputes. While all trade disputes involve the interests of particular individuals, environmental disputes have a wider range of ecological or social impact. Contrast, for example, the GATT decision on *Copper Scrap* with the *Tuna-Dolphin* decisions. This difference in the range and depth of interests has implications for the procedures used in dispute resolution. Seven issues will be discussed below: (A) Mediation, (B) Selection of Panelists, (C) Technical Advice, (D) Public Input, (E) Intergovernmental Organization Input, (F) Voting Rules, and (G) Alternative Fora.

#### A. MEDIATION

The DSU provides for "good offices, conciliation and mediation" when undertaken voluntarily by the parties of a dispute.<sup>124</sup> In addition, the WTO Director-General may take the initiative to offer good offices.<sup>125</sup> In many of the past environment-related trade disputes, neutral observers found both sides partially right. Yet, in settling the dispute via the application of GATT law, the parties miss out on the opportunity to reach integrative solutions.

One way the WTO might head off the public controversies entailed in environment-related disputes is to make better use of the good offices of the WTO Director-General. For example, the Director General might appoint a judge, or diplomat, or academic—with experience in trade and environment—to work with both sides to fashion a compromise solution. Had this been done in the *Turtle-Shrimp* dispute, the mediator could have tried to get the complaining parties to improve their protection of turtles and tried to get the defendant party to negotiate a compromise.

#### B. SELECTION OF PANELISTS

The DSU states that panelists must be "well-qualified" individuals and that members of a panel should be selected with a view to ensuring "a sufficiently diverse background and a wide spectrum of experience."<sup>126</sup> Thus, while individuals with experience in environmental regulation may serve on a panel, there is no requirement that panels hearing cases about environmental laws have such experience. In the environment and health cases decided in 1996–97, it appeared as though none of the panelists had regulatory experience.

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*International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 295 (1997) (suggesting that the WTO would rule against a requirement that wood from tropical forests be so labeled).

124. DSU, *supra* note 41, article 5:1.

125. *Id.* article 5:6.

126. *Id.* article 8.

When the WTO reviews the DSU this year, proposals could be made for changing the rules so as to require technically qualified panels in disputes affecting environment or health. This might give a panel more capacity to carry out its responsibility of making an "objective" fact assessments. One precedent might be the provision in DSU article 8.10, which allows developing country governments involved in WTO disputes to insist that at least one panelist be from a developing country. The idea behind this selection factor presumably is not that this panelist will favor a developing country litigant, but rather that he may have a fuller understanding of its position.

### C. TECHNICAL ADVICE

The DSU states that a panel may seek information from any individual or body which it deems appropriate, and that for scientific and technical matters, a panel may establish an expert review group.<sup>127</sup> In the *Gasoline* dispute, the panel did not set up an expert review group and did not seek outside information. On the other hand, in the *Hormone* dispute, the panel set up an expert review group. Finally, in the *Turtle-Shrimp* dispute, the panel has sought the advice of experts.

Outside information or expert review groups are particularly important when panels need to make findings involving technical judgments. For example, in the *Gasoline* report, the panel made key factual findings regarding the EPA's ability to determine gasoline origin and to verify foreign producer baselines.<sup>128</sup> These findings may have been correct, but the record contained little support.

### D. PUBLIC INPUT

The parties in GATT/WTO adjudication are Member governments. Although it was recognized at least as early as 1902 that states could use international tribunals to espouse the interests of private parties,<sup>129</sup> such adjudication is still formalistically viewed as state-to-state. The public, however, sees through this legal fiction. For example, while the recent WTO dispute over the film market was technically between the United States and Japan,<sup>130</sup> much of the press characterized it as a dispute between Kodak and Fuji.<sup>131</sup>

Although governments can espouse private interests in WTO dispute settle-

127. *Id.* article 13.

128. *Gasoline Panel Report*, *supra* note 11, paras. 6.26, 6.28.

129. See *Pious Funds Case* (Mex. v. U.S.), Hague Ct. Rep. (Scott) 1 (Perm. Ct. Arb. 1902).

130. *Japan—Measures Affecting Consumer Photographic Film and Paper*, *Report of the Panel*, WT/DS44 (Apr. 22, 1998), at WTO Website, *supra* note 25.

131. See, e.g., *WTO Backs Fuji*, NAT'L L. J. Dec. 22, 1997, at A10; *USA Still Ahead at WTO Despite Kodak's Defeat*, U.S.A. TODAY, Dec. 10, 1997, at 24A; Shin Sato, *Fuji Wins; Kodak Loses in WTO Suit*, THE DAILY YOMIURI, Dec. 7, 1997, at 1; *WTO Rules in Favor of Fuji in Dispute with Kodak*, BUFFALO NEWS, Dec. 5, 1997, at 7B; *WTO's Kodak Ruling Heightens Trade Tension*, WALL S.J., Dec. 8, 1997, at A3.

ment, many non-governmental organizations (NGOs) are looking for more direct input opportunities. None of the WTO panels considering environmental or health issues, nor the Appellate Body, have called a public hearing or invited NGO amicus briefs. Some NGOs have submitted amicus briefs anyway,<sup>132</sup> but there is no evidence that the panels read the briefs. Nonetheless, the DSU rules do not preclude such public involvement.<sup>133</sup>

The need for NGO input is particularly strong on matters in which the participating governments are *not* espousing important NGO views.<sup>134</sup> Moreover, since the public does not yet have full access to all of the briefs submitted by governments, NGOs have difficulty knowing whether their views are being espoused. As several commentators pointed out, procedures could easily be adopted to provide NGOs the opportunity to submit information to panels.<sup>135</sup>

Individual citizens might also be given a right to lodge complaints in the WTO against trade actions by their own or another government.<sup>136</sup> At present, if the U.S. government forbids the export of a particular product to Country X, the only complainant could be the Government of X whose importers are being frustrated. However, X might not consider its interest sufficient to warrant a WTO tangle with the United States. In that situation, a more liberal trading system might give standing to citizens of the United States or Country X to challenge the GATT-legality of the export ban and its enforcement.<sup>137</sup>

132. See, e.g., WWF, *WWF Amicus Brief to WTO Shrimp-Turtle Dispute*, 1997.

133. Article 14.1 of the DSU states that panel deliberations shall be confidential. This, however, would not prevent public hearings. Appendix 3(2) of the DSU says that the panel shall meet in closed session. This could be interpreted loosely to allow an informal public hearing. Alternatively, a panel could rely upon DSU article 13.1 which authorizes panels to seek information "from any individual or body which it deems appropriate."

134. See generally Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L. ECON. L. 123, 132-37 (1998); see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 289 (1997) (noting that the web of potential relationships between private parties, supranational entities, and domestic governments lies at the heart of supranational adjudication).

135. See, e.g., Matthew Schaefer, *Non-Identical Yet Twin Challenges for the World Trading System: Further Advancing the Rule of Law and Legitimacy*, PROC. CAN. COUNCIL ON INT'L L. (forthcoming 1998). Some commentators go further in suggesting that private parties be able to lodge complaints. See Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275 (1997); PETER UIMONEN & JOHN WHALLEY, ENVIRONMENTAL ISSUES IN THE NEW WORLD TRADING SYSTEM 122 (1997) (suggesting that NGO participation be made a regular part of panel deliberations).

136. See Marin Lukas, *The Role of Private Parties in the Enforcement of the Uruguay Round Agreements*, 29 J. WORLD TRADE 181, 202-06 (Oct. 1995). See also Ernst-Ulrich Petersmann, *Introduction*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 61, at 115 (suggesting that individuals should be able to invoke WTO rules in domestic courts).

137. See Bill Mongelluzzo, *Obey or Pay: Customs Targets Rules Violations*, J. COM., Jan. 26, 1998, at 1A (noting that the U.S. government is punishing violators with multi-million-dollar fines, seizure of assets, and jail terms).

## E. INTERGOVERNMENTAL ORGANIZATION INPUT

In the Thailand *Cigarette* case, the GATT panel consulted the World Health Organization pursuant to an agreement of the parties.<sup>138</sup> This action was consistent with the provision in GATT article XXIII:2 authorizing the GATT to consult with appropriate intergovernmental organizations regarding disputes. However, the DSU does not specifically provide for such consultation even though it seems permissible under the power of panels "to seek information."<sup>139</sup> Because intergovernmental organizations for the environment could provide useful input to panels, it might be helpful to clarify that WTO panels can seek *advice* from such organizations (e.g., the U.N. Environment Programme) as well as "information."

## F. VOTING RULES

The DSU does not specify internal voting rules for panels. WTO panel reports are unclear as to whether decisions are unanimous.<sup>140</sup> Presumably at least two of the three panelists agree with each panel's decision. To give more weight to non-commercial values, the DSU rules could be changed to require any determination that national environmental or health measures violate the WTO must be made by a panel unanimously.

## G. ALTERNATIVE FORA

Another way of handling contentious environmental issues would be to shift them to another forum. Richard J. McLaughlin suggested that trade disputes about marine living resources be adjudicated in the tribunal established by the U.N. Convention on the Law of the Sea.<sup>141</sup> McLaughlin points out several advantages of this tribunal over the WTO including that it would comprise individuals with relevant expertise.<sup>142</sup>

## IV. Conclusion

The supervision of environmental and health laws that affect trade is a responsibility of the WTO, but one that it needs to carry out more effectively. The Appellate Body has stated that "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they

138. Taxes on Cigarettes, *supra* note 52.

139. DSU, *supra* note 41, article 13.

140. There were at least two GATT panels that revealed non-unanimity. See "Dissenting Opinions" in GUIDE TO GATT LAW AND PRACTICE, *supra* note 9, at 755 (WTO ed., 1995).

141. Richard J. McLaughlin, *Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENVTL. L. REV. 29 (1997).

142. *Id.* at 69-71, 79-81.

enact and implement.”<sup>143</sup> But these soothing words have been contradicted by some of the decisions taken by the Appellate Body as detailed above. Environmentalists do not have confidence in the current WTO dispute system. If the WTO aspires to ensure the rule of law, it should give more attention to deficiencies in its adjudications. Improving the DSU will be important not only to elicit the right outcomes from trade adjudication but also to assure continuing public support for the world trading system.

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143. Appellate Body Gasoline Decision, *supra* note 65, at 634.

