

The Legality of PPMs under the GATT

Challenges and Opportunities for Sustainable Trade Policy



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1. Introduction¹

Since the *Tuna-Dolphin* cases in the mid-'90s, the treatment of process and production methods (PPMs) under the General Agreement on Tariffs and Trade (GATT), and subsequently the World Trade Organization (WTO), has remained a high-profile concern for advocates of sustainable development. And although the relationship between PPMs and the WTO has received unprecedented attention by policy-makers and NGOs alike over the last decade, perceptions on the state of WTO law with respect to PPMs are anything but consistent.²

While no major agreements have been added to the WTO body of treaties since the finalization of the Uruguay Round, the case law over the past decade has evolved at a dramatic pace. Moreover, much of the recent evolution exhibited by GATT case law has drawn heavily from an acknowledgement that trade liberalization must occur “in accordance with the principles of sustainable development” as demanded by the preamble to the GATT 1994. It is perhaps not surprising then that recent developments in GATT case law have addressed some of the most egregious tensions between the GATT and a broader sustainable development agenda raised by the *Tuna-Dolphin* rulings.

Despite significant “advances,” in the law, however, established perceptions with respect to PPMs combined with the case-based nature of recent developments have allowed confusion and uncertainty among policy-makers to persist. The resulting political (and legal) indeterminacy regarding the status of PPMs under the WTO renders it difficult for policy-makers to assess the international legal framework from a strategic perspective.

Given the close linkages between PPMs and sustainable development objectives, uncertainty on the role of policy in promoting “sustainable” PPMs is a major challenge to the implementation of a proactive sustainable development agenda within the context of the WTO.

Under Paragraph 32 of the Doha Declaration, WTO Members explicitly mandate the Committee on Trade and Environment (CTE) to identify areas of the WTO which need clarification with respect to, *inter alia*, labelling requirements, environmental measures and TRIPs. To the extent that the law with respect to PPMs continues to be subject to differing and inconsistent interpretations in political circles, and bears direct relevance to each of the specifically mentioned themes for consideration, clarifications on the status of PPM-based measures under the WTO can be regarded as falling within the purview of current negotiations.

Beyond any political rationale that might exist, as a matter of practical fact, PPM requirements are increasingly being stipulated by public and private procurement policies. Where PPM requirements are mandatory, they have a strong potential for generating rigid barriers to market access. Even where PPM compliance remains voluntary, market concentration and bottlenecks in international supply chains can have the effect of rendering such requirements as virtual prerequisites to market access. This situation is complicated for developing countries by the fact that PPM requirements, whether developed by public or private actors, tend to be driven by the consumption side of the supply chain, providing limited opportunities for developing country stakeholders to negotiate

1 The author would like to thank Howard Mann, Steve Charnovitz, Robert Howse, Alice Palmer and Mark Halle for their insightful suggestions, comments and guidance, without which, the preparation of this paper would not have been possible. Any oversights which may persist within the current document remain the sole responsibility of the author.

2 As we shall see below, academics are increasingly of the view that PPM-based measures are permissible to one degree or another under the WTO set of agreements. Officials and delegates are nevertheless prone to regarding PPM-based measures as being contrary to the spirit, if not the law, of the WTO. See Steve Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality” (2002) 27 *Yale J. Int'l L.* 59–110 [Charnovitz] for a list of public statements by high-level officials on the illegality of PPMs.

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market access issues over the course of their development and implementation.³ Within this context, clarification and guidance on the use of PPM requirements at the multilateral level can serve developing country interests by creating greater transparency, equity and predictability in the use of such measures across international markets as a whole. Taking the PPM issue seriously at the multilateral level provides an opportunity for explicit attention to the growing needs of developing countries in meeting such requirements and thus has a practical role to play in the context of the Doha negotiations.

The main objective of this paper is to provide a brief overview of the current state of GATT case law with respect to PPM issues as a means to enabling a more strategic use of PPM-related policy measures more generally. The paper begins with a résumé of the case for PPM-based policy measures along with a taxonomy of such measures. This is followed by a review of the technical legality of PPM policy under the GATT. The paper concludes with a number of strategic recommendations for policy-makers aimed at improving the effectiveness of PPM measures for promoting sustainable development within the context of the Doha Agenda.

3 The concentration of PPM requirement instruments on the consumption side of the supply chain is a reflection of the distribution of market authority along international supply chains more generally. One example of a large “consumption”-driven PPM system is Eurepgap, a voluntary PPM standard being implemented by 30 major retailers in Europe.

2. The Case for PPM-based Trade Measures

Process and production methods, in the broadest sense, refer to any activity that is undertaken in the process of bringing a good to market. Under this definition, a PPM can refer to activities related to the actual production of a good (such as the chemicals used to treat widgets) to the extraction of natural resources for eventual incorporation into goods (harvesting methods applied to timber used in widgets), to trading practices used in bringing goods to market (long-term contracts with timber suppliers in the production of widgets). PPMs, which are used in the manufacture of goods, can be described as either *product-related* or *non-product related* depending on whether a particular set of PPMs affect the *physical* characteristics of the product which they produce.⁴ Although there are both political and economic reasons for abandoning this distinction in the sphere of international trade law *per se*, the distinction is considered to be of deep importance to WTO Member countries in the context of negotiations and other official statements before the parties.⁵ In what follows, we shall assume the convention of using PPM to refer to non-product related PPMs unless otherwise specified.⁶

Market efficiency and cost internalization are widely recognized as cornerstones of sustainable development.⁷ Although free market theory predicts that social, economic and environmental costs of production will be automatically internalized by the pricing mechanism in a perfect market, inadequate communication, property rights and

competition in actual markets lead to efficiency-reducing market externalities.

The free market mechanism has proven to be a particularly unreliable transmitter of information on social and environmental costs of PPMs for a variety of reasons. On the one hand, the fact that PPMs (whether product-related or not) often are not directly evident in any given final product, makes it difficult for economic actors along the supply chain to actually monitor or enforce PPM application unilaterally. On the other hand, PPMs overlap with proprietary processes related to business management, which, systemically, establishes market incentives *against* the transmission of PPM information. PPMs are particularly prone to misallocation when they interact with public goods, which themselves are inadequately integrated into market structures. Non-product-related PPMs are even more problematic from this perspective, since it is *physically impossible* to detect the type of PPMs used from an analysis of the physical characteristics of the product itself.

The challenges facing communication of the costs specifically associated with PPMs, lead to a persistent source of externalities, overall market inefficiency and, ultimately, reduced global social welfare. The threat posed to sustainable development by PPM-based market inefficiencies is particularly acute due to the direct impact of PPMs on the transformation of social and environmental

4 In making the distinction between product-related and non-product-related PPMs, we are concerned only with PPMs used in the production and processing of goods. This is distinct, of course, from the broader group of “non-product-related PPMs” which might be available for trade “in and of themselves,” such as engineering or processing techniques.

5 The distinction has been used as the dividing line between the appropriate domains of sovereign authority of trading partners on the understanding that different cultural, geographic and economic conditions warrant specific PPMs which should not be subject to foreign manipulation or influence unless they directly affect the welfare of the importing country (as in the case of product-related PPMs). However, the fact that both product- and non-product-related PPMs can (and do) have impacts on global goods, renders this distinction irrelevant from the perspective of “legitimate sovereign interest.” Similarly, the presupposition that consumers are (or should be) only concerned about the physical characteristics of products is neither true nor desirable given the recognized need to promote sustainable consumption patterns.

6 This paper focuses specifically on the legality of non-product-related PPMs as it is here that the greatest inconsistencies in perception and uncertainty in legal status persist.

7 See, for example, the “Principle of Efficiency and Cost Internalization” of the Winnipeg Principles, online: <http://www.iisd.org/pdf/2003/trade_sd_principles.pdf>.

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factors into goods—the economic stage at which both the rural poor and global environments are most at risk.⁸

One of the tasks of policy-makers in such instances is, of course, to design policy instruments which “help” the market fully internalize the costs associated with market activity in ways which support long-term sustainable development. Recognition of the critical relationship between PPMs and sustainable development has led to its edification at the global level through Principle 8 of the Rio Declaration:

*to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.*⁹

While the implementation of PPM-related policies within closed national boundaries may be relatively uncontroversial, the challenge associated with implementing such policies in the context of globalized markets has become increasingly evident over the past several decades. As competition deepens across borders, there has been a growing impetus to complement national PPM-oriented policy measures⁷ with parallel instruments to ensure similar rates of PPM compliance within foreign jurisdictions.¹⁰ The fear that other countries might gain competitive advantage based on the use of less demanding PPMs has provided a fundamental stimulus to the use of PPM measures to level the playing field between compliant and non-compliant practices. Table 1 provides a rough taxonomy of the broad range of different mechanisms adopted by governments to

ensure PPM compliance of products sold within their jurisdictions.

Market-based¹¹ and trade-related¹² PPM measures are particularly appealing from a sustainable development perspective because they have the potential to provide a direct link between the pricing mechanism and overall public goods provision in international markets. While this link provides a compelling basis for the use of such measures from a cost internalization, and therefore sustainable development perspective, the presence of a wide range of other potential factors and motivations for such measures suggests that they can only be expected to promote sustainable development in a limited set of circumstances. Coming to terms with the appropriate and inappropriate uses of PPM-based measures and the opportunities and challenges facing such measures, is a critical first step for leveraging such instruments effectively toward the achievement of sustainable development.

Three main arguments are typically provided as reasons why trade-related PPM measures are inappropriate policy instruments. First, and most evidently, it is argued that the implementation of unilateral trade-related measures can be used to serve protectionist interests. Second, it is argued that the exportation of national policy priorities through PPM-based policies is *inherently* in conflict with the sovereign right of states to determine their own policy priorities. Third, it is argued that the temporal and geographic distance between the enforcement of trade-related measures and the actual application of PPMs makes effective enforcement technically unfeasible and (potentially) arbitrary.

8 Following a needs-based approach to sustainable development, the social, economic and environmental conditions of the poor have the highest priority in the implementation of a sustainable development strategy.

9 See Principle 8 of the *Rio Declaration on Environment and Development*. UNCEDOR, 11d Sess., Annex, Agenda Item 1, UN Doc. A/CONF.151/26 (1992) at p. 8.

10 Although not a new phenomenon, concern has grown considerably with the rapid expansion of outsourcing production to foreign providers. The use of PPM-based requirements as a condition for trade dates back at least to the end of the 19th century. By 1914, more than 20 bilateral trade agreements had been formulated with the inclusion of obligations towards the harmonization of labour standards across parties to the agreement. See Leary, Virginia, 1996, “Workers Rights and International Trade: The Social Clause,” p. 185, in Jagdish Bhagwati and Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* London: MIT Press.

11 We use the term “market-based” to refer to any policy measure which relies upon the market to allocate compliance across economic actors. Examples of market-based measures include quota systems, taxes, certificate systems and subsidies.

12 We use the term “trade-related” to refer to any policy measure which has direct impacts on trade. Examples include trade tariffs, trade quotas and trade bans as well as internal fiscal policy.

While each of these arguments has a legitimate basis, the specific arguments apply equally to a wide range of other policy measures, and therefore have little merit as arguments against PPM measures *per se*. Rather than suggest the inappropriateness of PPM measures outright, these concerns are more appropriately taken as signposts for those things to avoid and/or strive for in the design of “sustainable” PPM policy.

With respect to the protectionist argument, the ability of PPM requirements to serve protectionist purposes is undisputable. Trade benefits and market access can be linked to PPMs which are geographically and/or culturally specific.¹³ However, the potential of trade-related PPM measures to serve protectionist interests is shared by *all* trade-related measures bearing no special relationship to whether those measures specify PPM requirements or mere product characteristics. Any formal distinction between products, whatever the basis, can be designed to serve protectionist purposes if so desired.¹⁴ The test for avoiding protectionism in the context of trade-related measures should not be based on whether or not the measure specifies PPMs, but whether or not the measure specifies PPMs which are effectively accessible to all origins—that is, PPMs which are “origin neutral” in character.

A subset of the “protectionist” concern is forwarded by developing countries that fear that PPM-based trade measures systemically disadvantage small developing country producers. This is a real concern that must be addressed, but again, does not speak specifically to the issue of PPMs *per se*. While it is possible that PPM-based measures can be designed in ways that favour developed countries, it is also possible for such measures to be designed in ways that improve social, environmental and economic opportunities for and within developing countries. The provision of PPM-based tariff preferences under U.S. and EU generalized system of preferences (GSP) policy is one clear example of

how PPM-based differentiation can overcome the challenge of “developed country” protectionism.

On the other hand, the recent explosion of PPM requirements being implemented through “voluntary” supply chain relationships suggests that there may be transparency and equity gains to be had for producing countries through greater integration of PPMs within the multilateral discussions at the level of the WTO. To the extent that voluntary standards are developed through processes with imperfect information and participation, the proliferation of the use of such standards represents a real and growing threat to those who do not, and often *cannot*, participate in their development—that is, developing country stakeholders. As the use of voluntary standards multiplies, developing country interests may be better served through the increased transparency and inclusivity brought forth by the clear and *intentional* treatment of PPM-related measures within the context of the international trading structure.

Arguments against the use of PPMs based on the sovereign rights of states to determine their own policy objectives and instruments, provide little basis for avoiding PPM measures. On the one hand, both PPM- and non-PPM-based policy measures can have significant impacts upon the pursuit of foreign policy objectives. SPS requirements on food products will inevitably require foreign jurisdictions to undertake new procedures in much the same manner as a particular PPM measure. To the extent that both PPM and non-PPM policies restrict the ability of foreign jurisdictions to choose their own policy objectives and instruments, it is unclear how sovereignty provides a foundation for arguing against PPMs *per se*. On the other hand, it is unclear how a PPM measure (or any other measure implemented through a government’s legitimate authority) can be said to “infringe” upon the national sovereignty of its trading partners. If the implementation of PPM-based

13 The classic example being the 1904 German tariff concession to Switzerland lowering the tariff on “Large dapple[d] mountain cattle reared at a spot at least 300 metres above sea level and having at least one month’s grazing each year at a spot at least 800 metres above sea level.” See Hudec, Robert E., “Like Product: The Differences in Meaning in GATT Articles I and II,” p. 101, in Thomas Cottier and Petros Mavroidis (eds.), 2000, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*. Ann Arbor: University of Michigan Press [Hudec].

14 For example, a Canadian ban on the import of all bear meat products other than polar bear meat, could be regarded as serving protectionist interests, despite the physical distinctiveness of polar bears with respect to other bear species.

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policy restricts access to a particular market, then it remains within the authority of the foreign jurisdiction to decide whether or not it wants to access that market. Policies that restrict market access are viable instruments under international law precisely *because* they don't infringe upon national sovereignty. Whether a particular policy is in accordance with international trade obligations is, of course, another matter, but as a principled basis for rejecting the use of PPM measures outright, there appears to be little in the way of a legal or rational basis for the claim.

With respect to the enforcement argument, non-product-related PPMs do raise special challenges which make it difficult for countries downstream on the supply chain to “unilaterally” verify the legitimacy of PPM compliance claims at the border. While the difficulties posed by PPM verification “at the border” were monumental at the time the GATT was negotiated, the past several decades has given rise to a wide range of private sector initiatives which rely upon third party verification of PPMs along the supply chain.¹⁵ The growth of such systems suggests that there is an increasingly viable alternative to “physical” verification requirements typically applied in customs practice. Meanwhile, new information technologies such as eCOPS¹⁶ and RFID¹⁷ for ensuring the traceability of supply chains in commodity markets have greatly improved the ability of private sector and government actors alike to verify and control the practices applied to production in foreign jurisdictions. These developments point towards the potential for addressing the enforcement and compliance problem by building on a model of

internationally accepted supply-chain-oriented enforcement mechanisms, whether they are those reflected in the ISO system, issue-specific multilateral agreements or alternative international processes.

While the traditional arguments against the use of trade-related PPM measures highlight important challenges facing the implementation of such measures, they do not detract from the principal strength which such measures offer, namely, one of the most direct means for correcting market failure across global markets. At the same time, such arguments do suggest specific challenges which must be addressed in any attempt to take advantage of PPM measures as a systemic tool for improving the efficiency outcomes of the global market. Specifically, the arguments suggest that trade-related PPM measures are most appropriate when they are directed towards “origin-neutral” applications and under circumstances where credible “independent” verification is possible.¹⁸

As global markets become increasingly integrated, countries are exposed to growing incentives to use low-cost, low-standard PPMs as a basis for gaining competitive advantage. However, the same forces that threaten the use of high-standard PPMs, also point to a path for the promotion of desirable PPMs and the public goods they protect. As global markets increase their “authority” over national and local decision-making with respect to the provision of public goods, the use of market-based tools that leverage supply chain relations, hold a growing promise as instruments for catalyzing change for sustainable development. By translating

15 A wide range of voluntary standards-based certification and labelling schemes have been developed at the national and international levels. These systems typically revolve around verification systems for ensuring that claims are matched by practice along international supply chains. Some examples of such initiatives operating at the international level include: Forest Stewardship Council; SA 8000; WRAP standards; Fairtrade Labelling Organizations International; Rainforest Alliance; Marine Stewardship Council; Rugmark, etc.

16 eCOPS is an electronic tracing and certificate system for commodities markets—currently applied to coffee and cocoa but applicable to other product chains. For more information see eCOPS Electronic Commodity Operations Processing System, online: <<http://www.nybot.com/services/eCOPS/indexeCOPS.htm>>.

17 Radio Frequency Identification (RFID) revolves around the use of radio tags embedded in products as they are transported along the supply chain. See, for example, Radio Frequency Identification, online: <<http://www.epcglobalcanada.org/rfid.htm>>.

18 On the basis of the shared policy objectives of trade liberalization and sustainable development towards greater economic efficiency, there is also a strong analytic rationale for favouring market-based instruments which apply product-oriented PPMs rather than actor-oriented PPMs (whether country or company-based). The special ability of such measures to promote origin neutrality and economic efficiency makes them particularly appropriate candidates for “sustainable” trade policy.

policy objectives into market signals through trade measures, or other market-based approaches, the flexibility, creativity and power of the market can be mobilized to serve the basic objectives of sustainable development.

Despite the growing potential for using trade-related measures as a tool to promote sustainable development, however, many policy-makers

continue to assume that such approaches, regardless of their potential benefits, are nevertheless impossible or extremely difficult to implement due to legal constraints at the level of the WTO.¹⁹ The perceived tension between the use of PPM measures and current WTO obligations provides the rationale for our more in-depth analysis of the legal status of PPM measures under the WTO.

Box 1: Social vs. Environmental PPMs in the Trade Context

Discussions on the relationship between PPMs and WTO policy are usually framed either in terms of environmental PPMs or in terms of social PPMs, but not both together. Although the respective themes raise different political issues, the “PPMs and trade” issue *from a sustainable development perspective* is one that cuts across both social and environmental boundaries.

Both social and environmental goods raise identical issues with respect to the internalization of the costs of sustainable practice. In the same way that a company can use an environmental good without paying for the full cost of its use, so too can it use a social good (labour) without paying for the full cost of its use (in the extreme—slavery). Although social goods, such as those protected by labour standards, are intimately related to political and cultural context, so too are the value and availability of environmental goods. Despite regional diversity across social and environmental goods, “globally recognized” norms arising from widespread social, political or scientific agreement can set a basic framework for establishing PPM-based measures at the international level.²⁰ Moreover, within the post-Agenda 21 context, *integrated* policy approaches that address social, economic and environmental sustainability issues simultaneously are increasingly the norm. As policy instruments combine social and environmental elements within them, strict distinctions between social and environmental PPMs become increasingly irrelevant on the policy front.²¹

19 As a case in point, developing countries rejected outright suggestions on the inclusion of PPMs as a basis for defining product eligibility for the proposed “Green Goods and Services List” under Art. 32 of the Doha Declaration. Personal Communication, Ulrich Hoffmann, UNCTAD, March 2006.

20 For example, the ILO’s eight core labour conventions have earned virtually universal acceptance through the formal adoption of the Universal Declaration on the Fundamental Principles and Rights at Work by the ILO conference in 1998. See http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DECLARATIONHISTORY?var_language=EN. In addition to scientific agreement, multilateral environmental agreements and international standards can provide a reference point for globally recognized norms in environmental practice.

21 The rapid evolution from single-issue labelling and standards-based labelling initiatives (such as strictly environmental or labour-based labels) to multi-issue, sustainability standards-based initiatives (e.g., Fairtrade Labelling Organizations International; Rainforest Alliance; Roundtable on Responsible Soy) provides an obvious example of the trend towards integrated approaches to sustainable development.

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The table below provides a thematic overview of government initiated, trade-related PPM-based measures. Recognizing that governments may (and do) apply measures spanning more than one of the listed categories at a time, the following is only intended as a rough framework for considering the political, economic and legal implications of any given PPM policy.

Table 1: A Taxonomy of PPM-based Measures

Level of Implementation	Description	Product-oriented	Firm-oriented	Country-oriented
		Distinguishes between <i>products</i> that are PPM-compliant/non-compliant	Distinguishes between <i>firms</i> that are PPM-compliant/non-compliant	Distinguishes between <i>countries</i> that are PPM-compliant/non-compliant
Fiscal	Financial incentives to promote the use of specific PPMs (subsidies, tariffs, taxes)	<ul style="list-style-type: none"> • Preferential tariff or tax on products which are certified fair trade 	<ul style="list-style-type: none"> • Preferential tariff or tax for products coming from ISO 14000 compliant firms 	<ul style="list-style-type: none"> • Preferential tax or tariff for products coming from countries implementing turtle-friendly fishing devices
Technical	Labelling and packaging requirements related to PPMs	<ul style="list-style-type: none"> • Requirement that actual PPMs used in the delivery of a product are specified by the labelling of that product 	<ul style="list-style-type: none"> • Requirement that products coming from firms with specific PPM histories must notify consumers on labels 	<ul style="list-style-type: none"> • Requirement that products coming from a country with specific PPM histories must be labelled accordingly
Quantitative	Quantitative limits/requirements on the trade of products associated with compliance/non-compliance of PPMs	<ul style="list-style-type: none"> • Trade ban or quota on products produced with undesirable PPMs 	<ul style="list-style-type: none"> • Trade ban or quota on products coming from companies applying undesirable PPMs 	<ul style="list-style-type: none"> • Trade ban or quota on products coming from countries applying undesirable PPMs
Programmatic	Policy measures and projects implemented through the executive decision-making authority of the government based on policy or program priorities	<ul style="list-style-type: none"> • One-off support for advertising of labelled PPM-preferable products • Procurement policy on products with specific PPMs 	<ul style="list-style-type: none"> • Technical assistance to companies implementing, or in the process of implementing, preferable PPMs • Procurement policy on firms adopting specific PPMs 	<ul style="list-style-type: none"> • Technical assistance to countries implementing, or in the process of implementing, preferable PPMs • Country-based PPM procurement policy

3. The State of GATT Law

Any effort to provide an overview of the state of the law with respect to the legality of PPMs under the WTO is fraught with difficulty. Strictly speaking, as treaty-based law, the text of the various WTO agreements, and corresponding negotiating documents, form the sole basis of WTO law. Although occasional mention of PPMs throughout the different WTO agreements would suggest an implicit acceptance of such measures within the overall body of WTO rules,²² nowhere within the WTO package of agreements is there explicit reference to the legality or illegality of non-product-related PPMs.

As a starting point, this puts any assertion regarding the legality or illegality of PPM measures on a shaky footing. WTO case law does not formally benefit from the principle of *stare decisis*, and therefore is neither binding nor precedent-setting in a strictly legal sense.²³ However, as a practical matter, dispute-settlement bodies have relied upon previous decisions with a consistency that gives them a high degree of legal authority. This general trend has been reinforced by the establishment of the Appellate Body (AB) as the court of last resort under the WTO. Notwithstanding the enhanced impact and clarity arising from a growing body of WTO case law, WTO dispute-settlement bodies have displayed a persistent and intentional reluctance in making broad assertions with respect to non-product-related PPMs.

As we shall see, our overview confirms what commentators have identified as the AB's growing attentiveness to meet the needs of "two constituencies" to the WTO: one internal made up of WTO delegates; and one external made up of NGOs and academics.²⁴ On the one hand, this shift represents an important opening for the integration of non-trade interests such as those typically embodied by PPM measures within the regime of WTO Agreements and is symbolized by the findings in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*²⁵ and *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*.²⁶ On the other hand, it lends itself towards extended ambiguity and uncertainty, as embodied by the AB's increasingly minimalist, case-by-case approach to the resolution of non-product-related disputes.

As the cornerstone of the WTO package of agreements, the GATT plays a symbolic and, in many ways, leading role in the development of WTO law more generally. The fact that initial doubts with respect to the legality of non-product-related PPMs arose in the context of a series of GATT Panel decisions, only served to reinforce the primacy of the GATT as setting the framework for assessing the overall legality of PPMs within the WTO.

22 The GATT, SPS and TBT Agreements all make reference to the legitimate use of measures related to processing and production methods. See Charnovitz, *supra* note 2 at pp. 61–62.

23 The AB noted that Panels are not bound by the decisions or legal reasoning of previous Panels. *Japan – Taxes on Alcoholic Beverages (Complaint by Canada, European Communities, United States)* (1996) WTO Doc. WT/DS8, 10, 11/AB/R at Section E 13 (Appellate Body Report) (Lexis) [*Japan Alcohol*].

24 Howse, Robert and Elisabeth Tuerk, 2002, "The WTO Impact on Internal Regulations – A Case Study of the Canada–EC Asbestos Dispute," pp. 283–328, in Gráinne de Búrca and Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*. Oxford: Hart Publishing.

25 *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan and Thailand)* (1998), WTO Doc. WT/DS58/R (Panel Report) [*Shrimp Turtle Panel*]; *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan and Thailand)* (1998) ETO Doc. WT/ DS58/AB/R (Appellate Body Report) [*Shrimp Turtle*].

26 *European Communities – Measures Affecting Asbestos and Asbestos-containing Products (Complaint by Canada)* (2001) WTO Doc. WT/DS135/AB/R (Appellate Body Report) (Lexis) [*Asbestos*].

The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy

Concern about the legal relationship between international trade law, PPM measures and sustainable development principally stems from the conclusions reached under two cases related to U.S. restrictions on tuna imports. The two *U.S. Restrictions on Imports of Tuna*²⁷ Panel decisions crystallized the potential conflicts between trade liberalization and sustainable development by establishing apparent threshold rules with respect to PPMs which would have resulted in severe limitations on a range of trade-related policy tools aimed at protecting the environment and other sustainable development objectives. Although neither of the *Tuna* Panels were actually adopted by the contracting parties to the WTO, and therefore have no formal legal status today, they nevertheless continue to animate political and analytic discussions on the relationship between PPMs and the WTO.

The *Tuna* cases arose in response to the U.S. Marine Mammals Protection Act (MMPA) which banned imports of tuna and tuna products from countries that could not demonstrate tuna had been captured according to the “dolphin-safe” standards promulgated by the MMPA.²⁸ Ultimately, both Panels found the MMPA to be in violation of GATT obligations due to the fact that it prohibited the importation of certain tuna products on the basis of their PPMs. Implicit within the *Tuna* cases was a general exclusion of differential treatment between products based solely on their PPMs.

The apparent illegality of PPM measures arose from three pivotal conclusions reached by both Panels in the *Tuna* cases:

- that the MMPA, by virtue of distinguishing between products based on PPMs, did not meet the product-related threshold of eligibility required for consideration under Art. III, (and therefore could not qualify for one of the legitimate bases of differential treatment permitted by that Article);²⁹
- that, in any event, even if considered under Art. III it would fail the non-discrimination test due to the fact that dolphin-friendly tuna is “like” conventionally captured tuna;³⁰ and
- that the MMPA, by specifying PPMs permissible in foreign jurisdictions, had extra-territorial effect which rendered it ineligible to qualify under Art. XX exceptions.³¹

The combined logic of these conclusions, was that differential treatment between products based on PPMs alone would be highly vulnerable to violating the *principle of non-discrimination* (by violating either or both of Art. III and/or Art. XI) while simultaneously being ineligible for exception under Art. XX. Although a GATT Panel had addressed the issue of non-product-related measures previously,³² the *Tuna* cases were the first to

27 GATT, *Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, (1991) 30 I.L.M. 1594 [*Tuna I*]; GATT, *Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, (1994) 33 I.L.M. 839 [*Tuna II*].

28 The MMPA actually consisted of two separate trade bans referred to as the “primary nation embargo” which prohibited the importation of tuna from countries which had not demonstrated compliance with the MMPA standards and the “secondary nation embargo,” which prohibited imports of processed tuna products from countries which did not themselves ban the import of non-MMPA-compliant tuna.

29 The Panel, in both cases, concluded that the MMPA import ban *could not* be justified as a border tax adjustment under Art. III of the GATT due to the fact that it made distinctions based on criteria which were not related to the *nature* of the product itself and therefore were not covered by Art. III allowances for equal treatment between national and foreign products. *Tuna I*, *supra* note 27 at para. 5.14; *Tuna II*, *supra* note 27 at para. 5.8–5.9. The logic of the *Tuna* rulings suggested that there was a product-related “threshold” which had to be met in order to qualify for consideration under Art. III (and by implication Art. I). In the absence of meeting this threshold, any given restriction would be highly vulnerable to being characterized as a pure trade restriction prohibited under Art. XI.

30 *Tuna I*, *supra* note 27 at para 5.15.

31 The Panels grounded their reasoning on the fact that the GATT reserves the right of each member to set its own environmental standards and, therefore, *prevents* any given state from imposing its standards on other parties through trade policy. The result was an effective threshold rule that in order for measures to qualify under an Art. XX exception, they could not have the purpose of motivating a change in policy or action in a foreign jurisdiction. *Tuna II*, *supra* note 27 at 5.42.

32 *Belgian Family Allowances (Complaint by Norway and Denmark)* (1952), GATT Doc. L/7927, 1st Supp. B.I.S.D. (1953) 59 [*Belgian Family Allowances*].

establish what *appeared* to be the illegality of PPM-based measures under the GATT *ab initio* and, as such, played a symbolic role for environmentalists and other onlookers of the developing trading system. A closer look at the recent application of the principle of non-discrimination and Art. XX under the GATT reveals not only that no such rule exists, but also that there is a wide range of opportunity for implementing PPM measures under the GATT as it currently stands.

The Principle of Non-discrimination: Art. I, III and XI

The “principle of non-discrimination” forms the cornerstone of the GATT and is set forth in the preamble as a general commitment to enter into “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariff and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”³³ Although the principle of non-discrimination informs the entire Agreement, it is elaborated in three key provisions within the GATT: 1. Article I: General Most Favoured Nation Treatment; 2. Article III: National Treatment on Internal Taxation and Regulation; and 3. Article XI: General Elimination of Quantitative Restrictions.

Under Article I, each member country is obliged to accord no less favourable treatment of all foreign “like products” irrespective of their origin or destination in the implementation of policies affecting the eventual sale of such products. Article III requires member countries to treat “like products” of foreign origin “no less favourably” than those of domestic origin with respect to the design and implementation of internal policies and regulations. Art. I and Art. III effectively apply to “all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use” of like products.³⁴

Article XI, on the other hand, prohibits the use of quantitative restrictions on the import and export of goods. The primary instruments targeted by Art. XI are outright trade bans and trade quotas associated with products.

The obligations set under these three articles set the basic framework for determining when and how member countries may legitimately subject products to differential treatment under the GATT. The relationship between PPMs and GATT law therefore turns fundamentally on how PPMs relate to these basic GATT obligations.

The Threshold Rule

Both of the *Tuna* cases excluded consideration of the MMPA under Art. III on the grounds that the measure was not related to the product and therefore not covered by Art. III. The conclusion that PPM measures were not covered by Art. III eliminated potential grounds of justification associated with the article (as, for example, a border tax adjustment, or that such products might be “unlike”). It also rendered such measures more vulnerable to being found in violation of Art. XI since virtually any rule, whether tax, tariff or labelling requirement, that allows the blocking of trade in the face of non-compliance, has the potential to be framed as a quantitative restriction on trade. By categorically excluding PPM measures from consideration under Art. III (and by implication, Art. I), the *Tuna* decisions, had they been adopted, would have left PPM measures subject to characterization as forms of quantitative restriction in violation of Art. XI.³⁵

Although no Panel or AB decision has directly commented on the potential eligibility of PPM measures for consideration under Art. III (or Art. I) as such, there are numerous examples of cases which have, in fact, applied Art. I and/or Art. III analysis to non-product related measures. To cite but a few:

33 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27, (entered into force January 1, 1948), preamble.

34 Although Article I does not itself list these areas of coverage, they are incorporated by reference to Article III, para. 2 and 4. *Ibid.*, GATT, Article I, para. I.

35 The rationale for not considering the MMPA under Art. III (namely that it dealt with non-product-related issues whereas Art. III is limited to product-related distinctions) would presumably apply equally to Art. I, which carries the same structure as Art. III.

- in *Belgian Family Allowances*, a Panel considered, under Art. I, a measure which provided an exemption of charges on imports purchased by Belgian government agencies when the products in question came from a country with a system of “family allowances” similar to that of Belgium;
- in *Indonesia – Certain Measures Affecting the Automobile Industry*,³⁶ a Panel considered, under Art. I, an Indonesian import duty based on the Indonesian content levels in imported cars;
- in *United States – Measures Affecting Alcoholic and Malt Beverages*,³⁷ a Panel considered, under Art. III, a Minnesota law that provided a tax credit to micro-breweries on the basis of their size; and
- in *United States – Standards for Reformulated and Conventional Gasoline (Reformulated Gas)*,³⁸ a Panel considered, under Art. III, a measure that applied different tax levels to imported gasoline based on the importing company’s ability to provide certain statistical data.

The fact that case law has considered measures which are non-product related within the context of Art. I and Art. III analyses both prior to and following the *Tuna* decisions, provides clear and ample evidence of the lack of traction that this “rule” has in official case law under the GATT. In fact, the *Tuna* decisions offer the *only* example of such an argument within the GATT case law and therefore can generally be considered to be simply erroneous on this point. No application of the threshold rule has been, or can be expected to be, responsible for finding a PPM measure to be in violation of the international trading rules under the GATT.

Like-product Analysis

The *Tuna* decisions, in obiter, noted that even if the MMPA were eligible for consideration under Art. III, it would fail to comply with the article due to the MMPA’s differential treatment of (physically) identical products. The implicit conclusion was that non-product-related PPMs did not change the nature of the *product* as such and therefore, that Art. III, which specified rules with respect to products alone, did not permit differential treatment among such products based on their PPMs. The implication of the reasoning in the *Tuna* Panels was that PPM-based differential treatment of products would automatically be in violation of Art. III.³⁹

Although the *Tuna* Panels did not consider Art. I, its parallel emphasis on rules for the treatment of products would suggest a similar logic regarding its application as well. Extrapolating the obiter in the *Tuna* decisions could be interpreted as suggesting that *any* measures favouring certain products over others based on their PPMs alone would be, *per se*, in violation of Art. I and/or Art. III. Whether based on the *Tuna* Panels or not, this reasoning has provided the basis for the presumption of illegality with respect to PPMs. Consider, for example, the following statement from the House of Lords, Select Committee on European Communities:⁴⁰

one of the basic principles of the WTO is that member countries may not discriminate between “like products.” This has hitherto normally been interpreted as preventing discrimination between goods on the basis of how they are produced... . To allow discrimination on the basis of production and processing methods (PPMs), there would have to be a re-interpretation of the crucial term “like product.”

36 *Indonesia—Certain Measures Affecting the Automobile Industry (Complaint by the Japan, European Communities and United States)* (1998), WTO Doc. WT/DS54/R (Panel Report) (Lexis) [*Indonesia Automobile Industry Panel*].

37 *United States—Measures Affecting Alcoholic and Malt Beverages (Complaint by Canada)* (1992) GATT Doc. DS23/R, 39th Supp. B.I.S.D. 206 (1991) [*Malt Beverages*].

38 *United States—Standards for Reformulated and Conventional Gasoline (Complaint by the Brazil and Venezuela)* (1996) WTO Doc. WT/DS/9/AB/R (Appellate Body Report) [*Reformulated Gas*].

39 *Tuna I*, *supra* note 27 at para. 5.15.

40 House of Lords Select Committee on European Communities, *The World Trade Organisation: The EU Mandate After Seattle*, United Kingdom Sessional Papers (1999–2000) at pp. 223–224 cited in Charnovitz, *supra* note 2 at pp. 61–62.

Claims such as this rest on the presumption that products which differ only on the basis of their PPMs, are “like products” and therefore subject to being treated no less favourably than their like-product counterparts. Following this reasoning, the meaning of “like products” as used in the two articles operates as something of a fulcrum point in determining whether differential treatment (e.g., preferential tariff treatment) between products based on their PPMs will violate either Art. I or Art. III of the GATT.

Notwithstanding its importance, neither the GATT, nor any other WTO document, offers an explicit definition of the meaning of “like products.” The closest formal attempt at defining the term is found in the *Working Party Report on Border Tax Adjustment*.⁴¹ Adopted in 1970 by the parties to the GATT, the *Report on Border Tax Adjustment* provides a set of guidelines for determining product likeness without actually providing a definition of the term. The key conclusions emanating from the *Report on Border Tax Adjustment* were that:⁴²

1. *like product determinations should be made on a case-by-case basis without relying on steadfast rules, and;*
2. *that the issues considered under a like products analysis should include:*
 - a. *product end uses,*
 - b. *consumer taste and habit, and*
 - c. *physical properties of the product.*

These criteria, although never formally integrated within the actual treaty language, have been applied in virtually every GATT/WTO dispute-resolution decision undertaking a like product analysis since its adoption by the parties.⁴³ Below we consider the “case-by-case” approach and the application of the criteria individually.

Case-by-case Approach

In conducting like-product analysis, dispute settlement bodies (DSBs) have repeatedly affirmed the case-by-case approach outlined in the *Report on Border Tax Adjustment* in determining both the meaning and application of product likeness under any given circumstance.⁴⁴ In *Japan Alcohol*, the AB put it accordingly:⁴⁵

no one approach to exercising judgement will be appropriate for all cases. ... The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

Strict allegiance to the case-by-case approach has steered GATT DSBs away from making blanket statements on the meaning of product likeness

41 GATT, *Report of the Working Party on Border Tax Adjustment*, GATT Doc. 18d Supp. B.I.S.D. (1970) 102 [*Report on Border Tax Adjustment*].

42 The working party report concluded that, “problems arising from the interpretation of the terms [‘like products’] should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is similar: the product’s end uses in a given market, consumers’ tastes and habits, which change from country to country, the product’s properties, nature and quality.” *Ibid.* at p. 18.

43 The following is an incomplete listing of cases where the *Report on Border Tax Adjustment* has been applied: *United States – Taxes on Petroleum and Certain Imported Substances (Complaint by Canada, European Communities and Mexico)* (1987), GATT Doc. L/6175, 34th Supp. B.I.S.D. (1987) (Article III:2 of the GATT 1947) (Lexis) [*Taxes on Petroleum Panel*]; *United States – Gasoline*, (Article III:4 of the GATT 1994); *Japan Alcohol*, *supra* note 23 (Article III:2 of the GATT 1994); (Article III:2 of the GATT 1994); *Indonesia Automobile Industry Panel*, *supra* note 33 (Articles I:1 and III:2 of the GATT 1994); *Korea – Alcoholic Beverages (Complaint by the European Communities and United States)* (1999), WTO Doc.WT/DS75, 84/AB/R, (Appellate Body Report) (Article III:2 of the GATT 1994); *Chile – Taxes on Alcoholic Beverages (Complaint by the European Communities)* (2000) WTO Doc.WT/DS87, 110/R, (Panel Report), as modified by the Appellate Body Report (2000) WT/DS87, 110/AB/R, (Article III:2 of the GATT 1994).

44 Hudec, suggests that the emphasis of the case-by-case approach may, in fact, be the most important contribution of the Working Party Report. See Hudec, *supra* note 10.

45 *Japan Alcohol*, *supra* note 23 at p.114.

while permitting flexibility based on specific circumstances. To the extent that the definition of “like products” is dependent upon both the context it appears within the GATT (i.e., the particular clause), and the particular context to which it is applied (i.e., the facts of the case), it would appear that there is little that can be said about product “likeness” outside of any particular decision. The AB’s affirmation of the case-by-case approach explicitly rejects the possibility of a steadfast rule on the meaning of like products—including, it would appear, any rule regarding the role of PPMs in determining product likeness. A closer analysis of the meaning given to like products in the case law only goes to confirm this particular point.

Meaning of Likeness Criteria

The *Report on Border Tax Adjustment* lists three criteria of a product for consideration in determining product likeness—a product’s properties, end uses and consumer taste and habit. Importantly, the *Report on Border Tax Adjustment* also notes that the list is non-exhaustive. Indeed, in applying the *Report on Border Tax Adjustment* framework, the Panel in *US Reformulated Gas* added a fourth criterion—tariff classification—which has since been applied in following cases.⁴⁶ The non-exhaustive character of the list, like the case-by-case approach, suggests a built-in flexibility in the meaning of like products, which is adaptable to the changes in the understanding and purposes of the trading regime, a flexibility that might allow for the explicit inclusion of PPMs as a basis for determining product likeness.⁴⁷

The relationship between PPMs and product likeness, however, is not restricted to the addition of new criteria for determining product likeness. Although a product’s “properties, nature and quality” as well as its “end uses,” normally will not vary on the basis of non-product-related PPMs alone, it is not only possible, but indeed very much the case, that both consumers and tariff classifications do distinguish between products solely on the basis of their PPMs. The growth of markets for eco-labelled products that specify non-product-related PPMs provides clear evidence of the ability of consumer taste to treat products as different from their conventionally produced counterparts.⁴⁸ Similarly, specific Harmonized System (HS) codes, although rare, do exist for products based on whether they are produced by hand and according to organic principles.⁴⁹

The logic provided by the *Report on Border Tax Adjustment*, suggests the possibility of defining product likeness on the basis of PPMs alone (when consumer taste and/or tariff classifications support such an interpretation) which in turn suggests the potential for implementing PPM-based measures without violating either Art. I or Art. III.⁵⁰ Moreover, several comprehensive reviews by legal scholars have authoritatively established the fact that no Panel or AB decision has ever explicitly rejected this possibility.⁵¹ The existence of formally recognized likeness criteria which are (or can be) directly dependent upon PPMs alone, combined with the formal adoption of the case-by-case approach and the absence of any explicit rules on product likeness in the case law, all suggest, quite clearly, that no rule on product likeness for PPMs exists.

46 *United States – Standards for Reformulated and Conventional Gasoline* (1999), WTO Doc. WT/DS2/R (Panel Report) at para 3.22 [*Reformulated Gas Panel*].

47 The AB, in *Shrimp Turtle* formally adopted an “evolutionary approach” to the interpretation of Art. XX. In so doing, it placed significant emphasis on the inclusion of the objective of “sustainable development” within the GATT 1994. Both elements of the approach in *Shrimp Turtle* highlight the potential for expanding the list of criteria for determining product likeness in accordance with the objective of sustainable development. It should be noted, however, that the potential for adding additional criteria to the list of relevant factors for consideration under a like products analysis is not large, given that over its history of more than 30 years, only one item has been added.

48 Markets for certified sustainable products have been growing over the past two decades. Some markets, such as those for organics foods, Forest Stewardship Council forestry products and Fair Trade certified products have well established markets. See Giovannucci, Daniele, 2003, *The State of Sustainable Coffee: A Study of Twelve Major Markets*. New York: IISD.

49 Ron Steenblik. OECD Working Paper; Canada’s recent Organic Regulations specify a new HS code for organic agricultural products. See Canada Agricultural Products Act, 2007, *Canada Gazette*, Part II, December 21, 2006.

50 Quantitative PPM-based measures would, regardless of any specific findings on product likeness, be subject to the prohibition against quantitative restrictions under Art. XI.

51 See Howse, Robert and Donald Regan, 2000, “The Product/Process Distinction: An Illusory Basis for Disciplining Unilateralism in Trade Policy” 11 E.I.J.L. 249, and Charnovitz, *supra* note 2 at pp. 61–62.

It is worth noting, however, that while no rule against the use of PPMs in determining product likeness has ever been explicitly stated, the consumer taste and habit criterion (the most likely avenue for legitimizing differential treatment between products based on PPMs under Art. I and Art. III) has rarely been applied as a *primary* basis for determining product likeness. Moreover, to date *no* GATT DSB has actually found two physically identical products to be “unlike” either. Indeed, the ambience of many cases in the ’80s and ’90s could be read as implicitly suggesting that criteria related to the *functionality* of a product (e.g., physical or end use characteristics) are either *more important* than non-functional criteria (such as consumer taste and habit) or perhaps even *sufficient* for determining product likeness. Consider, for example, the following:

- In *United States – Taxes on Petroleum and Certain Imported Substances*, one of the first cases to apply the Report of the Working Party, a Panel considered the legality of a Superfund tax which set forth tax rates of 8.2 cents per barrel on domestic “crude oil, crude oil condensates and natural gasoline” and 11.7 cents per barrel on imported “crude oil, crude oil condensates, natural gasoline, refined and residual oil or liquid hydrocarbon products.” The tax was challenged under Art. III:2 on the grounds that domestic petroleum products were subject to lower internal taxes than like foreign products. The Panel relied on the fact that liquid hydrocarbon

products served “substantially identical end-uses” to crude oil, crude oil condensates and natural gasoline in coming to its conclusion that they were *like* products.⁵²

- A decade later, in *Reformulated Gas Panel*,⁵³ a Panel rejected the “statistical situation” of manufacturers as a basis for the treatment of petroleum products under the Clean Air Act of 1990, noting that, “chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification and are perfectly substitutable,” and thus, “are like products under Art. III:4.”⁵⁴
- The AB in *Japan Alcohol* in outlining what would be required to find product likeness under the “narrow” definition of like products applicable to Art. III:2,⁵⁵ noted that while a “commonality of end-uses” would not be sufficient, “physical identity” might be sufficient for a finding of likeness under the article. No mention was made of consumer taste and habit or tariff classification despite the fact that Japan had offered such criteria as the explicit basis of differential treatment among the products under consideration.⁵⁶

Reasoning such as that exhibited by the forgoing examples, could be interpreted as suggesting that functional criteria have a greater saliency and thus higher priority in determining product likeness.

52 Although the case dealt with a tax provision which displayed differential treatment on the basis of national origin and not process, the fact that the Panel found the hydrocarbon products to be “like” crude oil, etc. despite their physical differences, decidedly demonstrated that the circle of “like products” was larger than merely physically identical products. *Taxes on Petroleum Panel*, *supra* note 43.

53 *Reformulated Gas*, *supra* note 38.

54 *Reformulated Gas Panel*, *supra* note 46 at para. 6.9.

55 *Japan Alcohol*, *supra* note 23 at para. 8.11. The Panel and the DSB noted that Art. III:2, relied on the specification under para. 2 of the Ad to Art. 2 in reaching this conclusion. Para. 2 of the Ad specifies that, “A tax conforming to the requirements of the first sentence of para. 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.” Given that the Ad describes “directly competitive products” as something other than “like products,” the DSB was logically constrained to interpret the term “like” in a narrow fashion in the context of this paragraph of Art. III.

56 “The wording of the term ‘like products’ ... suggests that commonality of end-uses is a necessary but not a sufficient criterion to define likeness. In the view of the Panel, the term ‘like products’ suggests that for two products to fall under this category they must share, apart from commonality of end-uses, essentially the same physical characteristics.” *Japan – Taxes on Alcoholic Beverages (Complaint by Canada, European Communities, United States)* (1996) WT/DS8, 10, 11 /R, (Panel Report) at para. 6.22.

Following such a logic, it might be concluded that where functionality is identical (as in the case of physical identity), products are necessarily “like.”

In this sense, the decision by the AB in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* marks a turning point with regard to the underlying approach in determining product likeness by directly challenging the implicit priority of the functionality criteria in determining product likeness. In that case, the Panel found Chrysotile (Asbestos) fibres to be “like” PCG fibres (PVA, cellulose and glass fibres), despite displaying physical differences due to their essentially identical end uses and substitutability.⁵⁷ The Panel’s decision was based on reasoning which relied, in a manner similar to previous GATT decisions, on functionality characteristics in determining product likeness in Art. III—at the expense of considerations linked to tariff classifications and consumer taste and habit.⁵⁸ In rejecting the Panel’s finding on likeness however, the AB noted that the foundation for determining product likeness is not end use, substitutability (or other functionality criteria) but rather the nature of the “competitive relationships” between such products:

under Article III:4 of the GATT 1994, the term “like products” is concerned with competitive relationships between and among products. Accordingly, whether the Border Tax Adjustment framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are—or could be—in a competitive relationship in the marketplace.⁵⁹

Following its approach, the AB went on to include a consideration of health risks associated with the products in question in determining their likeness and, on this basis found the products to be unlike.⁶⁰ By placing the emphasis on competitive relationships, the AB provided for the possibility of determining product likeness on criteria unrelated to actual functionality, such as non-product related PPMs.

In its clarification of the Panel’s errors of analysis, the AB went on to insist, in particular, on the need to consider all the relevant criteria⁶¹ of the *Report on Border Tax Adjustment* on their own individual merit—a methodological approach which further reinforces the inherent and independent value of any given criteria as it relates the competitive relationship between products.⁶² The process of considering individual criterion on their own merit suggests that *any* single criterion may be sufficient and that no single criterion or set of criteria (e.g., functionality-based criteria) can be deemed *necessarily* more important in determining product likeness *as such*.

The AB’s emphasis on competitive relationships places the primacy of the analysis on “market responsiveness” rather than “functionality” and, as such, opens the door to differentiation in cases where functional use is identical. Although the details of *Asbestos* dealt with products which were physically different, application of the logic to products which differ *only* on the basis of their PPMs but which exhibit distinctiveness in the market-place (as in the case of markets for eco-labelled products), could, on this reasoning, be found to be “unlike” despite their being physically

57 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2000) WTO Doc. WT/DS135/R at para. 8.126 (Panel report).

58 The Asbestos Panel, although noting the different tariff classification between Chrysotile and PCG fibres nevertheless considered this to be insufficient to find the products to be unlike. *Ibid.* at para. 8.143.

59 *Asbestos*, *supra* note 26 at para. 103.

60 *Ibid.*, at para. 115, “Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly ‘like’ products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for ‘adopting or enforcing’ a WTO-inconsistent measure on the grounds of human health.”

61 *Ibid.*, at para. 109.

62 *Ibid.*, at para. 111.

identical and having identical end uses.⁶³ The AB's reliance on the "competitive conditions" between products, in principle, allows a wide range of "consumer interests" to form the basis of Art. III compliant differential treatment by providing a basis for characterizing products as unlike. While the breadth of the applicable interests in determining product likeness under this reasoning has the potential to generate other sustainability challenges,⁶⁴ it nevertheless opens a wide door for the application of PPM-based measures.

The framework set forth in *Asbestos* for determining the meaning of likeness effectively repudiates the conclusion set forth by the *Tuna* decisions suggesting that measures which distinguish between products on the basis of non-product-related criteria necessarily violate Art. III. But even if two products (PPM-compliant and PPM non-compliant) are found to be like, the logic in the *Tuna* decisions would not stand as a rule, since GATT DSBs have repeatedly held that differential treatment between like products need not entail discriminatory treatment between such products.⁶⁵ Neither Art. I nor Art. III prohibits differential treatment between such products *per se* but rather only *less*

favourable treatment when compared with corresponding domestic products (Art. III) or products from other member countries (Art. I). This portion of the application of the principle of non-discrimination is typically overlooked by proponents of the view that PPM measures "automatically" violate the GATT and therefore warrant explicit consideration.

Determining Discrimination among Like Products

Although the determination of product likeness is a key step in determining whether or not a measure is in violation of Art. I or Art. III, consistency with either article does not depend upon a finding of product likeness alone. Where two products are determined to be "like" in nature, a complainant must also demonstrate that the measure either affords protection with respect to domestic products (contrary to Art. III national treatment) or provides an "advantage" unique to some GATT members (contrary to Art. I MFN treatment). Below we consider the specific analysis utilized in GATT case law in determining discrimination of like products under Art. III and Art. I respectively.

63 It should be noted that although the AB suggests that each criteria should be considered on its own merit, it refers to the existence of a higher burden of proof in determining likeness when products are physically different—thereby suggesting—or reaffirming an implicit priority of physical properties in determining product likeness (rather than relying fundamentally on competitive relationships as it suggests earlier). The inability of the AB to fully apply its own reasoning consistently points to the need for a test case to determine the extent to which the AB will indeed follow this logic. See *Ibid.*, at para. 118. See also Howse & Tuerk, *supra* note 24.

64 Roessler, for example, notes that the effort to limit like-product analysis to economic criteria in the absence of due consideration of the actual "aims and effects" of internal regulations, DSBs limit their ability to apply the "spirit" of the GATT as contained within Art. III:4, that is, the prohibition of the use of internal measures "so as to afford protection." Where one or another internal regulation aims at *correcting* market imperfections (a common condition where sustainable development policy is concerned), reliance upon market conditions for determining opportunities for distinguishing between products will be insufficient (from a sustainable development perspective). See Frieder Roessler, *Beyond the Ostensible: A Tribute to Professor Robert Hudec's Insights on the Determination of the Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade Journal of World Trade* 37(4): 771–781, 2003. Ironically, the reliance upon economic analysis, doesn't even provide an appropriate theoretical basis for preventing the use of product "unlikeness" as a basis for protectionist purposes. Consumer tastes and habits vary infinitely across different economic and cultural settings. At the limit, consumers in some countries may display explicit consumer preferences for products which are produced locally or nationally. Defining the likeness of products based solely on competitive relationships determined by consumer taste and habit without stringent limitations could significantly challenge the robustness of the principle of non-discrimination itself. To the extent that consumer taste and habit are to be considered a legitimate basis for differential policy treatment, clear boundaries for ensuring that differential treatment under such circumstances is legitimate and not a form of disguised protectionism will be necessary.

65 In *U.S. Section 337* the Panel noted that distinct or different treatment may nevertheless satisfy the conditions of Art. I and/or Art. III based on the existence of "effective equality of competitive opportunities. See *United States – Section 337 of the Tariff Act of 1930 (Complaint by European Economic Communities)* (1989), GATT Doc. L/6439, 36th Supp. B.I.S.D. at para. 5.10-5.12 [*U.S. Section 337*]. This position was affirmed in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (2000), WTO Doc. WT/DS161, 169/AB/R at para. 136 (Appellate Body Report) (Lexis) [*Korean Beef*]. *Asbestos*, *supra* note 26 at para. 100.

Art. III: Effective Equality of Competitive Opportunities

The specific requirements for a finding of discrimination under Art. III vary depending upon the specific subsection of the article under consideration. As a general rule, the discrimination analysis consists of an analysis of the: 1. nature of the products; 2. nature of the government policy; 3. existence of effective equality of competitive opportunity for foreign and domestic products.⁶⁶ Assuming that two products which differ only on the basis of their PPMs are found to be like products (which, on the basis of our analysis above is not self evident), and that the actual policy instrument is covered by the specific section of the article,⁶⁷ then, the primary determinant for determining whether discrimination actually exists will be in the application of the requirement that foreign products be given effective equality of competitive opportunity.

The phrase “effective equality of competitive opportunity” was used by the Panel in *U.S. Section 337* to describe the obligation following from the prohibition of “less favourable treatment” for foreign products found in Art. III:4.68. Although the Panel in that case considered Art: III:4, in cases following *U.S. Section 337* the effective equality of

competitive opportunities test has been interpreted as applying to the entirety of Art. III:⁶⁹

the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures... not be applied to imported or domestic products so as to afford protection to domestic production.” Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.

Under the equality of competitive conditions analysis, the DSB does *not* look to actual impacts on trade flows,⁷⁰ nor does it rely upon whether or not foreign and domestic products are “technically” treated differently,⁷¹ but rather relies upon the *actual* impact on competitive conditions generated by the treatment of like products. While these elements of the analysis were originally set forth under *U.S. Section 337*, *Asbestos* clarified the meaning and application of Art. III emphasizing the need to compare the *group* of like foreign products with the *group* of like domestic products in an Art. III discrimination analysis:⁷²

66 “For a violation of Art. III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are ‘like products;’ that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use;’ and that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.” *Korean Beef*, *supra* note 65 at para. 133.

67 Although Art. III:4 specifies a limited number of policy measures to which it applies, the WTO DSB has frequently read this as a non-exhaustive list that effectively includes *any* government measure. See for example, *Japan Film Panel* that “all laws, regulations and requirements” is equal to “measure” used in Art. XXIII of the GATT, (implying that effectively refers to all formal government action). *Japan- Measures Affecting Consumer Photographic Film and Paper (Complaint by the United States)* (1998), WTO Doc. WT/DS44/R at para. 10.376 (Panel Report) [*Japan Film Panel*] and *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Complaint by the Ecuador, Guatemala, Honduras, Mexico, United States)* (1997), WTO Doc. WT/DS27/AB/R at 146 (Appellate Body Report) [*EC-Bananas*].

68 “The Panel noted that, as far as the issues before it are concerned, the “no less favourable” treatment requirement set out in Art. III:4, is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Art. III. The words “treatment no less favourable” in para. 4 call for “effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.” *U.S. Section 337*, *supra* note 65 at para. 5.11.

69 *Japan Alcohol*, *supra* note 23 at para. 33. See also *Japan Film Panel*, *supra* note 67 at para. 10.379 where its applicability to all of Art. III was reaffirmed. See also *Asbestos*, *supra* note 26 at para. 97.

70 *EC-Bananas*, *supra* note 67.

71 Different rules may be necessary between domestic and foreign products in an effort to generate equal conditions. See *Korean Beef*, *supra* note 62 at 134–137 and *U.S. Section 337*, *supra* note 65 at para. 5.11.

72 *Asbestos*, *supra* note 26 at para. 100.

The term “less favourable treatment” expresses the general principle, in Article III:1, that internal regulations “should not be applied... so as to afford protection to domestic production.” If there is “less favourable treatment” of the group of “like” imported products, there is, conversely, “protection” of the group of “like” domestic products.

The AB’s emphasis on the need to compare the *group* of products subsumed under a like-product analysis as a whole, rather than individually (either on a product-by-product, or country-by-country basis) was based on a recognition of the fact that the purpose of the article is to prohibit differential treatment which provides systemic *protection* to domestic like products, not differential treatment as such.⁷³ Treating foreign and domestic like products as respective groups, helps ensure that the discrimination analysis is not circumstantial but actually reflects the systemic character of the measure in question. Following this reasoning, well-designed, origin-neutral measures providing differential treatment to products based on their PPMs, should, even if found to be “like products,” satisfy the non-discriminatory conditions of Art. III.⁷⁴

Art. I: Conditionality Analysis

Art. I specifies that, “any advantage, favour, privilege or immunity granted by any contracting party

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 contracting parties.” The application of the principle of non-discrimination, and indeed, the determination of the consistency of PPM-related differential treatment to Art. I, turns fundamentally on an assessment of whether or not advantages, favours, etc., can be conditioned on the basis of non-product-related criteria. The relevant question from a PPM perspective under Art. I is whether or not advantages can be *conditioned* on the basis of PPMs without being considered *per se* inconsistent with the obligation.

The seminal Art. I conditionality case, *Belgian Family Allowances*,⁷⁵ involved complaints against a Belgian law which exempted countries with a “family allowance plan” similar to Belgium’s family allowance scheme, from an import levy. In that case, the Panel noted that the internal policies of any given trading partner were “irrelevant” with respect to the core obligations under Art. I.⁷⁶ The Belgian policy did *not* deal explicitly with PPMs, but the Panel findings did rest on the observation that family allowance schemes were not related to the product and, therefore, an unacceptable basis for differentiation.⁷⁷

73 The AB in *Asbestos* explicitly interpreted discrimination in terms of the discriminatory treatment of a “group” of imported products. “Thus, even if two products are ‘like,’ that does not mean that a measure is inconsistent with Article III:4. 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:1, that internal regulations ‘should not be applied... so as to afford protection to domestic production.’ If there is ‘less favourable treatment’ of the group of ‘like’ imported products, there is, conversely, ‘protection’ of the group of ‘like’ domestic products.” *Ibid.* In the uncontested *EC-Biotech* case, a Panel considered whether or not an EU moratorium on approvals for imports of biotech products was in violation of Art. III:4. The Panel concluded that the evidence was, “not be sufficient, in and of itself, to raise a presumption that the European Communities accorded less favourable treatment to the group of like imported products than to the group of like domestic products,” thereby confirming the analysis put forward under *Asbestos*. See *European Communities – Measures Concerning the Approval and Marketing of Biotech Products (Report of the Panel)* WT/DS293R at para. 7.2514 (emphasis added). See also Ehring, Lothar, *De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment – or Equal Treatment?*; Jean Monnet Working Paper No. 12, 2001 at <http://www.jeanmonnetprogram.org/papers/01/013201.html> for a more detailed analysis of the case law relating to AB determination of “less favourable treatment.”

74 Requiring discrimination with respect to the group of foreign producing countries, helps avoid idiosyncratic determinations of discrimination. However, by painting such a wide brush it arguably exposes developing countries to “non-actionable” protectionism by developed country measures where the group of importing countries is made up of both developing and developed countries. Under such circumstances, measures which have adverse impacts on developing countries due to poor infrastructural development would, nevertheless, NOT qualify as discriminatory to the extent that developed countries with adequate infrastructures were part of the foreign group of suppliers of such products to market.

75 *Belgian Family Allowances*, *supra* note 32.

76 *Ibid.*

77 *Ibid.*

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The same position was reiterated more explicitly with respect to “conditions” almost half a century later in *Indonesia – Certain Measures Affecting the Automobile Industry*⁷⁸ where a Panel addressed an Indonesian import duty based on the Indonesian content levels in imported cars. The Panel concluded that Art. I advantages, “cannot be made conditional on any criteria that is *not related to the imported product itself*.”⁷⁹ It then went on to note that, “in the GATT/WTO, the right of Members cannot be made dependent upon, conditional on, or even affected by, any private contractual obligations in place.”⁸⁰ Although, the import duty under consideration in that case had no semblance of origin neutrality, the Panel’s dicta effectively qualified *all* “criteria” as an illegitimate basis for conditioning benefits under Art. I.

Following the conclusions of these cases, policies offering differential treatment between products based on criteria would be considered *per se* inconsistent with Art. I. In a case just following *Indonesia Auto*, however, this particular position was put into question by contrasting dicta in *Canada – Certain Measures Affecting the Automobile Industry*.⁸¹ In that case, a Panel was

assigned the task of determining the WTO compatibility of the Canadian Motor Vehicle Tariffs Order (1998) which granted import duty exemptions to car manufacturers established in Canada and meeting specified ratios of “Canadian Value Added” through their operations. Japan, relying on the reasoning in *Indonesia Auto*, argued that conditionality of benefits on the basis of criteria was *per se* illegal under Art. I. The Panel rejected Japan’s argument noting:⁸²

we... do not believe that... the word ‘unconditionally’ in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is per se inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.

The Panel’s conclusion suggests that “origin-neutral” non-product-related conditionality⁸³ (as in the case of a PPM measure) might, at least in principle, comply with Art. I:1, although it is difficult to say so with any certainty given this decision does directly contradict a previous Panel decision and has not been ruled on by the AB.

78 *Indonesia Automobile Industry Panel*, *supra* note 36.

79 *Ibid.*, at para. 14.143. Emphasis added.

80 *Ibid.*, at para.14.144.

81 *Canada – Certain Measures Affecting the Automobile Industry (Complaint by the Japan and European Communities)* (2002) WTO Doc. WT/DS139/R (Panel Report) [*Canada Automobile*].

82 *Ibid.*, at para. 10.24.

83 In *U.S. Section 337* the Panel based its expression of the effective equality of competitive opportunity obligation on an underlying “equality of treatment” obligation observed to apply to both Art. I and Art. III: “The Panel noted that, as far as the issues before it are concerned, the ‘no less favourable’ treatment requirement set out in Article III:4, is unqualified. *These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III.* The words ‘treatment no less favourable’ in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis.” The Panel’s dictum suggests that the equality of competitive opportunities obligation also applies under Art. I and, therefore, following *Asbestos*, that an analysis of the impacts of the measure on the *group* of like products rather than any particular circumstantial impacts in any given case would be the focus of the analysis.

Box 2: The Enabling Clause

The *Enabling Clause*⁸⁴ allows governments, by way of exception,⁸⁵ to provide special advantages to developing countries through a generalized system of preferences (GSP).⁸⁶ The relevance with respect to PPMs draws from the fact that: (1.) Art. I obligations are waived under the GSP; and that; (2.) a growing number of GSP schemes have made access to GSP benefits conditional on national performance related to PPMs.⁸⁷

Although the *Enabling Clause* envisions a variety of different mechanisms for providing differential treatment to developing countries, it is principally used as a basis for providing preferential tariffs to developing countries. In addition to the requirement that such preferences be designed to benefit developing countries, the *Enabling Clause* requires that they also be, “generalized, non-reciprocal and non-discriminatory”⁸⁸ but does so without defining “non-discriminatory” or, in particular, stating whether or not *all* developing countries must be treated equally regarding like products under eligible provisions. Notably, the *Enabling Clause* makes no reference to “like products.” In *EC Preferences*,⁸⁹ the first case to actually consider the meaning of “non-discriminatory” under the *Enabling Clause*, the AB decided that while GSP benefits need not be equally available to all developing countries, differences in the distribution of such benefits nevertheless need to be “generalized” which is to say, based on an objective standard of developing country needs. The AB went on to note that while needs recognized in international agreements or conventions could provide such a standard for differentiation, that any given GSP scheme would, nevertheless, have to provide a transparent *mechanism* for determining eligibility to a particular preference scheme directed at addressing a particular “need.”⁹⁰ Notably, the AB referred to the EC’s treatment of labour and environmental conditionalities under its GSP scheme as examples of an appropriately objective mechanism for determining access to special needs-based benefits.⁹¹

The AB’s approach confirms the right of GSP granting countries to confer tariff preferences on the basis of a variety of “non-product-related” criteria—including, in particular, sustainable-development-related PPMs. As such, the GSP framework provides a unique opportunity for implementing cost-internalization policy based on PPM criteria in the context of developing countries and, notably, *without* the risk of serving protectionist interests or favouring developed country capacity for PPM compliance.⁹² To the extent that this is one of the primary concerns of developing countries with respect to the adoption of PPM measures more generally, the use of the GSP scheme holds particular promise as an entry point for making adjustments in the pricing mechanism in recognition of preferable PPMs.

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- 84 The adoption of the “Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries” or *Enabling Clause*, by the parties established a permanent waiver for GSP measures under the GATT. GATT, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT C.P.Dec. L/4903, XXXXth Sess. 26th Supp. B.I.S.D. (1979) 203 [*Enabling Clause*]. The *Enabling Clause* has since been incorporated in the GATT 1994. The legal basis for differential treatment under the *Enabling Clause* is principally found in Sec. 1 and Sec. 2 of the decision.
- 85 The AB in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2004) WTO Doc. WT/DS246/AB/R at para. 114–115 (Appellate Body Report) [*EC Preferences*] formally qualified the *Enabling Clause* as an exception to the GATT thereby allocating the burden of proof with respect to the clause upon parties implementing measures pursuant to it. Due to the special centrality of the *Enabling Clause* within the context of the GATT, the AB concluded that the complaining party does bear a special burden of identifying the portion of the *Enabling Clause* which is being violated. The complainant is not, however, obliged to prove the inconsistency identified.
- 86 There are currently 16 national GSP schemes notified to the UNCTAD secretariat. The following countries grant GSP schemes: Australia, Belarus, Bulgaria, Canada, the Czech Republic, the European Community, Hungary, Japan, New Zealand, Norway, Poland, the Russian Federation, the Slovak Republic, Switzerland, Turkey and the United States of America.
- 87 The U.S. has integrated labour standards within its GSP system and related regional trade acts. Section 19 U.S.C. § 2462 (b)(2)(g) conditions eligibility to benefits under the U.S. GSP program based on the provision and enforcement of “internationally recognized worker rights.” (G) Such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country). The EU, on the other hand, has integrated environmental and labour conditions into its GSP system. Both the EU and U.S. GSP conditionalities are exercised on a country-by-country basis. See Section U.S.C. 19 S. 2702(b)(7). Art. 9 of the EC, *Council Regulation (EU) No980/2005 of 27 June 2005 applying a scheme of generalised tariff preference*, [2005] O.J. L 169/1 at.1 of the European Union, on the other hand, offers special incentives for the ratification and implementation of core ILO conventions.
- 88 *Enabling Clause*, *supra* note 84 at note (3).
- 89 *EC Preferences*, *supra* note 85. Although GSP measures were not formally tested against the *Enabling Clause*, numerous GATT waivers had been provided by the contracting parties on individual GSP measures.
- 90 *Ibid.*, at para. 163 and para. 182.
- 91 *Ibid.*, at para. 182.

Art. XX: Beyond Extra-territoriality

Although the existence of a “threshold rule” or “likeness rule” with respect to PPM-based measures would set the stage for rendering such measures “GATT illegal,” neither, on its own, is determinative of the legality of such measures under the GATT as such. Art. XX provides a number of bases upon which non-compliance with core GATT obligations is deemed legal under the Agreement. One of the aspects which rendered the decisions in the *Tuna* cases particularly troubling was the additional finding that PPM-based measures, as examples of an attempt to influence policy in foreign jurisdictions, were fundamentally against the spirit of the GATT and therefore ineligible for consideration under Art. XX exceptions.

Notwithstanding the fact that the *Tuna* decisions were never adopted, their reasoning had sufficient saliency to lead the Panel in *U.S. Import Prohibition of Shrimp and Certain Shrimp Products*⁹³ to reach a similar conclusion with respect to Art. XX in its consideration of Section 609 of Public Law 101–162 regarding the protection of sea turtles. The *Shrimp Turtle* set of cases involved a factual situation almost identical to that of the *Tuna* disputes—under Section 609, the U.S. had promulgated an import ban on shrimp and shrimp products not certified as “turtle-friendly” by U.S. authorities. As in the *Tuna* cases, the U.S. certification was only available on a country-by-country basis.

The conclusions of the Panel in *Shrimp Turtle*, largely resembled those of the *Tuna* Panels. The

Panel found the ban to be in violation of Art. XI and that because it was aimed at compelling another party to change its policies, were: (1) a threat to the multilateral trading system as a whole; (2) against the object and purpose of the WTO Agreements; and (3) outside the scope of Art. XX in their entirety.

But the Panel’s findings and analysis were emphatically rejected by the AB noting, in particular, that the Panel’s line of argument effectively rendered Art. XX meaningless.⁹⁴

it appears to us, however, 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.... It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

92 There are at least three major challenges facing the use of the GSP regime as a tool for making adjustments to the pricing mechanism. The first, and most obvious limitation, is related to the fact that only developing country markets are covered by the GSP schemes. Although this is an advantage in the short term, as countries adapt to the integration of PPMs in their own policy-making, it cannot be expected to sustain cost-internalization policy over the long term. The second and more immediate challenge is related to the fact that GSP conditionalities, like much other PPM-related trade policy, have been applied on a country-by-country basis thus allowing inaccurate market signals with respect to actual production practices along any given supply chain. The third challenge relates to the success of the WTO and other trade agreements in reducing MFN tariff rates to all countries. Overall, the actual potential for developing countries to accrue real benefits through higher tariff reductions is limited by the levels of regular MFN tariff bindings. As MFN rates decrease, so too does the potential of GSP measures as a tool for providing corrective market signals. At the limit, the GSP offers nothing in completely liberalized markets—markets which, nonetheless, can be expected to suffer from significant and “unsustainable” market externalities.

93 *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan and Thailand)* (1998), WTO Doc. WT/DS58/R (Panel Report) [*Shrimp Turtle Panel*]; *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan and Thailand)* (1998) ETO Doc. WT/ DS58/AB/R (Appellate Body Report)[*Shrimp Turtle*].

94 *Shrimp Turtle*, *supra* note 93 at para. 106–107.

The AB then went on to note that the proper approach to determining the permissibility of measures under Art. XX, must involve striking a balance between the *right* of a Member to invoke an exception under Art. XX and the *duty* of that same Member to respect the treaty rights of the other Members.⁹⁵ Without explicitly defining whether measures with extraterritorial effect were in fact permissible, the AB nevertheless implied that extra-territorial effect *was* permissible on condition that there was a “sufficient nexus” between the object of the measure and the country invoking it.⁹⁶ Although the AB did not provide any indication of specific criteria for determining what might constitute a sufficient nexus, the facts of the case in *Shrimp Turtle* suggest that some identifiable level of domestic effect (such as in the case of turtles migrating in and out of U.S. waters) would appear to be a sufficient basis for consideration under Art. XX.⁹⁷ Following this logic, most measures aimed at protecting or preserving global or shared public goods would also appear to be eligible, notwithstanding the absence of any ruling on extra-territoriality *per se*.

Although the *Shrimp Turtle*’s implicit acceptance of the measures with potential extraterritorial affect helped pave the way for securing the eligibility of PPM-based measures under Art. XX, actual eligibility under Art. XX depends upon a two part analysis initially developed in *U.S. Reformulated Gas*.⁹⁸ Following that case, the basic procedure for determining actual eligibility under Art. XX entails: (1.) a determination of the eligibility of the measure concerned under the specific headings of the article; and

(2.) a determination of the conformity of the application of the measure with the requirements of the chapeau of the article.⁹⁹ Below, we consider the potential eligibility of PPM measures under Art. XX following this order of analysis.

Art. XX: Headings

Most of the headings listed under Article XX are designed to allow countries to diverge from the main GATT principles of non-discrimination under a limited set of clearly identified circumstances set forth under the “headings” of the article. Of the 10 headings listed under Article XX, six provide a potential basis for excepting measures which have sustainable development related objectives (and, as such, measures PPM measures with sustainable development objectives). These are headings (a), (b), (d), (e), (g) and (h):¹⁰⁰

Art. XX: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) *necessary to protect public morals;*
- (b) *necessary to protect human, animal or plant life or health;*

95 *Ibid.*, at para. 144.

96 The AB concluded in this case that, “there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).” *Ibid.*, at para. 121.

97 “The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat—the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).” *Ibid.*, at para. 133.

98 *Reformulated Gas*, *supra* note 38.

99 Established in the *Reformulated Gas*, *supra* note 38 at para. 22. This rule has been applied repeatedly since its initial formulation. (See, for example, *Shrimp Turtle*, *supra* note 93 at para. 102–103.)

100 Other measures might integrate sustainable development objectives, however, such as XX(d) or XX(h), depending on the substance of the relevant instruments supported by the measure.

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- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved.

Although (e), prison labour, is the only heading dealing with an explicitly PPM motivated exception, headings (a), (e) and (g) have frequently been cited as possible bases for PPM measures. Heading (a), although never tested as such, has frequently been

cited as a possible basis for trade measures linked to labour standards and/or human rights.¹⁰¹ Headings (b) and (g), on the other hand, have been forwarded as a basis for justifying environmentally-motivated PPMs.¹⁰² Although not typically considered a basis for justifying PPM measures, heading (d) could be used to justify measures used in the implementation of PPM-related labelling requirements associated with national labelling laws which are designed to limit misleading advertising, etc. Finally, heading (h) potentially opens a window for a wide range of PPM-based measures—so long as they are agreed upon within the context of an international commodity agreement.¹⁰³ Without considering the challenges related to applying each of these headings for PPM-based measures aimed at meeting sustainable development objectives, the breath of the listed policy objectives suggests fairly wide, even if imperfect, coverage for potential PPM-based measures.¹⁰⁴ This possibility was, in fact, implicitly acknowledged by the AB in *Shrimp Turtle* when it rejected the Panel's conclusion that Art. XX exceptions did not apply to measures which required exporting countries to adopt unilaterally determined importing country policies. By placing the emphasis and the objectives and implementing procedures, the AB formally left Art. XX open as a basis for justifying PPM-based measures.¹⁰⁵

101 Among the authors maintaining the plausibility of such an interpretation are: Bal, Salman, 2001, "International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT," 10 *Minn. J. Global Trade* 62; and Howse, Robert, 1999, "The World Trade Organization and the Protection of Workers' Rights," 3 *J. Small and Emerging Bus. L.* 131.

102 *Reformulated Gas*, *supra* note 38, *Shrimp Turtle*, *supra* note 93.

103 Although PPM-related measures have not found their way into commodity agreements to date, Art. 57 of the Havana Charter formally recognized that one of the accepted rationales for the establishment of Intergovernmental Commodity Agreements was "to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion." See UN, *Final Act of the United Nations Conference on Trade and Employment: Havana Charter*, 18 February 1948, E/Conf.2/78, online: <<http://www.worldtradelaw.net/misc/havana.pdf#search=%22havana%20charter%20chapter%20VI%22>> During the 1990s discussions on the potential of forming "International Commodity Related Environmental Agreements" (ICREA's) explicitly explored the potential role of using commodity agreements to manage environmental PPMs. See Kox, Henk, 1998. *Promoting Sustainable Production of Primary Commodities by International Commodity Related Environment Agreements*. Free University of Amsterdam, Netherlands.

104 It is important to note, however, that many of these "potential" paths for justifying PPM measures under Art. XX are untested and, therefore, remain indeterminate in terms of their full ability to save any given PPM measure.

105 See *Shrimp Turtle* *supra* 93 at para 121.

In addition to fulfilling the policy objective stated in a given heading, compliance with Art. XX also requires that the measure bear a direct relationship with that policy objective as stipulated by the qualifier associated with the heading. Thus, in order to qualify as “necessary” under headings (a), (b) and (d), a given measure must be “least trade restrictive,” which is to say that, “no alternative measure consistent with the General Agreement, or less inconsistent with it... could reasonably be expected to [be] employ[ed]” by a country in seeking the stated policy objective. The measure of least trade restrictiveness is directly linked to the effectiveness of any given measure at reaching a stated policy objective¹⁰⁶ and the importance of the policy objective.¹⁰⁷

Similarly, in order to qualify as “relating to” under headings (e) and (g), a measure must be “primarily aimed at” the specific policy objective which is to say that it must display a, “a close and genuine relationship of ends and means” with the stated objective.¹⁰⁸ The application of the respective qualifiers under Art. XX headings, suggests that measures which expect to benefit from an Art. XX exception need to take special care to maintain specificity and least trade restrictiveness with respect to the listed policy objective in the headings. Vague or multi-purpose measures are, therefore, less likely to provide a basis for successful defence under Art. XX.¹⁰⁹

Art. XX: Chapeau

In addition to qualifying with a specific heading of Art. XX, any given measure must also comply with the requirements of the chapeau of Art. XX. *Shrimp Turtle* provided considerable clarity on the meaning and application of the chapeau and has operated as a reference point for its application since. In *Shrimp Turtle*, the AB noted that in order to comply with the chapeau, a given measure must not be *applied* in a manner which amounts to either *unjustifiable* or *arbitrary* discrimination between countries where the same conditions prevail. Accordingly, the AB outlined a three-step process for assessing whether or not this, in fact, is the case: (1.) determine whether the measure is applied in a manner which discriminates where the same conditions prevail and, if so, determine; (2.) whether the discrimination is arbitrary; or (3.) whether the discrimination is unjustifiable.

In answering the first question, the AB concluded that the U.S. turtle-friendly regulations at stake did, in fact, discriminate between products where the “same conditions prevailed.” Given the application of the U.S. ban on the basis of whether or not a given country had obtained certification, the AB concluded that shrimp trawlers in a non-certified country could apply the turtle-friendly harvesting methods and still be denied access to U.S. markets.¹¹⁰ The AB’s focus on the potential for

106 “We indicated... that one aspect of the ‘weighing and balancing process... comprehended in the determination of whether a WTO-consistent alternative measure’ is reasonably available is the extent to which the alternative measure ‘contributes to the realization of the end pursued,’” *Asbestos*, *supra* note 26 at 172.

107 The AB in both *Korean Beef*, *supra* note 65 and *Asbestos*, *supra* note 26 at para. 172 went on to note, that “[t]he more vital or important [the] common interests or values’ pursued, the easier it would be to accept as ‘necessary’ measures designed to achieve those ends.”

108 *Reformulated Gas*, *supra* note 38 at para 19. In *Shrimp Turtle*, the AB accepted a measure because it was “reasonably related” to the protection and conservation of sea turtles. *Shrimp turtle*, *supra* note 93 at 141. In *Reformulated Gas*, the AB noted specifically that the concept of “primarily aimed at” applies to measures as a whole, not to their parts, suggesting that measures which want to take advantage of an heading using this qualifier need to maintain a direct link with the specified policy objective at the level of the entire measure.

109 To the extent that the clarity of any measure is central to avoiding unexpected applications and policy-motivated distortions in trade, this outcome is in line with general sustainable development objectives. It remains to be seen whether or not the “single-issue” approach to eligibility under Art. XX headings might operate as a barrier to “multi-issue” measures which attempt to embody an “integrated” approach to sustainable development as called for by Agenda 21 and the Johannesburg Implementation Plan. To the extent that a measure attempts to address social, economic and environmental elements simultaneously, it may have greater difficulty in asserting its being primarily aimed at, or necessary for one or another of those objectives.

110 *Shrimp Turtle*, *supra* note 93 at para. 156.

discrimination against shrimp trawlers in non-certified countries by the U.S. ban, highlights the importance of matching the application of a given measure with actual practice on the ground.¹¹¹

Following this initial determination, the AB went on to conclude that the discrimination was also unjustifiable due to its failing to make good faith efforts to take into consideration the specific conditions facing different countries:¹¹²

it may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.

The fact that the U.S. had failed to consult and/or negotiate with many important trading partners on the matter led the AB to conclude that the discrimination was unjustifiable under the circumstances.¹¹³ Again, on the basis of the AB's conclusion, countries are effectively obliged to embark upon good faith consultations to reach international agreement in order for a measure with extra-territorial effect to be considered "justifiable."¹¹⁴

Finally, the AB also found the measure to be arbitrary due to the absence of any formal monitoring, review or complaints process with respect to certification under the U.S. measure thus leading to potentially arbitrary distinctions between suppliers. The AB's finding of arbitrariness of the U.S. measure suggests the importance of transparency and predictability in the system used to apply a given measure and the central role of monitoring and evaluation in ensuring the non-arbitrary nature of measures adopted under Art. XX.

In addition to allowing extra-territorial measures eligibility under Art. XX, the AB's interpretation of the chapeau provided a far clearer framework for determining when and how extra-territorial measures could be considered discriminatory, justifiable and non-arbitrary. On the basis of the decision in *Shrimp Turtle*, three basic PPM-related conclusions can be drawn: First, discrimination itself can be reduced or eliminated by using product- and firm-oriented measures rather than the traditional country-oriented measures. Second, the justifiability of any measures with extra-territorial effect is greatly enhanced by the linking of differential treatment to internationally agreed standards or, in their absence, through attempts to reach international agreement. Third, the arbitrariness of any given measure can be avoided by having clear, objective and transparent monitoring, review and verification processes in the implementation of a given measure. To the extent that any given PPM measure might seek exception from MFN or National Treatment obligations under Art. XX, these observations provide a useful basis for designing "sound" PPM-based measures.

111 The AB's logic implies that product-oriented and firm-oriented measures, in addition to being more efficient than country-oriented measures, are also more likely to fall within the bounds of the requirements of the chapeau since such measures tend to match the application of the measure (on the product) with *actual* conditions (used in the production of the product). See Box 3.

112 *Shrimp Turtle*, *supra* note 93 at para. 155.

113 "Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members." *Ibid.*, at para. 156.

114 The AB stopped short, however, of requiring actual agreement among the parties as a means to ensuring justifiability.

Box 3: The Potential of Product- and Firm-oriented Market-based Measures under the GATT

In Section 2, we noted that market-based mechanisms are, *ceteris paribus*, preferable to command and control mechanisms as tools for attaining compliance targets and for stimulating innovation in reducing compliance costs (static and dynamic efficiency). We also noted that product- and firm-oriented measures are preferable, on efficiency grounds, due to their ability to link actual practices with policy incentives more accurately than in the case of country-oriented initiatives.

Given the economic rationale underlying the WTO, it is, perhaps, not surprising that GATT rules also exhibit a potential preference for the use of product- and firm-oriented measures. Product- and firm-oriented measures are, as a general rule, likely to be less susceptible to challenge under the GATT for the following reasons:

1. Distinct markets have developed for products with specific PPMs which are recognized as “sustainable.” The Appellate Body’s reliance on the nature of the competitive relationship between products in determining product likeness in *Asbestos* suggests that measures which leverage or build upon *existing* markets for sustainable products could qualify for differential treatment outright under Art. I or Art. III based on the distinctiveness of the markets which exist for such products in any given case. Since PPM-based markets are more viable on a product-by-product basis than on a country-by-country basis, product-oriented measures have a better prospect of being grounded upon such “market distinctiveness.”
2. Determinations of discrimination under Art. I and Art. III ultimately rely upon a comparison of the impact of the measure on the “competitive conditions” facing products from other member countries. Although product- and firm-oriented measures *can* be designed for protectionist purposes, they have a strong potential for “origin neutral” design. Country-oriented measures, on the other hand, being applied along national boundaries, are more prone to discrimination along such boundaries.
3. Policies which exhibit arbitrary and unjustified “discrimination where the same conditions prevail” are not eligible under Art. XX for exception. Measures which are applied on a country-by-country basis have an inherent likelihood in discriminating among products “where the same conditions prevail” due to the fact that firms may apply a wide range of different practices within any given country. Any given measure applied at the country level will, invariably, treat some products differently despite the existence of similar conditions of production.

The principle of non-discrimination as embodied through the application of Art. I, Art. III and Art. XX, suggests that origin neutral, product-oriented measures are less likely to be found discriminatory or, at the very least, have a greater capacity to succeed under challenge. The fact that this is also in accordance with the efficiency objectives in economic planning provides a strong rationale for the use of (market-based) product- and firm-oriented measures wherever possible.

The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy

4. Designing GATT-compatible PPM Measures

The fact that PPM measures as a *type* policy instrument are, all other things being equal, effectively GATT compliant, raises a wealth of opportunity for the design and implementation of sustainable development policy. In the absence of an authoritative legislative and enforcement environment for the protection of social and environmental goods at the global level, the use of trade-related measures offers one of the most direct and concrete opportunities for adjusting international market signals.

PPM measures are unique for their ability to influence economic activity across international borders and, therefore, have a special role to play in encouraging substantive changes across multiple jurisdictions through the use of market-based incentives. As such, PPM policy represents an important opportunity for implementing commitments outlined in the Johannesburg Implementation Plan and the integration of sustainable development objectives within the framework of international trade more generally.

While the effective design of truly “sustainable” sustainable development policy must respond to issues such as national interest, equity and efficiency, consistency with international trade law has often operated as a litmus test for the feasibility of trade-related policy. Indeed, in the past, implicit understandings of the GATT illegality of PPM policy, has led to a general reluctance to consider such initiatives among the range of viable policy options for meeting any given policy objective. Although there is much in existing GATT case law which demonstrates that this is no longer the case, if it ever was, it nevertheless remains true that virtually *any* policy which impacts trade *can* be found to be incompatible with GATT law if improperly designed and implemented. Based on the heritage of “presumed illegality” associated with PPM measures, as well as the potentially higher burden of proof associated with measures distinguishing between products based on “non-functional” characteristics, the careful design and implementation of PPM measures provides the key to the successful use of such measures in the international

sphere. Below, we list a set of both general and specific strategies for ensuring the GATT compatibility of sustainable-development-motivated PPM measures.

Designing Non-discriminatory PPM Policy: Art. I, III and XI

The best defence against trade challenges under the GATT is to design policy which complies with the cornerstone articles of the agreement. Any effort to ensure compliance with the main principles of the Agreement should begin by avoiding bans and other quantitative restrictions on the trade of products. Quantitative measures and bans have frequently been found to be GATT non-compliant. Indeed, it is worth noting that the only two sets of cases explicitly concerned with “sustainable development PPMs” under the GATT (namely the *Tuna* and *Shrimp Turtle* cases), revolved around U.S. trade bans, and not around any inherent discriminatory character of PPM policy as such. Fiscal, programmatic and technical PPM-based measures (see Table 1) all offer tools for pursuing sustainable development objectives without violating Art. XI of the Agreement and, therefore, should be considered preferable from the perspective of ensuring GATT legality.

Although neither Art. I nor Art. III were directly implicated in the *Tuna* or *Shrimp Turtle* decisions which found certain PPM measures to be incompatible with the GATT, Art. I and Art. III have, nevertheless, animated *perceptions* of the GATT illegality of PPM policy. Ensuring that PPM policy is indeed consistent with Art. I and Art. III is, therefore, an important (though not necessarily essential) strategy for ensuring the overall legality of such measures. One obvious way to strategically promote the use of specific PPMs at the global level, without contravening specific requirements of the GATT, is to use policy instruments which are not explicitly covered by the Agreement such as those embodied in programmatic policy measures like public procurement policy or PPM-based government grants. Although programmatic policies such as these are not covered by the GATT and are

less vulnerable to trade challenges more generally, care does need to be taken in their use to the extent that they may be covered by other WTO agreements such as, for example, the Agreement on Public Procurement (in the case of public procurement) or the Agreement on Subsidies and Countervailing Duties (in the case of PPM-based government grants).

Where non-programmatic measures are sought, consistency with Art. I and/or Art. III will largely turn on the selection of appropriate product definitions in PPM policy design and implementation. Since Art. I and Art. III obligations apply only across “like products,” differential treatment based on PPMs becomes a non-issue so long as a set of specified PPMs are sufficient to qualify products as “unlike” their non-PPM counterparts. The AB’s reliance in *Asbestos* on the nature of the “competitive relationship” between two products in determining product likeness, and its simultaneous reliance on “consumer taste and habit” in determining product distinctiveness (unlikeness), suggests that policy-makers may be able to avoid an initial finding of inconsistency with Art. I and/or Art. III by basing PPM policy on PPMs which have well established markets and/or well established health or environmental risks (which could be expected to define consumer taste and habit). PPMs drawn from existing eco-labelling systems and other voluntary standards systems which have demonstrable market-shares provide an obvious inroad into the design of PPM policy which is legitimized by the natural market recognition of PPM-based product distinctiveness.

Claims of PPM-based product distinctiveness can also be reinforced through the establishment of PPM-based tariff lines as well. Since the decision in *Reformulated Gas*, the AB has repeatedly referred to tariff classifications as one element for consideration in the determination of product likeness. Although PPM-based tariff classifications are rare at present, the main practical obstacles to the implementation of such measures, stemming from difficulties associated with verification and enforcement at the border, are diminishing in

importance through the growth of an ever expanding network of third party independent certification and verification systems. As the practical difficulties associated with enforcing PPM-based tariff distinctions fade away and the market recognition of specific PPMs grows, the rationale for establishing PPM-specific tariff lines is increasingly salient.

Since one of the rationales underlying PPM policy is a recognition of the need to adjust existing market conditions towards better recognition of the social and environmental costs, one can expect cases where the implementation of PPM policy may be justified from a sustainable development perspective notwithstanding the absence of any existing market recognition. That is, in some cases, it may be desirable to move beyond “current,” “existing” market definition in the design and implementation of PPM policy for sustainable development. The analysis conducted in *Asbestos* by the AB in fact placed its emphasis not on existing markets but on scientific research demonstrating the potential health dangers associated with the products in question. The reasoning in *Asbestos* thus suggests that heavily corroborated scientific research on potential health or environmental risks (combined with evidence that consumer markets are likely to respond to such risks), *could* provide a basis for characterizing products as unlike their counterparts based on their PPMs alone.¹¹⁵

Even where products are found to be “like,” the possibility of differential treatment across such products is not “automatically” incompatible with the GATT. WTO DSBs have explicitly distinguished between the notion of “differential treatment” between products and “discrimination” between products, noting that only the latter is directly incompatible with Art. I and Art. III. The case law defining both Art. I “conditionality analysis” and Art. III “effective equality of opportunities” analysis suggests that *origin neutral* differential treatment need not qualify as discrimination.

115 It is important to note, however, that in *Asbestos* the AB was dealing with a product which displayed *physical* differences and, therefore, may have been subject to a less stringent “market test” in this regard.

While no clear definition of origin neutrality has been provided by GATT case law to date, the insistence by the AB in *Asbestos* on discrimination with respect to the “group” of importing countries (in the application of Art. III) suggests that incidental “advantages” conferred to one country or another will NOT be sufficient to base a finding of discriminatory policy. Transparency and inclusiveness provide a clear foundation for building origin-neutral policy. By undertaking consultations with supply countries and/or conducting comparative analysis of the competitive impacts of a policy on domestic vs. foreign products, one may be able to avoid eventual findings of discrimination notwithstanding differential treatment between like products. Product- and firm-oriented PPM measures, although not of themselves foolproof, provide a logical framework for the development of origin-neutral measures due to their focus on product and firm characteristics, rather than national characteristics, and therefore should be given special consideration in the development of PPM policy.

Designing PPM Policy Eligible for Exception under Art. XX

Art. XX provides a number of sustainable development-related substantive bases for the exception of policy which might otherwise be considered GATT inconsistent. Although we have seen that there are plausible and legitimate grounds for the application of PPM-based policy in ways which are, in fact, consistent with the principle of non-discrimination as embodied within Art. I, Art. III and Art. XI, the most explicit basis within the GATT for justifying differential treatment between products based on PPMs rests within Art. XX. Following the two-step process outlined in *Reformulated Gas* for determining policy eligibility for exception under Art. XX, policy-makers need to ensure both eligibility under a specific heading of Art. XX as well as consistency with the requirements of the chapeau of Art. XX.

To the extent that PPM measures attempt to influence actions in foreign jurisdictions, they are inherently “extra-territorial” in nature. One of the key observations made by the AB in *Shrimp Turtle* was the importance of Art. XX as a basis for balancing the rights and obligations of member

countries. In *Shrimp Turtle*, the AB implicitly accepted the notion of extra-territorial effect where a “sufficient nexus” between the implementing country and the impact of the measure exists. Although the AB provided no criteria for determining what might constitute a sufficient nexus, the example in that case, namely, the protection of turtles which travel in and out of U.S. waters, suggests that some degree of real and direct impact on the implementing country will suffice. Using this as a basic guide for the implementation of PPM policy suggests that such policy should focus principally upon PPMs with direct impacts on the implementing country—that is to say, global goods or transboundary goods.

Since eligibility under Art. XX fundamentally depends upon linking the objectives of the measure to the accepted objectives for exception listed within the article, it is important that any given measure be *explicitly* and *clearly* linked to a corresponding Art. XX heading through the appropriate language and preparatory investigations. As a general rule, claims of eligibility under any particular heading will be strongest if substantiated by scientific assessments of risk and impact. Since the test of eligibility to one or another heading is effectively a test of the political *intentions* behind the measure, it is critical that policy-makers back relevant PPM policy with substantial “intentional evidence.” For example, where a PPM policy is designed to respond to an identified social or environmental risk, it should be possible to demonstrate that equal risks are treated with effective equality across the spectrum of policy instruments implemented by the country concerned.

Depending on which heading is sought as the specific basis for Art. XX exception, differing degrees of “specificity” in the link between the policy and the listed Art. XX objective will be required. The use of the qualifier “necessary” in headings (a), (b) and (d) has been interpreted by the AB as requiring that the measures be the “least trade restrictive” available. While no precise methodology for determining least trade restrictiveness has been forward by WTO DSBs to date, they have insisted on a comparison between the policy objectives and the available opportunities for reaching those objectives. As a general rule, non-quantitative market-based mechanisms, such as fiscal and tariff

policy should be preferred to outright trade bans due to their lower vulnerability to generating policy-based trade distortions. Moreover, the AB has noted that policy “necessity” is also a function of the importance of the policy objectives whereby highly important policy objectives are more likely to be found to be “necessary.” In an effort to abide by the least trade restrictiveness requirements of these headings, policies should emphasize matters of critical importance to the public good (such as health matters, cf. *Asbestos*) and should seek measures which accurately link the impacts of the measure to the stated heading objective (such as in the case of product- and firm-oriented rather than country-oriented policies).

Where exception for a given policy is sought under headings (c), (d) or (e), heading eligibility is qualified by the term “related to” which, in application has been interpreted as meaning “primarily aimed at.” As such, the clarity and specificity of the link between the policy measure and the specific heading should be emphasized in the formulation of the policy.

Many of the headings under Art. XX have not been applied in actual case law and, therefore, remain indefinite in terms of scope. Nevertheless, the language contained is suggestive of some basic strategies for ensuring compliance on a heading-by-heading basis. For example, claims under heading (a) are likely to have greater success if the “public morals” being protected are *internationally recognized*, the obvious case in point being policy linked to international human rights conventions such as the Universal Declaration on Human Rights, International Covenant on Social, Economic and Cultural Rights, International Covenant on Civil and Political Rights and/or ILO core labour standards. Claims under headings (d) and (g) on the other hand, will be easier to maintain where direct linkages and science-based cross-comparisons between existing domestic policy and the corresponding policy affecting foreign products are conducted. Finally, efforts to base exceptions under heading (h) imply the undertaking of negotiations among member countries to one or another International Commodity Agreement prior to the formulation of any trade-related PPM policy.

In addition to heading eligibility, any given PPM policy seeking exception under Art. XX needs to demonstrate compliance with the requirements of the chapeau of Art. XX as well. *Shrimp Turtle* established the current framework for determining compliance with the chapeau based on a demonstration of the absence of arbitrary or unjustified discrimination. Efforts to ensure compliance with the chapeau can be based on any one or a combination of three different strategies: (1.) the avoidance of discrimination; (2.) the avoidance of unjustified discrimination; and (3.) the avoidance of arbitrary discrimination. Based on the analysis in *Shrimp Turtle* policies which treat products favourably or disfavourably “where the same conditions prevail” discriminate. In an effort to avoid an initial finding of discrimination, policy measures seeking Art. XX eligibility should prioritize the accurate linkage between the policy measure and the actual activities targeted on the ground. As discussed previously, product- and firm-oriented measures provide a unique ability to link policy objectives to actual practice and, therefore, offer a direct strategy for reducing the potential of discrimination both with respect to Art. I and Art. III, but also with respect to eligibility under the chapeau of Art. XX.

Notably, though, discrimination, of its own, is not determinative of eligibility under the chapeau of Art. XX. The requirement of the chapeau specifies that any discrimination which exists must not be unjustified or arbitrary in nature. In determining whether a measure is a form of justified discrimination, the AB will look to the degree to which the “different situations” of different countries are taken into consideration in the promulgation of the measure. Importantly, the AB looks beyond the mere policy language toward the facts behind the policy design and implementation. One of the key lessons drawn from the *Shrimp Turtle* analysis is the importance of seeking the input and agreement of affected parties, and the corresponding treatment of affected parties according to their different situations. This suggests the importance of basing eventual policy measures on consultative processes as well as defining actual implementation procedures that reflect those processes.

Similarly, the AB has interpreted the requirement that discrimination be non-arbitrary to mean that discriminatory measures must nevertheless respect basic rules of due process throughout the implementation process of any given measure. Again, in *Shrimp Turtle*, transparency and consistency of application were deemed to be key elements in determining the non-arbitrary nature of the measure. Based on the AB's reasoning, policies which contain clear and transparent monitoring and enforcement mechanisms which are applied equally to all parties will have a greater ability to secure eligibility under Art. XX.

Designing PPM Policy through the Enabling Clause

An additional window for securing the GATT compatibility of PPM measures otherwise found to be in violation of Art. I of the GATT is available through the *Enabling Clause*. Under the clause's allowance of the provision of non-reciprocal advantages to developing and least developed countries, it is quite feasible to distribute such benefits on the basis of compliance with specific PPMs. In *EU Preferences*, the AB relied on the needs-based rationale of the *Enabling Clause* in its

conclusion that the allocation of GSP benefits did not have to be equal across developing or least developed countries, but rather that such measures had to be allocated on the basis of an "objective standard" of country needs. The AB went on to cite "multilateral instruments adopted by international organizations" as an example of an "objective standard" of need suitable for application in the context of the *Enabling Clause*. This observation suggests that the successful integration of PPM-related criteria for the distribution of PPMs could be fortified by reliance upon existing international instruments in the distribution of such benefits. Although the AB has not yet analyzed the full implications of this reasoning, it would also suggest that instruments which are able to explicitly link the impacts of a given GSP scheme with the meeting of actual needs on the ground, will have a greater likelihood of being found consistent with the terms of the *Enabling Clause*. As such, product- and firm-oriented measures could be considered to be particularly suitable—although as of yet under-explored—opportunities for the integration of PPM policies within GSP regimes.¹¹⁶

¹¹⁶ It may be worth noting that the design of product-oriented PPM policy within GSP regimes implies the development of corresponding tariff classifications for such products.

The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy

Table 2: Strategies for Designing GATT-compliant PPM Policy

GATT Article	GATT Principle	Strategy	Action
Art. I; Art. III	Non-discrimination, product likeness	Establish a basis upon which PPM products can be found to be “unlike” their non-PPM counterparts	<ul style="list-style-type: none"> - Establish distinct tariff lines for products based on PPMs; link policy to PPM-based tariff lines - Base policy on established “consumer markets” for specific PPMs - Base policy on well-established scientific assessment of risk associated with product which might reasonably be expected to influence consumer markets. - Use programmatic PPM measures to promote specific PPMs
	Non-discrimination, effective equality of competitive opportunity	Establish a basis upon which PPM measures are “origin neutral”	<ul style="list-style-type: none"> - Use product-oriented and firm-oriented policy rather than country-oriented policy
Art. XI	Non-discrimination	Avoid quantitative measures	<ul style="list-style-type: none"> - Use market-based, fiscal and programmatic policies where possible
Art. XX	Heading eligibility, general	Only implement policy where a clear nexus with national interest is present	<ul style="list-style-type: none"> - Limit the application of PPM policy to manage global public goods and/or trans-boundary goods
	Heading eligibility, general	Establish a clear link between the policy and the heading objective	<ul style="list-style-type: none"> - Base the policy on scientifically established risk analysis and/or science-based policy impact analysis - Strive towards “equal treatment of equal risks”
	Heading eligibility, Art. XX(a), (b) and (d)	Implement PPM measures which are “least trade restrictive”	<ul style="list-style-type: none"> - Use market-based measures rather than quantitative measures - Use product- and firm-oriented measures rather than country-oriented measures - Conduct a cost-effectiveness analysis of different measures - Emphasize impacts related to matters of serious importance to the public good (e.g., health matters)
	Heading eligibility, Art. XX(c), (e), and (e)	Implement measures which “primarily aim at” the relevant heading objective	<ul style="list-style-type: none"> - Match the policy measure to the heading objective - Restrict the scope of the policy measure so as to focus on the heading objective - Clearly state the heading objective within the policy
	Heading eligibility, Art. XX(a)	Link policy action to international norms	<ul style="list-style-type: none"> - Base policy on core ILO labour standards or international human rights conventions
	Heading eligibility, Art. XX(h)	Link policy to commitments in International Commodity Agreements	<ul style="list-style-type: none"> - Negotiate commitments through International Commodity Agreements - Base policy on terms established in International Commodity Agreements
	Heading eligibility, Art. XX (d) and (g)	Policy required as a part of implementing and enforcing national laws	<ul style="list-style-type: none"> - Conduct research to ensure that the policy has impacts which are roughly equivalent and parallel to impacts on domestic products
	Chapeau, discrimination	Link application of policy measure to actual use of PPMs	<ul style="list-style-type: none"> - Use product- or firm-oriented measures with effective monitoring mechanisms
	Chapeau, arbitrary discrimination	Link application of policy measure to actual use of PPMs	<ul style="list-style-type: none"> - Apply measure equally to all imported products - Apply transparent certification and monitoring systems in implementation
Chapeau, unjustified discrimination	Design policy based on international interests	<ul style="list-style-type: none"> - Invite supply country participation in policy formation - Base policy on international agreement - Provide adequate notification prior to policy implementation - Design policy based on different situations of different countries 	
Enabling Clause	Needs-based differential treatment	Link policy to internationally recognized needs	<ul style="list-style-type: none"> - Base policy on international agreements, norms or standards

5. Conclusion

Our analysis of the relationship between PPM-based measures and the GATT suggests that not only is there no evidence of a legal rule against the use of such measures within the GATT, but even more, that the existence of such a rule would appear to be *inconsistent* with the essential logic applied in GATT jurisprudence to date. On the one hand, there is no evidence of the existence of a threshold rule with respect to Art. I or Art. III and PPMs—on the contrary GATT DSBs have regularly considered non-product-related measures under both articles. On the other hand, there is no evidence of the existence of a likeness rule—on the contrary, like-product analysis is expressly to be determined on a case-by-case analysis of the “competitive relationships” between the products, rather than physical or other “functional” characteristics. PPMs are demonstrably and increasingly defining competitive relationships and as such should be increasingly eligible as a basis for defining product “likeness.” Even where products which differ only in respect of the PPMs they employ *are* found to be like, there is evidence that origin neutral differential treatment is permissible under Art I and Art. III. Meanwhile, there is no evidence of an extra-territorial rule under Art. XX—on the contrary *Shrimp Turtle* has asserted the eligibility of PPM-based measures with extra-territorial effect under Art. XX as long as a sufficient nexus exists between the implementing country and the objective concerned.

The potential legality of PPMs under the GATT is an important foundation for building greater coherence between sustainable development objectives and trade law. However, the potential legality of such measures by no means ensures the *actual* legality of any given measure. Given the fact that PPM measures are likely to face a higher burden of proof (whether it be through a determination of compliance with Art. I or Art. III or with respect to qualification under Art. XX) the successful implementation of such measures will depend upon strategic implementation and design in light of the sustainability objectives being sought and the acceptable conditions for such

measures under the GATT. On the basis of current GATT case law, we have identified a number of proactive strategies for ensuring the consistency of PPM policy with GATT law. Our brief overview reiterates the feasibility of designing PPM policy which is compatible not only on the basis of exceptions found under Art. XX and the *Enabling Clause*, but also through the design of *non-discriminatory* PPM policy. GATT case law, through the rulings of the WTO’s Appellate Body, has produced deeper clarity and understanding on the *nature* of the principle of discrimination embodied within the GATT. Based on this illuminated understanding of discrimination, there is *no* basis for assuming the GATT illegality of non-product-related PPM measures and several very concrete strategies which may be applied in ensuring the non-discriminatory character of PPM policy. Emphasis on the use of science, transparency and inclusiveness in the design of PPM measures could go a long way to ensuring GATT compatibility. Product- and firm-oriented measures, although relatively rare to date, hold particular promise as instruments for ensuring the origin neutrality, efficiency and thus GATT compatibility, of PPM measures and thus warrant careful consideration by policy-makers.

The implementation of “sustainable trade policy” should not, however, be limited to concerns regarding the mere “GATT legality” of such measures. The implementation of any trade-related policy, whether PPM-based or not, has the potential to have important ramifications on market opportunities for developing and least developed countries. Given the high dependency of the world’s rural poor on international markets for securing viable livelihoods, full and due consideration of the impacts of any given trade policy on those most in need will be of critical importance to the design of truly sustainable trade policy. Indeed, it is here that the GATT’s formal silence on the issue of PPMs may be most in want. On the basis of existing GATT case law, PPM policies are fully permissible, so long as the basic non-discrimination requirements of the agreement are maintained.

The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy

While such an understanding provides important inroads for the integration of sustainability interests within trade policy, it does nothing to address the systemic dis-equilibrium in the abilities of developed and developing countries to comply with specific PPM requirements. Sustainable PPM

policy, like sustainable trade policy more generally, will ultimately depend on the ability of policy-makers to design instruments which acknowledge, and are responsive to, such imbalances in international markets in a proactive and equitable manner.

The Legality of PPMs under the GATT

Since the Tuna-Dolphin cases in the mid-'90s, the treatment of process and production methods (PPMs) under the General Agreement on Tariffs and Trade (GATT), and subsequently the World Trade Organization (WTO), has been a pivotal point of debate and controversy for environmentalists, policy-makers and industry alike. And while governments and other stakeholders have since openly recognized the importance of policy that takes into account the nature of the processing and production methods, a general myth on the illegality of PPM-based policies within the WTO has persisted. Following an examination of the alleged grounds for this conclusion, as well as recent decisions by the WTO Appellate Body, the paper concludes not only that there is no basis for the assumption that PPM-based policy is *a priori* illegal under the WTO, but also that the legality of any given measure is favoured by taking guidance from basic principles of sustainable development such as economic efficiency, science-based decision-making and international cooperation. Building from this observation, the paper concludes by outlining a series of targeted strategies for the design of WTO-compliant PPM policy.