

11. Process and Production Methods and the Regulation of International Trade

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The advent of the Uruguay Round constituted a significant change in the scope and complexity of the regulation of international trade, embodied in the GATT 1994 and other Agreements (outlined in Chapter 1). In spite of the substantial extension of the coverage of the WTO Agreements however, they are still by no means comprehensive in that a range of additional issues have yet to be negotiated upon and incorporated. One of the most important areas of debate for possible further negotiation at the WTO is the issue of process and production methods (PPMs).

11.1 PROCESS AND PRODUCTION METHOD ISSUES IN INTERNATIONAL TRADE

Process and production methods (PPMs) refer to the desire of some countries to regulate international trade in goods and services on the basis of the inputs and process technologies utilised in their production. The wish of WTO Members to regulate trade-related issues, such as goods embodying health and safety or environmental issues, is likely to further increase the complexity of many trade regulation problems.

Process and Production Method Trade Issues

The broadest interpretation of PPMs embraces several contentious international trade issues of contemporary concern:

- The health and safety aspects of new technologies.
- Resource depletion, both renewable and non-renewable.
- Environmental pollution.
- The use of child, forced, prison and slave labour

All of these issues relate to the potential generation of negative externalities in the form of unforeseen or ignored impacts. The key debate concerning PPMs however, is the extent to which these contentious issues can be dealt with effectively under existing WTO Agreements, specifically GATT Article XX (General Exceptions) and the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements. There have already been several WTO complaints on these issues as well as further pending potential trade disputes.

The issues in the health and safety effects of new technology include uncertainty about the effects of the use of beef hormones (see Chapter 9) and genetically modified organisms (GMOs) (see Chapter 10). These have led the EU to invoke the 'precautionary principle' to restrict trade in these products. This requires that, in spite of evident benefits, any harmful impacts of scientific progress should be known prior to the products, primarily food, being made available to consumers.

The conservation of renewable and non-renewable resources may be direct in terms of the need to limit trade in scarce or environmentally important resources, notably the logging of tropical hardwoods and Antarctic icefish. Trade in endangered species is already covered under the Convention on International Trade in Endangered Species (CITES), a separate agreement outside the WTO. Limits on trade in many other resources are covered under formal and informal multilateral undertakings. Under certain circumstances, the WTO rules permit controls on trade for environmental reasons using Paragraph (g) of Article XX of GATT 1994, General Exceptions. The recent dolphin-friendly tuna and shrimp/turtle cases, in particular, highlight the potentially adverse environmental externalities in fisheries and the need to formulate appropriate trade measures to deal with such issues. These cases are analysed in Sections 11.5 and 11.6.

Pollution control targets for the industrialised countries were agreed as part of the Rio and Kyoto UN Conferences on Environment & Development, although with greater leeway for compliance by the developing countries. These agreements attempt to limit the negative externalities generated by pollution at the global level but are not specific to the production of particular goods and services but rather general targets for the pollution created by each country. Health and safety issues arising from the use of 'dirty technology', such as the use of asbestos for insulation and mercury in the refining of precious metals, are matters for national legislation unless trade in these goods embodies these risks. Many developing countries remain reliant on older dirty technologies because the additional costs of clean technologies reduce their international competitiveness by raising their export costs. The recent WTO cases on gasoline emissions and asbestos are analysed in Sections 11.7 and 11.8.

International labour standards are the remit of the multilateral International Labour Organisation (ILO), a separate and distinct institution to the WTO. The ILO was recognised by the WTO Singapore Meeting in December 1996 as the competent body to deal with these issues. ILO signatory countries are bound by agreed core minimum labour standards – including restrictions on the use of child, forced, prison and slave labour – and the recognition of trade unions. The PPM issue arises with respect to labour because the WTO rules apply only to international trade in the resultant goods and services rather than whether or not they were produced contrary to ILO standards. GATT Article XX, General Exceptions, Paragraph (e) however, does permit trade barriers to be used against products made with prison labour.

The WTO Committee on Trade and the Environment

The WTO Committee on Trade & the Environment (CTE) was established as part of the Ministerial Decision in Marrakesh in April 1996 to supersede the GATT Group on Environmental Measures & International Trade (EMIT). The CTE has two primary objectives:

- To identify the relation between trade measures and environment measures to promote sustainable development.
- To recommend necessary modifications of the policies of the multilateral trading system compatible with its open equitable and non-discriminatory nature.

The remit of the CTE is to cover trade and environment issues across the whole range of the WTO Agreements. This includes the relationship between trade and multilateral environmental agreements (MEAs) in trade disputes, environmental protection and domestic prohibited goods (DPGs), among others. Its effective policy role is therefore to facilitate trade in environmental goods and to assess the impact of environmental measures on market access.

The responsibilities of the CTE with respect to the consideration of environmental issues in the current Round of trade negotiations are set out in Paragraph 31 of the 2001 Doha Ministerial Declaration (WTO, 2001a) and include:

- The relationship between existing WTO rules and specific trade obligations set out in MEAs.
- The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

The inclusion of environmental issues in the Doha negotiations was controversial, mainly because the prime mover, the EU, indicated that WTO Members might have to adopt the environmental provisions of MEAs, even if they were not signatories of these agreements (Colyer, 2003). The CTE is also working to define environmental goods and services, including those defined on the basis of their production process – for example, the use of recycled materials.

The Debate on Trade and the Environment

The theoretical debate about the relationship between international trade and the environment nevertheless remains unresolved. There are two principal schools of thought on this issue. There are those, such as Bhagwati and others, who regard environmental concerns as separate and distinct from the regulation of international trade. Environmental issues should instead therefore be dealt with through the appropriate MEAs (see Bhagwati, 2000, 2002). Others argue that it is essential to consider environmental issues within trade agreements such as the WTO rather than treat them in isolation (see Deere and Esty, 2002). Given that the CTE has been charged with bringing the WTO and MEAs closer together as part of its Doha responsibilities, the latter viewpoint better reflects the current state of play with respect to the issue.

The actual distance between the two sides of this debate is, in fact, not particularly substantial or irresolvable. Recent developments in WTO case law, notably with respect to the shrimp–turtle case (see Section 11.6), highlight the importance of the existence of a relevant MEA as a precondition for environmental regulations under GATT 1994 Article XX(g). Health and safety issues are covered under Article XX(b), which permits nationally determined policies based upon accepted scientific evidence. The gasoline emission standards and asbestos cases (see Sections 11.7 and 11.8) are recent examples of the (not always successful) use of Article XX(b) as a defence.

Nevertheless, it may be better for WTO Members to deal with environmental issues comprehensively and effectively on a multilateral basis rather than risk exposing them to the legal vagaries of a trade dispute panel. The issues arising from the overlap between international trade and environmental issues are discussed at length elsewhere (see, for example, Esty, 2000; Huang and Labys, 2002; Colyer, 2003).

11.2 THE POLITICAL ECONOMY OF PPMs

The increased impetus for the consideration of PPMs within the WTO rules comes primarily from consumers, based upon political and ethical – that is, qualitative – grounds. This is a relatively recent development and contrasts strongly with the traditional analysis of the origins of protectionism (see Chapter 1). Domestic producers can no longer be regarded as the principal lobbyists for greater protection and consumers necessarily as the principal beneficiaries of liberalisation. The desire for the regulation of trade based upon PPMs is arguably a direct consequence of the success of multilateral trade liberalisation, notably in the leading industrialised countries. This has led to an increasing focus on more sophisticated qualitative issues relating to consumer choice with respect to alternative modes of production as opposed to the more traditional issues of the simple availability and prices of products.

Governments and producers, particularly those in the industrialised countries, are not necessarily opposed to the ethical and political grounds for qualitative regulation on the basis of PPMs. Rather, they view many PPMs as already being covered under existing WTO Agreements. Further, there is considerable concern that, even if there were a consensus at the WTO in favour of action on PPMs, extending the rules to include them would give rise to excessive regulatory complexity and therefore greater scope for dispute. The failure of governments to deal with consumer concerns and act on the PPM issue however, is likely to widen the perceived democratic deficit of the WTO and so further undermine its credibility.

There is by no means a consensus on PPMs between the leading industrialised countries but there is clear evidence of a ‘North–South’ split. Many developing countries are deeply suspicious of proposals for the explicit inclusion of PPMs in the WTO. The primary reason for this is their fear of the imposition of harmonised environmental, technological and other qualitative standards with high thresholds set by the industrialised countries. These would threaten the already precarious market access of developing countries and not take account of their special position in the WTO, recognised in Part IV of the GATT 1994. The treatment of PPMs within the WTO therefore remains problematical and, unlike under the GATT, there is no leeway for the implementation of a voluntary code, such as those agreed as part of the Tokyo Round. An Agreement on PPMs therefore remains a distant prospect unless the industrialised countries can gain the necessary support for regulatory change from the developing countries.

11.3 PPMS, TRADE IN LIKE PRODUCTS, EXCEPTIONS AND THE WTO

The regulatory treatment of most PPM trade issues are subject to two principal articles of the GATT 1994. Article III, National Treatment on Internal Taxation and Regulation, oversees the implementation of the GATT principle of non-discrimination and Article XX, General Exceptions, covers a range of specific circumstances when trade barriers may be used.

GATT Article III, Non-Discrimination and ‘Like Products’

The principle of non-discrimination is one of the key foundation stones of the GATT/WTO system (see Chapter 1) and requires equal treatment to be afforded to domestic and imported goods and services. This equality of treatment (or no less favourable treatment) is enshrined in the *chapeau* and paragraphs of Article III of GATT 1994:

... any internal tax or other internal charge, or any law, regulation or requirement ... which applies to an imported product and to the like domestic product and is collected or enforced ... at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement ... and is accordingly subject to the provisions of Article III. (*chapeau* to Article III, WTO, 1999)

... internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations should not be applied to imported or domestic products so as to afford protection to domestic production. (Article III:1, WTO, 1999)

The critical wording of the Article, used in the *chapeau* and qualified in Paragraph 2 is the term ‘like product’. This is defined as meaning ‘a directly competitive or substitutable product’ (Article III:2, WTO, 1999).

The criteria for determining what constitute like products have developed as a result of the evolution of GATT/WTO case law (see, for example, CEC, 2000; Choi, 2003). Four general criteria were first established by a GATT Working Party in 1970 (GATT, 1970):

- The properties, nature and quality of the products, that is, the extent to which they have similar physical characteristics.
- The end-use of the products, that is, the extent to which they are substitutes in their function.
- The tariff classification of the products, that is, whether they are treated as similar for customs purposes.

- The tastes and habits of consumers, that is, the extent to which consumers use the products as substitutes – determined by the magnitude of their cross elasticity of demand.

The critical issue here for PPMs is that qualitative criteria for trade regulation are generally inconsistent with the product-based customs methodology enshrined in Article III. In many cases, the physical characteristics of the PPM products concerned are identical or very similar, such that they cannot be distinguished easily or, possibly, at all, by means of scientific analysis. The goods-based approach assumes implicitly that apparently like products are therefore close substitutes. In the case of PPMs, this is certainly not the case for some consumers. By definition, the existence of by-product negative externalities is necessarily separate and distinct from the products themselves. This is certainly the case with PPMs such as dolphin-friendly tuna, turtle-friendly shrimps, goods made using child labour and organically grown farm products. Of the above WTO criteria for like products, only the last – consumer tastes and habits – would apply and then only for well-informed and discerning consumers.

A further issue, and one that has encountered difficulties at the WTO, relates to the use of national environmental and/or social legislation to deal with PPMs. The implication is that such restrictions may be applicable to domestic producers but are not sustainable with respect to imports from third countries because they are WTO-incompatible under Article III. As has been pointed out elsewhere, this is tantamount to effective reverse discrimination against domestic producers and a disincentive to raising domestic standards unless equivalence can be applied to imports (Fisher, 2001). The application of such equivalence to imports however, appears to be dependent upon the sanctioned use of Article XX, General Exceptions.

GATT Article XX, General Exceptions

Article XX is the general exception clause to the GATT 1994 and outlines ten specific grounds for permitting exceptions to the trade rules. These exceptions include: public morals [Paragraph (a)]; the protection of human, animal or plant life (b); national treasures (f); and the conservation of exhaustible natural resources (g). The use of any of the specific exceptional measures identified in Article XX is subject to the WTO consistency provisions of the *chapeau*:

... 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. (WTO, 1999)

The two paragraphs in Article XX which are of particular relevance with respect to the discussion of PPMs are (b) and (g) on health and conservation respectively. Paragraph (b) requires that any such exceptional measures are 'necessary to protect human, animal or plant life or health'. Paragraph (g) states that such exceptional measures are permitted 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

The meanings of Paragraphs (b) and (g) of Article XX appear to be quite clear. The discussion of specific PPM cases in Sections 11.5 to 11.8 below however, demonstrates that the interpretation by GATT and WTO Panels has developed over the last decade so as to further refine the circumstances under which the use of these Paragraphs is deemed WTO-compatible.

The SPS and TBT Agreements and PPMs

There is some debate concerning the extent to which PPMs are covered under existing WTO rules, notably the SPS and TBT Agreements. Restrictive trade measures under a GATT Article XX(b) exception on health grounds can be implemented 'only to the extent necessary' (Article 2:2 of the SPS Agreement) and 'not more restrictive than required to achieve the appropriate level of protection' (Article 5:6). Further, any such measures are required to be supported by a consensus of scientific evidence accepted by a recognised international agency, such as the Codex Alimentarius Commission in the case of food safety (Article 3:4). In the absence of sufficient scientific evidence however, countries are permitted to apply temporary measures and 'seek to obtain the additional information necessary ... and review the ... measures accordingly within a reasonable period of time' (Article 5:7). Further, all such measures must be applied in a manner consistent with WTO principles and not constitute a disguised restriction on trade (Article 2:3).

The TBT Agreement also allows for the application of similarly agreed international technical standards to justify Article XX(b) exceptions for health and safety reasons. A key element of the TBT is regulatory proportionality; that any such import regulations – for example, packaging and labelling requirements – should not be more trade-restrictive 'than is necessary ... taking into account the risks non-conformity would create' (Article 5:1:2 of the TBT Agreement). Again, any such measures must be applied in a manner consistent with WTO principles (Article 2:1). The

applicability of the SPS and TBT Agreements to PPMs are discussed at greater length in the context of GMOs in Chapter 10.

GATT Article IX, Geographic Indications and PPMs

The original GATT article dealing with product labelling was Article IX, Marks of Origin, which was designed to prevent fraud and the misleading of consumers. With the introduction of the WTO Agreements in January 1995, GATT Article IX has to some extent, been superseded by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Part 3 of the TRIPs Agreement deals with Geographical Indications (Articles 22 to 24), recognising that apparently like products may have location-specific characteristics. For example, Article 23 deals specifically with geographical indications for wines and spirits. The grounds for sanctioning discrimination between like products are given as 'where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin' (Article 22:1 of the TRIPs Agreement). These provisions dovetail with the use of trademarks – covered in Part 2 of the TRIPs Agreement – labelling and other types of information to improve consumer choice and prevent their misleading or fraudulent use.

There are important similarities therefore between geographic indications and PPMs in that they are both reliant upon qualitative as opposed to physical characteristics. The qualitative issue with geographical indications has been, at least partly, resolved by means of trademark protection, geographical names and product labelling. This is one potential way forward to deal with some PPM issues. As with geographical indications however, the costs of enforcement may be disproportionately high in terms of monitoring and tracing consignments and prosecuting legal cases in the event of fraud. The use of appropriate labelling of products containing GMOs so as to enable consumers to make informed choices about qualitative PPMs is currently a further source of contention between the EU and the United States.

11.4 PPMS AND DISGUISED PROTECTION

The issue of 'disguised' protection remains a particular concern of the WTO with respect to PPMs. This is because the use of qualitative criteria for restrictive trade measures, unlike those provided for in the SPS and TBT Agreements may, by their very nature, lack scientific justification. It is this crucial dichotomy between scientific consensus – based upon the accumulation of evidence – and qualitative arguments – based upon political

and/or ethical grounds – that is critical to the PPM debate. The goods-based methodology of trade regulation is amenable to cross-border scrutiny whereas many qualitative PPMs are not. The infeasibility of scrutinising products embodying intangible PPMs in the absence of adequate documentation and the traceability of consignments gives rise to the potential for fraud, particularly if consumers are willing to pay a price premium for such goods and services. While PPMs are of increasing importance in international trade, there are proportionality issues with respect to regulatory complexity and the costs of monitoring and enforcement.

To date, there have been several recent trade disputes at the GATT/WTO that have addressed various issues relating to PPMs. Some high profile cases – bananas (dealt with in detail in Chapter 6), beef hormones (see Chapter 9) and the potential trade dispute over GMOs (see Chapter 10) – raise critical issues of intrinsic merit relating to WTO legitimacy. These cases along with others, notably dolphin-friendly tuna, shrimp/turtle and US gasoline, have led to increasing questioning of the validity of WTO procedures and rules by several WTO Members as well as NGOs (Laird, 2001; Holmes *et al.*, 2003).

There is a view, particularly among NGOs and lay critics, that the WTO is anti-environmental in that trade concerns in key cases have consistently been found to take precedence over the environment. The most notable and controversial such case is probably that of dolphin-friendly tuna but it is also useful to outline several other relevant trade and environment cases. The discussion of these cases demonstrates that the regulatory issues are not as simple as some of the WTO's critics assume. All of these cases shed light upon WTO jurisprudence and the interpretation of the international trade rules by Dispute Panels with respect to important PPM issues.

11.5 THE GATT (DOLPHIN-SAFE) TUNA CASES

The GATT dolphin–tuna trade dispute case is regarded as being emblematic of the trade regulation–environment debate. This is because it was the first case to test the legitimacy of import restrictions, in this case by the United States, imposed on environmentally damaging PPMs.

The tuna–dolphin issue arises because the species are, in the eastern Pacific, symbiotic in that shoals of yellowfin tuna swim below pods of dolphins. Modern tuna search technology in the region focuses on locating dolphins on the ocean surface. The trade and environmental controversy results from the use of particular tuna fishing techniques, such as small and medium gauge driftnets, that have high dolphin mortality rates. The PPM

issue is therefore the result of tuna and dolphins being, when certain types of catch techniques are used, effectively joint products, so giving rise to significant negative environmental externalities through high dolphin mortality rates.

The United States was one of the first countries to enact national legislation to protect dolphins with the 1972 Marine Mammal Protection Act (MMPA). The MMPA set limits on acceptable (but, non-zero) dolphin mortality rates, particularly with respect to endangered species, and required US tuna vessels to carry official observers. The Direct Embargo ('comparability') Provision of 1984 prohibited imports of yellowfin tuna from those countries lacking conservation programmes similar to the United States. This was coupled with the Intermediary Nation Provision, which required that third country exporters, generally tuna canners, had to demonstrate that they prohibited landings of tuna from countries banned under the Comparability Provision (see Joshi, no date). In 1990, the US Congress passed the Dolphin Protection Consumer Information Act (DPCIA), which stated that dolphin-safe labels may only be applied to tuna harvested in a manner that is 'not harmful' to dolphins.

The US State Department and the Department of Commerce however, refused to apply the embargoes under the 1984 provisions for commercial and political reasons. This failure to act was the subject of a successful legal challenge, after appeal, by a coalition of environmental groups. In late 1990, the United States therefore imposed temporary embargoes on imports of tuna from several countries, including Mexico, that did not satisfy the requirement of the US MMPA. A permanent embargo went into effect on 22 February 1991.

The GATT Tuna Case I

On 5 November 1990, Mexico complained to the GATT that its tuna exports to the United States had been prohibited because it refused to comply with the MMPA. The primary basis for the Mexican complaint was the extra-territorial application of the US MMPA, which therefore constituted a GATT-incompatible barrier to trade. The failure of Mexico and the United States to resolve the issue within 60 days led to the establishment of a GATT Panel on 6 February 1991. The Panel's findings were published on 16 August 1991.

The legal substance of the tuna-dolphin case revolved around the extent to which the US MMPA regulations were permissible under GATT Articles III (National Treatment), XI and XIII (Quantitative Restrictions) and XX (General Exceptions) (GATT, 1991). The GATT Panel first investigated whether the MMPA constituted an internal regulation under Article III or a

quantitative restriction under Article XI. The Panel found that the MMPA did not directly regulate the sale of tuna under Ad Article III (GATT, 1991, 5.14) and further, under Article III.4, that its regulations on dolphins could not possibly affect tuna as a product (GATT, 1991, 5.15). Since the MMPA was not therefore an internal regulation, the Panel examined it with reference to Article XI. The MMPA regulations were found to constitute a quantitative restriction under Article XI.1 such that the MMPA was GATT-incompatible (GATT, 1991, 5.18). The Panel therefore decided that it was not necessary to examine the consistency of the MMPA under Article XIII (GATT, 1991, 5.19).

The GATT Panel then turned to the US argument that the MMPA could be justified by Article XX, General Exceptions, Paragraphs (b) and (g). With respect to XX(b), the issue was whether the MMPA provisions could be applied extra-territorially. The Panel found that the US measures did not meet the requirement of necessity, that it had not exhausted all reasonable options to ensure consistency with the GATT and that the calculation of the permitted dolphin mortality rates was unpredictable (GATT, 1991, 5.28). With regard to Article XX(g), the Panel rejected the extra-territorial US application of nationally determined conservation policies (GATT, 1991, 5.32). Further, it stated that, even if these were acceptable, the unpredictable dolphin mortality rate would not be a GATT consistent measure (GATT, 1991, 5.33).

The GATT Panel also considered the labelling of 'dolphin-safe' tuna in accord with the US DPCIA under Article I, Most Favoured Nation. The Panel decided that any advantage derived from consumer choice and was not determined by the origin of the product (GATT, 1991, 5.43), such that it was consistent with Article I.1 (GATT, 1991, 5.44).

In its Concluding Remarks, the GATT Panel noted that its findings did not provide an opinion on the appropriateness of the dolphin conservation policies of Mexico and the United States (GATT, 1991, 6.1). Rather, it had little scope to consider domestic environmental policies under Article XX Paragraphs (b) and (g), given the absence of specific criteria. This, the Panel believed, could only be resolved via a waiver or amendment of the GATT text.

The 1991 GATT Panel Report on tuna however, was never adopted in spite of strong support from the EU and many other intermediary countries. This was because Mexico and the United States agreed a bilateral solution outside the GATT (WTO, no date, a). There was no consensus therefore in favour of adopting the Report such that the Panel Decision in the first tuna case did not become part of the case law of the GATT.

The GATT Tuna Case II

The second GATT tuna case resulted from a complaint by the EU on 11 March 1992 against the original tuna Panel Decision. The Netherlands then complained on behalf of the Netherlands Antilles on 3 July 1992 and joined the EU as co-complainant on 14 July. A second tuna GATT Panel was established on 25 August 1992. The EU had been affected by the US MMPA as an intermediary processor and sought the removal of the US restrictions on imports of 'dolphin-safe' tuna after the failure to adopt the first GATT Panel Report. The general tenor of their complaint was that the United States had not amended the MMPA, such that the inconsistencies identified in the original complaint by Mexico and ruled upon in the first (unadopted) Panel Report remained with respect to third countries.

The Panel proceedings were suspended in the autumn of 1992 after the United States made several amendments to the MMPA and passed the International Dolphin Conservation Act into law. The latter was enacted as part of the Conservation of Dolphins Agreement, known as the La Jolla Agreement, under the auspices of the Inter-American Tropical Tuna Commission. The ten signatories of the La Jolla Agreement, including Mexico and the United States, agreed limits on dolphin mortality rates together with requirements for observation and monitoring along with penalty provisions.

The second GATT tuna Panel Report was published on 16 June 1994. Its findings broadly upheld those of the first Panel, albeit with some differences with respect to the interpretation of Article XX. While the Panel found in favour of the United States with respect to the extra-territorial application of its conservation policies under Article XX(g) (GATT, 1994, 5.20), the measures used were found not to be consistent with the GATT (GATT, 1994, 5.27). Similarly, the Panel found that US conservation policies were covered by the GATT under Article XX(b) (GATT, 1994, 5.33) but that the measures used were not necessary (GATT, 1994, 5.39). The second GATT tuna Panel therefore also found against the United States. Again, the Panel Report was not adopted, the United States claiming insufficient time to study the findings prior to the GATT being superseded by the WTO on 1 January 1995 (WTO no date, a).

Since the end of the second GATT case, the situation with regard to the tuna-dolphin issue has become more complex. The United States was one of eleven signatories, along with Mexico, of the 1995 Declaration of Panamá. This called for a lifting of the US embargo on tuna imports from other signatory countries in return for a legally binding treaty on a variety of dolphin conservation measures (see Scott, 1996). The United States agreed to

lift the embargo once the Declaration had been ratified by four countries. In preparation for this, the US Congress passed the International Dolphin Conservation Program Act (IDCPA) in mid-1997. President Clinton thus amended the MMPA to comply with the second GATT Panel ruling and thereby avoided a complaint under the WTO DSU.

In attempting to redefine 'dolphin-safe' tuna to include net-caught fish with zero dolphin mortality however, the IDCPA has split the environment movement. The US Department of Commerce (USDC) has been unable to change the labelling criteria because of legal challenges on the grounds that there is insufficient scientific evidence on zero dolphin mortality rates. Further, the major US canners will not buy net-caught tuna so that, in spite of USDC approval, Mexico has therefore been unable to sell its tuna as 'dolphin-safe' and is threatening to withdraw from the IDCPA (*Bridges Trade BioRes*, 2003).

The GATT Tuna–Dolphin Cases and PPM Issues

The principal issues raised by the tuna–dolphin cases in the context of PPMs are the interpretations of GATT Articles III, National Restrictions, and XX, General Exceptions, by the two Dispute Panels with respect to the US dolphin-safe measures. These issues are discussed in some of the literature on the two tuna cases (see Hurlock, 1992; Porter, 1992; Yechout, 1996).

The Panel discussions of Article III focus upon whether the US measures to protect dolphins could be applied to tuna, whether domestic or imported. The Panel decided that dolphin and tuna could not be viewed as like products. Neither Panel however, was required to adjudicate as to whether dolphin-safe and non-safe tuna were like products and therefore whether national restrictions on non-safe tuna were GATT-consistent.

The difficulty with the definition of like products in the context of the PPM discussion is where negative externalities arise because of joint production. In the tuna case, this is because certain catch technologies lead to protected dolphins as well as yellowfin tuna being caught in the eastern Pacific. The issue of negative externalities arising from joint production however, was never tested by either tuna Dispute Panel because of the indirect nature of the US protective measures.

The different Panel interpretations of Paragraphs (b) and (g) of GATT Article XX is important. The second tuna Panel found that the US dolphin conservation policy was GATT-consistent and could be applied extra-territorially. As in the first Panel Decision however, the actual measures were deemed neither 'necessary' nor GATT-consistent. The Declaration of Panamá and the International Dolphin Conservation Program are MEAs that

would now probably satisfy the consistency and necessity requirements of the *chapeau* to Article XX.

The first GATT tuna Panel also considered Mexico's request that they examine the provisions of the US DPCIA for dolphin-safe labelling under Article IX.1 (Marks of Origin). The Panel found that, since the dolphin-safe label applied to all tuna irrespective of origin, these provisions were not inconsistent with the GATT (GATT, 1991, 5.44). Given that the Panel Report was not adopted however, this finding has no legal status.

11.6 WTO SHRIMP–TURTLE CASE

The WTO shrimp–turtle case covers a very similar range of trade and environmental – and therefore PPM – issues as the two tuna–dolphin cases outlined above. The most important contribution of the shrimp–turtle case however, is that it was launched after the introduction of the WTO DSU such that the final Panel Decision has become part of WTO case law.

The 1973 US Endangered Species Act requires US shrimp trawlers and other shrimp vessels in US waters to use turtle-excluder devices (TEDs) 'when fishing where there is a likelihood of encountering sea turtles' (United States, 1973). TEDs are now regarded as the international standard for protecting turtles because of their low cost, effectiveness and ease of use (CIEL, 1999).

The Act was amended in November 1989 to permit the placing of embargoes on shrimp imports from countries that did not have a comparable regulatory programme to that of the United States to protect sea turtles. All US shrimp imports require certification that they were harvested using TEDs and that their incidental sea turtle mortality rate is similar to the United States unless their fishing environment does not pose a threat to sea turtles. In 1995, the Marine Turtle Specialist Group of the IUCN (International Union for Conservation of Nature & Natural Resources) prioritised the threat of shrimp fishing methods to endangered sea turtle species. The United States applied the embargo under the Endangered Species Act on all non-turtle-safe shrimp imports in May 1996.

In October 1996, India, Malaysia, Pakistan and Thailand lodged a WTO complaint against the US embargo on the grounds that such import bans cannot be applied extra-territorially (WTO, 1996a). The US defence, unlike in the tuna cases, rested upon GATT Article XX exceptions alone rather than incorporating Article III on national regulations.

The WTO shrimp Panel Report, published 6 April 1998, found that the measures were discriminatory in that the United States took no account of methods other than TEDs used to protect sea turtles. Further, prior

certification, technical and financial assistance along with longer transition periods were only negotiated with selected countries, mainly in the Caribbean. The prohibition of imports of shrimp from non-certified WTO Member countries therefore constituted a quantitative restriction under Article XI (WTO, 1998a, 7.16). The US argument that the ban on non-certified shrimp imports fell within the remit of Article XX(g) was rejected by the Panel on the grounds that sea turtles are not an exhaustible resource and that such 'unilateral measures could jeopardise the multilateral trading system' (WTO, 1998a, 7.60). The Article XX(g) finding conflicted with that of the second GATT tuna Panel (GATT, 1994) but the latter had no basis in WTO case law because neither tuna Decision was adopted.

The United States appealed against the Panel Decision on the grounds that sea turtles are endangered and should be regarded as exhaustible under Article XX(g) and that its import restrictions were therefore justified (WTO, 1998b). The WTO Appellate Body Report, published 12 October 1998, reversed the original Article XX(g) Decision in finding that endangered sea turtles are an 'exhaustible resource' and therefore that environmental and conservation objectives are a legitimate trade measure (WTO, 1998c, 134). The Appellate Body however, found that the US protective measures were 'arbitrarily' discriminatory and thus inconsistent with the *chapeau* to Article XX and therefore illegal under Article XI (WTO, 1998c, 184).

In response to the findings of the Appellate Body, the United States amended its Endangered Species Act and, in March 1999, published its Revised Guidelines for shrimp imports. In October 2000, the United States was then subject to a DSU Article 21.5 complaint from Malaysia concerning the compliance of the US Revised Guidelines with the Appellate Body ruling and the failure of the United States to negotiate a WTO-compatible multilateral agreement on sea turtle conservation (WTO, 2000a). The Panel Report, published in June 2001, found that the US Revised Guidelines violated Article XI (WTO, 2001b, 5.23) but were justified under Article XX(g) (WTO, 2001b, 5.42). The Panel refused to rule on US intentions with respect to securing a multilateral sea turtle agreement.

Although the United States lost the WTO shrimp–turtle case, it did so because its measures were discriminatory and not because it sought to protect the environment (WTO, no date, b). The shrimp–turtle case therefore represents a landmark decision in WTO case law (Jackson, 2000) in that the Appellate Body recognised the validity of the US Endangered Species Act. US Trade Representative (USTR) Robert Zoellick stated that the Decision 'shows that the WTO as an institution recognizes the legitimate environmental concerns of its Members' (Zoellick, 2001). The US State Department has since intensified its efforts to negotiate a multilateral agreement on sea turtle protection in the Indian Ocean and Southeast Asia.

The issues involved in the WTO shrimp turtle case are broadly similar to those of GATT tuna–dolphin. Both sets of cases arose because of significant negative environmental externalities resulting from the joint production of tuna/dolphins and shrimps/sea turtles respectively. Although the United States did not make use of Article III.4 in defence of its shrimp–turtle measures, the Appellate Body confirmed the interpretation of Article XX(g) as including conservation, first developed in the second GATT tuna case. This interpretation was based upon the broader application of the meaning of exhaustible resources in Article XX(g) to include all living beings, but particularly endangered species, in the light of the objective of sustainable development as laid down in the Preamble to the WTO Agreements (1998c, 134). Some trade and environmental issues involved in the shrimp–turtle case are discussed by McLaughlin (1997) and Shaffer (1998). The potential scope for exceptions permissible under Article XX(g) is discussed by Jackson (2000).

11.7 THE WTO US GASOLINE STANDARDS CASE

The gasoline standards case addresses the issue of the WTO-compatibility of national pollution control legislation. In a 1990 amendment to the US Clean Air Act, the US Environmental Protection Agency (EPA) developed new and stricter rules on the composition and emission effects of gasoline, the ‘Gasoline Rule’, effective 1 January 1995. The Gasoline Rule was intended to reduce toxic motor vehicle pollution. It established minimum levels of cleanliness for ‘reformulated gasoline’, to be sold in the most polluted parts of the country, and ‘conventional gasoline’, sold elsewhere. The Rule applied to all US refiners and blenders as well as imports of gasoline. The permissible emissions for ‘conventional gasoline’ for domestic refineries were based upon a baseline quality derived from a minimum of six months operation during 1990. Where no 1990 baseline could be established, the EPA assigned a ‘statutory’ baseline reflecting the average quality of domestic US gasoline. This same baseline was applied to imports of gasoline. The EPA’s statutory baseline however, was stricter than the baseline of most US refineries (WTO, no date, c).

Venezuela, later joined by Brazil, lodged a complaint on 24 January 1995 regarding the new and discriminatory US gasoline composition and emission regulations. The case became one of the first to be considered under the new WTO DSU. Venezuela’s WTO complaint was that the US regulation violated GATT Articles I and III as well as the TBT Agreement because the new EPA baseline standards discriminated between domestic and foreign refiners (WTO, 1995). By imposing the statutory baseline composition and

emissions on its gasoline imports, the United States was applying a stricter regulation than for its own domestic refineries. Further, compliance with the regulation was assessed on an annual average basis for US refineries but per shipment for foreign ones. The regulation discriminated against Venezuela's exports of refined heavy crude because of its high sulphur content, so making it much harder for Venezuelan gasoline to meet the EPA's statutory baseline.

The WTO Panel Decision, published 29 January 1996, found against the United States because the Gasoline Rule was inconsistent with Article III.4, like products, in that it treated foreign refineries more severely than domestic ones (WTO, 1996b, 6.16). Because the Gasoline Rule distinguished between reformulated and conventional gasoline, it also allowed variations in permitted baselines between domestic refiners. The Panel therefore found that the Gasoline Rule did not enforce consistent national air quality levels and thus could not be justified under Article XX(b), (d) and (g) (WTO, 1996b, 6.29, 6.40).

The United States appealed against the Panel Decision on the grounds that the Gasoline Rules was covered by Article XX(g) (WTO, 1996c). In its Report, published in April 1996, the WTO Appellate Body upheld the general conclusions of the Dispute Panel. It did however, rule that the baseline composition and emission rules should be considered under Article XX(g) but that they did not meet the requirements of the *chapeau* (WTO, 1996d).

In August 1997, the United States changed its regulations so as to comply with this ruling. The EPA permitted foreign refineries to make use of all available methods to calculate their baseline compliance with the Gasoline Rule in return for their governments' subjecting them to US inspection and enforcement (WTO, no date, c).

The analysis and findings of the WTO Dispute Panel in the US gasoline standards case is broadly similar to that of the tuna-dolphin and shrimp-turtle cases. The cases confirm the principle that WTO Members are free to implement national regulations to protect the environment under Article XX(g) on condition that these regulations are WTO-consistent. In the gasoline case, the US objective was to limit toxic vehicle emissions; the negative externality being the adverse health effects arising from gasoline *consumption*. The gasoline case provoked considerable controversy in the United States because the WTO Decision forced it to accept imports of Venezuelan gasoline with higher concentrations of certain toxic pollutants. The case was not about pollution per se however, but about regulatory discrimination against foreign refiners. Under the Panel's interpretation of Article XX(g), any WTO Member may determine its own acceptable emission standards but must ensure that they are WTO-consistent, that is, non-discriminatory.

11.8 THE WTO EU ASBESTOS CASE

The WTO asbestos case relates to the use of import restrictions on national health and safety grounds and the extent to which similar goods with different health effects can be viewed as 'like products'. The decision on the latter issue in the asbestos case has important, and potentially far-reaching, implications for PPMs relating to health and safety.

In December 1996, France imposed a general ban on the production, processing, importation and sale of all forms of asbestos and asbestos products for health reasons. Specific exceptions were made where safer substitutes did not yet exist. Similar EU-wide legislation on asbestos and asbestos products was passed in June 1999, effective 1 January 2005 at the latest.

After a complaint by Canada, a major asbestos exporter, that the French ban was illegal in May 1998, a WTO Panel was established in the following November. The Canadian case had two elements: that the blanket ban on carcinogenic chrysotile (white) asbestos was not based upon the international standard set by the ISO; and that the ban discriminated in favour of less dangerous substitutes. Canada therefore brought a case under Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement and the GATT Articles III, XI and XXIII (WTO, 1998d).

The findings of the WTO asbestos Dispute Panel were published in September 2000. France was found to have discriminated against Canadian asbestos under GATT Article III.4 because the Panel deemed that chrysotile asbestos and less carcinogenic substitutes were like products (WTO, 2000b, 8.150). The asbestos ban was therefore a quantitative measure inconsistent with GATT Article XI. The Panel ruled however, that the French ban on asbestos and asbestos products was justified under GATT Article XX(b) as being 'necessary' to protect human health on the grounds that the carcinogenic properties of all forms of asbestos have been proven scientifically (WTO, 2000b, 8.194). With respect to the blanket as opposed to a partial ban, the Panel found that the ISO's level of acceptable risk was higher than that being sought by France (WTO, 2000b, 8.210). As such, the ISO has no status as a multilateral agreement given that it is an industry-dominated body that agrees international specifications and performance norms. These ISO norms are generally minimum threshold international standards and not guidelines for setting acceptable national levels of public health risk. Canada's arguments under the SPS and TBT Agreements concerning internationally agreed standards were therefore not sustainable with respect to Article XX(b).

Both Canada and the EU appealed against the Panel Decision. Canada appealed because the blanket ban on asbestos had been found to be WTO-consistent on health grounds in spite of the ISO standard (WTO, 2000c). The EU appealed against the Article III.4 decision that less dangerous asbestos substitutes were like products on the basis of the four general criteria first established for like products by the GATT (WTO, 2000d).

In its submission to the WTO Appellate Body, the EU provided a detailed opinion on the interpretation of Article III.4, like products, with respect to the asbestos Panel Decision (CEC, 2000). This argued that the Panel recognised that white asbestos and its substitutes are like products only with respect to a small number of very specific end-uses but possess dissimilar physical characteristics, properties and tariff classifications (WTO, 2000b, 8.125). The EU submission concluded that the Panel established an erroneous hierarchy of criteria contrary to Article III.2 and, in making their decision solely on the basis of end-use, disregarded more important criteria (CEC, 2000).

The Report of the WTO Appellate Body, published in March 2001, found that the asbestos Dispute Panel had concluded that the products were like after examining only the first criterion to the exclusion of the other three (WTO, 2001c, 109). Further, the Panel did not consider the health implications of asbestos but the Appellate Body found that ‘... evidence related to the health risks associated with a product may be pertinent in an examination of “likeness” under Article III.4 ...’ (WTO, 2001c, 113). This meant that the third criterion, consumer tastes and habits, was pertinent given the health risk associated with chrysotile asbestos (WTO, 2001c, 122). The original Article III.4 ruling of the Dispute Panel on like products was therefore reversed by the Appellate Body (WTO, 2001c, 148). The Appellate Body also upheld the Panel ruling of the applicability of Article XX(b) on the grounds that the import ban was ‘necessary’ on public health grounds (WTO, 2001c, 175, 163). The Article III.4 ruling therefore meant that the Canadian WTO challenge under the SPS and TBT Agreements and GATT Article XI could not be sustained. The EU Trade Commissioner Pascal Lamy praised the Appellate ruling as showing that ‘[I]llegitimate health issues can be put above pure trade concerns’ (CEC, 2001).

The asbestos dispute is another landmark case with respect to establishing WTO case law on national health standards and like products. In over-riding the SPS and TBT Agreements, the Article XX(b) decision recognised the primacy of national governments over non-governmental agreements in setting appropriate domestic health and safety regulations. If the Article XX(b) argument had not been sustained by the Appellate Body, WTO Member countries would find it very difficult to ban trade in any dangerous goods. The Article III.4 decision on like products is important

because it establishes the need for Panels to consider *all* of the relevant criteria rather than focus unduly on one or more.

11.9 WTO PANEL INTERPRETATIONS OF PPM ISSUES

The consideration of PPM issues at the WTO remains incomplete although the dispute cases to date represent incremental progress in the interpretation and establishment of appropriate legal grounds for such trade restrictions. This Section considers the critical interface between the trade and PPM issues raised in the cases discussed in this and other chapters in this volume with respect to the key relevant Articles of GATT 1994. The cases demonstrate the progressive accumulation of GATT/WTO case law through the evolution of legal interpretation by dispute panels and the Appellate Body.

WTO Panel Interpretations of GATT Article XX, Paragraph (b), Health

Of the cases discussed in here, the only ruling on the applicability of GATT Article XX(b) as a justifiable exception is that on the WTO asbestos dispute between Canada and the EU/France. The Panel findings in the WTO asbestos case confirm that national public health measures are legally justified under Paragraph (b), where supported by appropriate scientific evidence. Both the original asbestos Panel and the Appellate Body found that the carcinogenic nature of chrysotile (white) asbestos fibres has, since 1977, been widely acknowledged by international bodies including the World Health Organisation (WTO, 2001c, 162). This consensus regarding the body of scientific evidence establishes *prima facie* support for the French and EU restrictive trade measures as 'necessary' on the grounds of the risk to public health. The only remaining requirement was for the Panel and Appellate Body to decide on whether the measures were WTO-compatible under the *chapeau* of Article XX. Because the ban imposed on imports of asbestos by France and the EU was a blanket one, the restrictive trade measures were non-discriminatory and therefore conformed to the requirements of the *chapeau*.

The gasoline standards case addressed the issue of the WTO-compatibility of national pollution emissions legislation, primarily on the grounds of protecting domestic health. In its defence, the United States cited Paragraph (b) of Article XX as well as Paragraphs (d) and (g). The WTO Appellate Body however, made its ruling on the basis of Paragraph (g) alone since, for the purposes of a Decision, only a single finding of exception under Article XX is necessary. It is possible to surmise that the Article XX exception would also have been sustained had the Appellate Body chosen instead to consider the Gasoline Rule under Paragraph (b). Because the Gasoline Rule was unpredictable for foreign refineries however, it was found to be discriminatory. As in the case of the Paragraph (g) exception however,

the Paragraph (b) defence would therefore have failed to comply with the *chapeau* to Article XX.

In the beef hormones case, the EU made use of the precautionary principle under Article XX(b) because it viewed the available scientific evidence as being inconclusive. 'Temporary' restrictions are permitted on health grounds in the absence of sufficient scientific evidence and/or consensus under Article 5.7 of the SPS Agreement. If conclusive scientific evidence is not forthcoming, then any trade restrictions must be brought into conformity. It was this lack of robust scientific evidence in support of its case that exposed the EU to a successful challenge to its import restrictions on beef produced with hormones by the United States under the SPS and TBT Agreements.

The dispute currently simmering between the EU and the United States over genetically modified (GM) goods is worth considering in the light of the discussion of beef hormones. While this has yet to become a full-blown WTO trade dispute case (see Chapter 10), there are strong similarities with the case of beef produced with hormones in terms of EU consumer health concerns. It is likely that, in the event of a trade dispute over GM goods, the EU would adopt a similar defence under Article XX Paragraph (b) on the basis of the precautionary principle. This risk-averse principle, whereby compelling scientific evidence is required to show that products have no harmful effects on consumers, was not accepted by the WTO beef hormones Panel as a legitimate defence under the SPS Agreement. As a consequence, it was not deemed to satisfy the requirements for an exception under Paragraph (b). It is very likely that a new panel on GM would therefore not accept the precautionary principle and so reject a claim of exception under Article XX(b).

WTO Panel Interpretations of GATT Article XX, Paragraph (g), Conservation

The shrimp–turtle Panel finding with respect to GATT Article XX(g) on the legal justification for national conservation measures has been cited as a major step forward for the WTO with respect to environmental issues (Jackson, 2000). The WTO Panel confirmed two critical legal points under Paragraph (g): that living creatures can be exhaustible resources; and that national conservation measures may be applied extra-territorially. This latter finding reiterated the unadopted second GATT tuna–dolphin Decision. The potential scope for exceptions permissible under Article XX(g) in the light of the shrimp–turtle case is discussed by Jackson (2000).

The principal reason why both the GATT and WTO Panels sustained the Paragraph (g) defence on extra-territorial conservation was because the

United States was party to appropriate multilateral environmental agreements (MEAs) on dolphins and turtles. Although the GATT tuna decisions were never adopted, a tuna–dolphin case launched under the WTO DSU would be unlikely to succeed because of the subsequent involvement of the United States in several MEAs for dolphins. These MEAs would be likely to satisfy the consistency and necessity requirements of the *chapeau* to Article XX.

The analysis and findings of the WTO gasoline Dispute Panel is broadly similar to that of the tuna–dolphin and shrimp–turtle cases in that it confirmed the use of Article XX(g). The case confirms the principle that WTO Members are free to pursue their own domestic environmental policies and implement national regulations under Paragraph (g) so long as these regulations are WTO-consistent under the conditions of the *chapeau*.

The applicability of Article XX(g) also has some relevance to the discussion of the potential dispute between the EU and the United States concerning GM goods. This is because of fears of environmental contamination of non-GM organisms, both within and between plant and animal species. Given the present lack of scientific evidence on the potentially long-term effects of genetic modification, the application of the precautionary principle would appear to be highly appropriate in this case. The critical issue however, is how a WTO Panel would interpret the lack of both positive and negative scientific evidence on genetic modification. The likelihood is that a panel would reject the use of a Paragraph (g) defence until sufficient scientific evidence on the long-term adverse effects of GM products was available. This was the case with asbestos under Paragraph (b) until relatively recently.

WTO Panel Interpretations of GATT Article III.4, Like Products

The WTO asbestos case successfully tackles scientifically proven negative health externalities arising from the processing or consumption of goods rather than from its production. The Article III.4 aspect of the asbestos case relates to the extent to which similar goods with different health effects can be viewed as ‘like products’. The WTO Appellate Body Report on asbestos contains a 70-paragraph analysis of what is meant by like products in the context of Article III.4 and accrued GATT/WTO case law. The Report follows the precedent, first established under the GATT in 1970, of considering the four like product criteria in turn and rejecting the establishment of a particular hierarchy. The analysis also recognises that like product issues need to be considered on a case-by-case basis.

The like product decision in the asbestos case has important, and potentially far-reaching, implications for PPMs relating to health and safety. This is because it establishes the need for Panels to consider all of the

relevant criteria rather than focus unduly on just a subset. The view that the asbestos Decision demonstrates that products entailing health risks can be accorded differential treatment to safer substitutes (Constantini, 2001) however, is not strictly accurate. Dangerous products can be banned under Article XX(b) on health grounds if verified by scientific evidence. The Article III.4 like product finding in the asbestos case only applies to essentially different products that are only potential substitutes in certain circumstances. Products deemed to be like products would generally be expected to have similar health effects such that trade restrictions would stand or fall under Article XX(b).

This aspect of the like product discussion has important ramifications for both beef produced with hormones and also GM goods. While these products differ scientifically from non-hormone beef and non-GM goods respectively, they are close substitutes in terms of their physical characteristics, properties, end-uses and tariff classifications. In its application of the like product methodology however, the Appellate Body in the asbestos case considered the impact upon consumer tastes and preferences in the light of the accumulated scientific evidence on the differential health risks (WTO, 2001b, 113). The Appellate Body's analysis rejected any hierarchy of like product criteria but decided that a negative finding under one criterion was sufficient to justify a failure to satisfy Article III.4. The banning of toxic chrysotile (white) asbestos was therefore sanctionable under Article XX(b) on health grounds while permitting trade in less harmful asbestos substitutes.

The critical issue for beef hormones and GM products is the extent to which the EU's precautionary principle has scientific merit with respect to their treatment as like products. This would depend upon the willingness of a WTO Panel to accept the risk averse approach of the EU and/or a lower standard of scientific evidence with respect to the like product criterion of consumer tastes and habits than is required under the SPS Agreement. A negative finding under Article III.4 in either case however, might still be referred back to Article XX Paragraph (b), and possibly (g), under which the SPS Agreement is again effective. In this case, the defence would probably fail. Nevertheless, a negative Article III.4 finding would sanction the use of differential tariff treatment between the two types of beef and GM and non-GM products respectively.

It is also interesting to consider the joint product aspects of the interpretation of like products under Article III.4. In both the tuna–dolphin and shrimp–turtle cases, the Panels found that these joint products could not be considered alike for the purposes of the legal analysis. In neither of these cases however, was the defence based upon joint production. All tuna catch technologies have by-catch effects on endangered species (see Clover, 2004),

even if dolphin mortality rates are now close to zero. Given that such by-catch effects are quantifiable rather than qualitative, joint production issues based upon scientific evidence could be addressed under Article III.4 rather than as exceptions under Article XX. This issue is not as important for shrimp–turtle because the effectiveness of TEDs means that they are no longer joint products.

WTO Panel Interpretations of GATT Article IX and Product Labelling

The finding of the first GATT tuna Panel was that the US dolphin-safe label was not discriminatory under Article IX.1, Marks of Origin, because it applied to all tuna regardless of its source (GATT, 1991, 5.41). Tuna could be sold in the United States whether or not it had a dolphin-safe label. Labelling therefore acted to inform consumers, enabling them to make a free choice (GATT, 1991, 5.42). Because the Panel Decision was never adopted however, it has no legal force.

The issue of product labelling has re-emerged with respect to consumer choice over beef containing growth hormones and GM products. The findings of the GATT tuna Panel suggest that EU labelling requirements for products containing beef hormones and GM products could be sustained under Article IX such that the current partial ban on imports of GM products could be lifted. There has, to date, been concerted opposition to EU regulations on GM labelling from the United States, primarily because it lacks a scientific basis (see Chapter 10). A further problem is that such labelling is negative in that it distinguishes a perceived ‘bad’ rather than a ‘good’ as in the case of dolphin-safe tuna. The Article IX decision of the unadopted first tuna Panel suggests that a WTO Panel on GM would find against the precautionary principle and therefore EU import restrictions on GM products. This would confirm the beneficial nature of product labelling in informing consumers and promoting free choice. Until a WTO Panel on GM is established to investigate the EU position however, this remains a matter of conjecture.

NOTE

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