Process and Production Methods (PPMs) in the GATT Agreement

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I. Introduction

This paper addresses a very controversial issue in WTO law, namely the legality of trade measures based on process and production methods (PPMs) used to address environmental or social considerations. While there have been debates on how to regulate the PPMs since the creation of the WTO, this has proved to be a key sticking point in international discussions on trade of sustainable products and very little progress has been made towards an international agreement on how to deal with PPMs. This has been regarded as a new means of discrimination against developing country exports, and has provoked strong reactions whenever PPMs have been

mentioned. This subject has become topical recently due to discussions on climate change caused by human activity as well as proposals on the use of sustainable products, i.e. products that, in comparison with conventional products, generate greater positive or lower negative social and environmental impact on the value chain from producer to end user. Taking into account the fact that the WTO Director-General *Pascal Lamy* has lately urged WTO member states to support an environmental chapter of the Doha Round, this debate might be reopened once again.

From the legal point of view, it is recognised that each state has a sovereign right within multilateral trading rules to apply any production or processing requirements it wishes upon the producers under its jurisdiction. A state cannot, however, enact regulations on foreign producers. In order to circumvent this prohibition and extend its production requirements to foreign producers, a country may resort to applying PPM requirements to imported products.[1] In most cases, PPM requirements set by a government have exclusively domestic effects and do not cause frictions with trade policy. However, some PPM requirements may have effects also on foreign trading partners. Such PPM requirements that address especially the protection of the environment and of human and labour rights will be the subject of this article. The legality of these trade measures based on PPMs in the WTO law has led to a lot of discussions especially after the GATT panel reports on *U.S. – Tuna/Dolphin* cases and the WTO report on the *U.S. – Shrimp/Turtle* case. Many trade officials, policy makers, non-government organisations as well as academics assume that a distinction made on PPMs (and in particular non-product-related PPMs) is not allowed under the WTO law. The aim of this paper is therefore to examine whether PPM-based measures really *per se* violate GATT provisions, in particular the Articles I, III and XI GATT and whether they cannot be justified by one of the Article XX GATT's exceptions. Thus, the conformity of PPM-based measures with Articles I, III, XI and XX GATT will be examined taking into account the literature published on the subject. The issue of PPMs will be presented in a broader context of political economy.

II. Political economy of PPM issues in international trade

1. Definition of process and production methods (PPMs)

The precise meaning of the term "process and production methods" is not generally agreed. This is one of the reasons why a lot of controversies have arisen with regard to PPMs.[2] The term of "PPMs" itself has its origin in the GATT Agreement

1 *Wiers*, Trade and Environment in the EC and the WTO: A Legal Analysis, Groningen: Europe Law Publishing, 2002, p. 268.

2 *Wiers* (2002), ibidem, p. 267.

of 1979 on Technical Barriers to Trade and referred to product standards focussed on the production method rather than product characteristics.[3]

One of the few attempts to define PPMs was made by the OECD in its paper of 1997 which provides a useful conceptual framework on PPMs.[4] According to the definition of OECD, the term PPMs refers to "the way in which products are manufactured or processed and natural resources extracted or harvested."[5] The OECD analysis concentrates on environmental and sustainability impact of PPMs, but this paper encompasses social considerations related to labour and human rights as well.

PPM requirements can be designed in different ways, e.g. prescribing a PPM, prohibiting one or several PPMs, or prescribing emission or performance effects rather than the methods themselves.[6] The implementation instruments of such PPM requirements, namely PPM-based measures (this term will be used in this article), can take also many shapes. They can embrace import prohibitions or restrictions on the basis of how a product has been produced, or on the basis of whether the product originates in a country where certain PPM requirements are prescribed and enforced by the authorities.[7] They can be also internal regulations according to which the marketing or sale of products depends upon their production method, or upon them originating in a country that prescribes PPMs equivalent to those in the importing country[8] as well as taxes, labelling, voluntary codes of conduct and associated monitoring mechanisms, preferences in the framework of GSP linked to labour rights performance or environmental protection.[9] It should be noticed that a requirement prescribing where a product must be produced is not a PPM, e.g. law banning fish import from North Korea is a plain embargo rather than PPM.

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3 *Charnovitz*, The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality, 27 Yale Journal of International Law 59 (2002), pp. 64-65.

4 Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-based Trade Measures, OECD/GD(97)137, Paris 1997 [hereinafter OECD (1997)]. The earlier version of this conceptual framework was issued in 1994. These studies were embarked on in the context of the fierce debates about the *U.S. – Tuna* cases.

5 OECD (1997), p. 7.

6 *Wiers* (2002), (fn. 1), p. 268.

7 This paper concentrates on import restrictions but the problem of PPMs may also concern export restrictions, e.g. the U.S. as technology-export controller. See *Charnovitz*, (fn. 3), p. 102.

8 *Wiers*, WTO Rules and Environmental Production and Processing Methods (PPMs), ERA-Forum: Scripta Iuris Europaei, n. 4, 2001, p. 103.

9 *Howse/Trebilcock*, Trade Policy and Labour Standards, 14 Minnesota Journal of Global Trade 261 (2005), p. 287.

2. Product-related versus non-product-related PPMs

The OECD paper delivers an important technical distinction between different PPMs, relevant for the further discussion, namely the difference between product-related and non-product-related PPMs. This distinction is based on whether the externalities related to production occur only during the production (cultivation, raising and slaughtering of animals, exploitation of natural resources, extraction of raw materials and production or manufacturing of goods) or during the consumption stage of a product (distribution, marketing, consumption or disposal of after consumption).

In the case of product-related PPMs, according to the OECD paper, a process and production method used affects the characteristics of a product so that the product itself (or substances physically incorporated into it) may pollute or degrade the environment when it is consumed or used. Examples involve criteria on chemical or heat treatment of timber, use of pesticides in agriculture or the use of ozone-depleting substances.[10]

As far as non-product-related PPMs are concerned, a process or the production method itself can have a social or environmental impact during the production stage that does not have a discernible impact on the product,[11] e.g. usage of force labour by production of T-shirts does not influence the characteristics of this T-shirt but have a social impact. The non-product-related PPMs concern widely environment and human and social rights. The fiercest discussions among politicians and lawyers are about non-product-related PPM.

The related/unrelated distinction brings a number of inconsistencies at the same time. Firstly, actually no PPM is employed without the reference to some product. As foreign process or production methods cannot be halted at the border, therefore it is the product that is prevented from coming across the border in order to enforce PPM-based measure.[12] Besides, a product-related PPM may have negative health or environmental impact not only during the consumption stage but in practice also during the production stage.[13] The assumption that consumer preferences can be precisely divided between the physical characteristics of the product and of other ecological or social concerns creates also some problems as in the real world con-

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10 See also worldwide prohibition of the use of CFC chemicals as propellant in air-conditioning systems and spray cans, ban in the EU on the use of chlooramphenicol as a veterinary drug in shrimp aquaculture in order to protect EU consumers from increased cancer risk. *Eaton/Bourgeois/Achterbosch*, Product Differentiation under the WTO. An Analysis of Labelling and Tariff or Tax Measures Concerning Farm Animal Welfare, Agricultural Economics Research Institute, The Hague, June 2005, p. 26.

11 OECD (1997), p. 11.

12 *Charnovitz*, (fn. 3), p. 65-66.

13 *Wiers* (2002), (fn. 1), p. 267.

sumers are influenced by these concerns. Moreover, the same regulation can be non-product-related and product-related at the same time as the same regulation may have multiple aims, e.g. the same ban on genetically-modified food might be applied to address the alleged ecological impact on agricultural production or the impact of ingestion on human health.[14] Another issue is that for some PPMs the process means the same as the product, e.g. regulation specifying a minimum amount of recycled content defines the product and also mandates a production process that uses recycled inputs. The recycled newsprint may be indistinguishable from virgin newsprint and will be used in the same way by the consumer.[15]

Despite all these conceptual problems the distinction between product-related and non-product-related PPMs will be followed because of its importance from the point of view of trade effects and GATT treatment.

3. Taxonomy of PPM-based measures

Undoubtedly a better differentiation between various PPMs-based measures can help to distinguish problems arisen in the PPM debate. It will be also very helpful in assessing the compatibility of PPM-based measures with the GATT law.

There are only few more comprehensive taxonomies of PPM-based measures presented in the literature, among which are the one of *Charnovitz* as well as the one of *Howse* and *Regan*.

According to *Charnovitz* one can distinguish three types of various PPM-based measures: (1) the government policy standard, (2) the how-produced standard, and (3) the producer characteristics standard.[16]

A government policy standard relates to the laws or regulations of specific foreign governments regarding the production process or their enforcement, e.g. a law banning the importation of fish from any country that permits driftnet fishing. This standard has coercive character as it imposes environment or social policies to foreign governments, especially when the country prescribing standards is a substantial importer of the targeted production. Besides, it punishes private economic actors who are willing and able to assure that their exports meet the importing country's standard. Such standards are generally more easily used by larger and politically more influential countries than small countries. Finally, it may lead to conflicts of policies in the exporting country because two importing countries might impose inconsistent policy standards.[17]

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14 *Charnovitz*, (fn. 3), p. 66.

15 See *Thomas*, The Future: The Impact of Environmental Regulation on Trade, 18 Canada – U.S. Law Journal 383 (1992), pp. 389-390.

16 *Charnovitz*, (fn. 3), p. 67. *Wiers* seem to follow a distinction between government policy standard and how produced standard without explicitly using the *Charnovitz* terminology.

A how-produced standard determines the processing method used for making a product, e.g. a law banning the importation of driftnet-caught fish.[18] In its functioning how-produced standard is similar to product standard. It does not coerce the government nor penalize economic actors fulfilling the standards of importing country; the small countries can use how-produced standards because they will almost always find willing suppliers.[19] Hence, its application will not generate as much negative effects for trade as the government policy standard does. This standard gives simply incentives for economic actors to change their production behaviour if they want to export their products successfully to importing countries that follow specific environmental or social policy aims. On the other hand, the how-produced standard could be less effective than government policy standard.[20]

Finally, the producer characteristics standard makes it dependent on the identity of the producer or importer. It is not always viewed as a PPM.[21] Standards prescribing where the product should be produced can be sometimes hidden as a how-produced standard under origin-neutral language relating only to a particular country.[22]

A distinction overlapping with the one above, and of a more simple application, is the one advanced by *Howse* and *Regan*, who distinguish PPMs-based trade measures in "country-based measures" and "origin-neutral measures".[23] Under "origin-neu-

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17 Ibidem.

18 Another example includes the production of diamonds. In 2000, the World Diamond Congress pressed for action to combat trade in "conflict diamonds" that are used to fund terrorism in Africa. In 2001 President Clinton issued an Executive Order to prohibit the importation of rough diamonds from Sierra Leone unless the particular diamond was controlled through a certificate of origin from the Government of Sierra Leone (how-produced PPM). *Charnovitz*, (fn. 3), intra note 39. See also *Price*, The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate, 12 Minnesota Journal of Global Trade 1 (2003); *Pauwelyn*, WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for Conflict Diamonds, 24 Michigan Journal of International Law, p. 1177 (2003).

19 *Charnovitz*, (fn. 3), p. 69.

20 Ibidem.

21 E.g. a law that bans fish imports from a producer owned by a pariah government will be probably considered as embargo rather than PPM. *Charnovitz*, (fn. 3), p. 67.

22 A very well known example was the German law of 1904. It provided a tariff reduction for "large dappled mountain cattle or brown cattle reared at a spot at least 300 meters above sea level and which have at least one month's grazing each year at a spot at least 800 meters above sea level". That is a how-produced PPM that is non-product-related. In this way Germany wanted to give a trade concession to Switzerland without generalizing it to other countries with which it had trade agreements. *Hudec*, "Like Products": The Differences in Meaning in GATT Articles I and III", in: Cottier/Mavroidis, Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, Ann Arbor: The University of Michigan Press 2000 [hereinafter *Hudec* (2000b)], pp. 101, 109-111.

23 *Howse/Regan*, The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy, 11 EJIL 249 (2000), pp. 252-253.

tral measures" the importability of the products will depend on actual methods used for producing the product in contrast to "country-based measures" that depend on which country the product comes from.[24] In the distinctions of both authors, "origin-neutral measures" and "how produced standards" may be less likely to violate WTO law than the other types of PPMs.

4. Reasons for PPMs application

In order to analyse the PPM-based measures a deepened understanding of the motivations behind these measures is needed. The OECD report distinguishes environmental, value-based and competitiveness motivations. In reality, states, when introducing PPM-based measures, are often guided by different motivations at the same time, which are not always transparent and distinguishable.[25]

Firstly, while applying PPM-based measures the importing governments may seek to protect the environment, in particular:

(1) the domestic environment – the governments set essentially standards for product and product-based PPMs applicable both to domestic and imported products, e.g. criteria on chemical products, food health and safety, rules for food irradiation, hygienic practices or pesticide use.

(2) shared environments (of both importing and exporting countries) – where production externalities spill over from one country to other countries and harm resources partially under their jurisdiction (e.g. transboundary pollution or migratory species) or global ecological assets shared by all countries (e.g. ozone layer, endangered species, and biodiversity).

(3) a foreign environment – even when there is no spill-over effect to other countries in order to raise their environmental PPM requirements out of a general concern about environmental degradation. The effectiveness of such measures is arguable.

Secondly, value based motivations may express home consumers' reservations to PPMs because they conflict with their strong moral or value preferences, especially when PPM requirements are derived from values that may not be universally accepted. Therefore, this may lead to a desire to influence other countries towards the values and/or preferences of the importing countries.[26] In this paper value-based motivations include also the commitment to labour standards, human rights improvements in exporting countries as well as animal welfare.[27] The differences in

24 E.g. a prohibition of the importation of tuna from any country that allows dolphin-unfriendly tuna fishing.

25 OECD (1997), p. 23.

26 Ibidem, p. 28.

approach towards PPM requirements depend on different cultural or other values and policy priorities, differences in political systems, approaches adopted in resolving problems, the level of knowledge and understanding of environmental impacts, varying interpretations of scientific evidence and acceptability of risk, financial capacities and technology available to address particular environmental problems.[28]

The OECD paper mentions also competitiveness motivations. They assume that high domestic environmental/social requirements put domestic industry at a competitive disadvantage in international markets. In other words, applying higher domestic standards would bring additional costs for producers in comparison with producers from low-standard countries. Therefore in order to equalise the competition conditions the governments may introduce the same PPM standards for imported products from countries with lower standards if domestic standards are increased. The competitiveness motivation on the one hand has a strong political force, but on the other hand it lacks empirical evidence to support it as a basis for restrictions on trade.[29] This is why they simply tend also to overlap protectionist motivations.

5. PPMs and developing countries

The use of PPM-based measures to address the environmental and social effects of production in other territories is controversial in the light of relation between developed and developing countries.[30] Generally, the importing countries willing to

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27 A very good example illustrating a PPM-based measure addressing animal welfare concerned leghold traps in the European Community (EC). In 1991, the Council enacted a regulation to prohibit the use of leghold traps in the EC and to ban the importation of pelts and manufacture goods of certain wild animal species unless the country of origin has banned leghold traps or unless the trapping methods used meet "internationally agreed humane trapping standards". The import ban was supposed to come into force in 1995 in order to give time for exporting countries to raise their standards. In the meantime, the U.S. and Canada threatened a lawsuit under GATT if the Commission puts its regulation into effect. Eventually, in 1997 the Commission reached agreement with Canada, Russia and the U.S., the major supplying countries to phase out the use of leghold traps and the import ban was not implemented towards these countries. See: *Swinbank*, Like Products, Animal Welfare and the World Trade Organisation, JWT 687 (2006); *Dale*, The European Union's Steel Leghold Trap Ban: Animal Cruelty Legislation in Conflict with International Trade, 7 Colombia Journal of Environmental Law and Policy 441 (1996); *Eaton/Bourgeois/Achterbosch*, (fn. 10).

28 OECD (1997), pp. 28-29.

29 See *Gaines*, Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?, 27 Columbia Journal of Environmental Law 383 (2002), p. 402, For a deepened analysis *Gaines*, Rethinking Environmental Protection, Competitiveness, and International Trade, University of Chicago Legal Forum 231 (1997); OECD, International trade and core labour standards, Paris 2000.

30 See: *Howse/van Bork*, Liberalising Environmental Goods in the Doha Round, Bridges Comment, No. 8, August 2005.

impose PPM-based measures belong to the group of developed countries. On the contrary, the exporting countries, with lower standards, amount to developing countries.

Many developing countries are deeply suspicious of proposals for the explicit inclusion of PPMs in the WTO. They fear that, firstly, the imposition of environmental, technological, social and other qualitative standards with high thresholds set by the developed countries would threaten their already precarious market access.[31] Secondly, they argue that such regulation of PPMs increases production costs in developing countries by, diminishing their comparative advantage and thereby hindering their economic development. Thirdly, it forces such countries to comply with the policy choices of a few wealthy nations if they want access to the world's largest markets.[32] Fourthly, they fear that developed countries could also use such standards as "disguised" protection to restrict increasing competition from developing countries' exports as trade liberalisation progresses.[33]

In the area of labour rights the developed countries sent a clear signal to developing countries during the 1996 Ministerial Meeting of the WTO in Singapore by declaring to reject the use of labour standards for protectionist purposes and acknowledging the comparative advantage of countries, particularly their low-wages. This was reaffirmed by the ILO in No. 5 of its 1998 declaration on core labour rights and by the Doha Declaration. However, as *Meng* notices, this clear confirmation of comparative advantages is not in conflict with a possible use of trade sanctions, conceivably based on PPMs, as countermeasures for violation of human rights or of treaty rights as well as customary law rights of other states. The violation of international obligations does not belong to the realisation of comparative advantages, although it might lower production costs, but is an unlawful behaviour.[34] On the other hand, a higher level of environmental and social protection in response to government policy or consumer preferences can have positive effects on the competitiveness of domestic producers and countries.[35] They can

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31 *Read*, Like Products, Health and Environmental Exceptions: The Interpretation of PPMs in Recent WTO Trade Dispute Cases, The Estey Centre Journal of International Law and Trade Policy 5 (2), 2004, pp. 91-101.

32 *Kelly*, The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance, 38 Cornell International Law Journal 459 (2005), p. 461.

33 *Read*, (fn. 31), pp. 91-101, *Meng*, International Labour Standards and International Trade Law, in: Benvenisti/Nolte (ed.), The Welfare State, Globalisation, and International Law, Springer 2003, pp. 371-394, p. 378. Such fears connected to environmental PPM-based measures are also expressed by *Charnovitz,* (fn. 3), pp. 74-75.

34 *Meng,* (fn. 33), p. 378.

35 OECD (1997), p. 28. Some studies, in fact, indicate that companies in developed countries, challenged by demanding environmental standards, actually improve their competitive performance compared to producers in developing countries. This is the so-called *Porter Hypothesis*. See; OECD, International Trade and Core Labour Standards, Paris 2000.

encourage technological change, stimulate investments, improve production efficiency, and promote new industrial sectors and new market niches.[36]

In my opinion, the costs imposed by PPMs on developing countries have to be examined more in detail. Undoubtely developed countries should provide help to bear these costs either by paying more for the good in question, or provide financial or technology transfers to these countries in order to enable them to efficiently comply with the PPM requirements.[37] This is especially important in relation to global resources.

6. Unilateral and multilateral approaches toward PPMs

The issue of PPM-based measures, especially those concerning the environmental protection, have led to fierce discussions also in the context of unilateralism in trade policy. In fact, this is the core problem with PPMs-based measures.

There is no agreed definition of "unilateral measure" in the WTO context, or "unilateralism" in public international law.[38] The term "unilateral" seems to have a neutral connotation and does not preclude that a unilateral measure is *per se* illegal.[39] At any rate each state has a sovereign right to introduce legal acts in the area of its own jurisdiction. However, in the very context of PPM-based trade measures pursuing extraterritorial protection goals and/or attempting to influence behaviour abroad by the imposition of one's community's values on another community, if that other community has not consented to or acquiesced in the imposition of such values, "unilateral" has a negative connotation, or might even be considered illegal under international law.[40] That can mean a risk of protectionist abuse under the pretence of environmental or social concerns of PPM-based trade measures and the increased possibility of conflicts among trade partners. Additionally, countries with greater market power will inappropriately or unfairly make pressure on countries with lesser power.

Therefore the Environmental Rio Declaration in one of its principles states that "unilateral actions to deal with environmental challenges outside the jurisdiction of

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36 OECD (1997), p. 28.

37 *Charnovitz*, (fn. 3), pp. 74-75.

38 On the concept of "unilateralism" see the special issue of European Journal of International Law (2000), Vol. 11 No. 2: *Sands*, 'Unilateralism', Values, and International Law, pp. 291-302; *de Chazournes*, Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues, pp. 315-338; *Bodansky*, What's So Bad about Unilateral Action to Protect the Environment?, pp. 339-347, *Jansen*, The Limits of Unilateralism from a European Perspective, p. 310.

39 *Wiers* (2002), (fn. 1), p. 270. In similar spirit *Schlagenhof*, Trade Measures Based on Environmental Processes and Production Methods, 29 JWT 123 (1995), p. 141.

40 *Wiers* (2002), (fn. 1), p. 270; *Jansen*, (fn. 38) p. 310; *Sands*, (fn. 38), p. 293.

the importing country should be avoided" and "environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." [41] The language of this principle does not simply imply a blanket prohibition of "unilateral actions" dealing with environmental challenges outside the jurisdiction of the importing country. It states only that such actions should be "avoided". Moreover, it is desirable that such measures should be based on international consensus, or where a consensus amongst interested states has been sought but not necessarily achieved.[42]

The implementation panel in *U.S. – Shrimp* described a "unilateral measure" as a measure "which has been designed and is applied without being expressly mandated or permitted by a multilateral agreement' without prejudice to its justification under Article XX GATT or any other provisions of the WTO Agreement."[43] The problems arising from this definition are the following: different member states of the WTO are parties of different multilateral agreements and the term "being expressly mandated or permitted" leaves also grey area (e.g. measures taken in order to pursue a goal of a multilateral environmental agreement).[44] Further, the Appellate Body and the implementation panel in *U.S. – Shrimp* suggested that in order to address certain environmental problems, unilateral trade-restrictive measures might only be taken if there are pending negotiations on a multilateral approach to address the environmental issues.[45]

But why in the face of existence of a number of multilateral environmental agreements the governments use unilateral trade PPM-based measures to address the problems? Firstly, they are difficult to negotiate, implement and enforce.[46] It is also difficult to achieve broad and effective membership of the treaties. Countries may not be interested at all in concluding any agreement as the result of disagreement over the existence or severity of the environmental threat and the efficiency and equity of the regulatory regime selected for addressing the threat.[47] Besides, coun-

41 Principle 12 of the Rio Declaration resulting from the United Nations Conference on Environment and Development held during 1990-1992. This attitude was mirrored also in Article 2.22 of the Agenda 21 (Environment and Poverty Agenda).

42 *Sands*, (fn. 38), pp. 295-296.

43 Panel Report on *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* [hereinafter *U.S. – Shrimp (Article 21.5 – Malaysia)*], WT/DS58/RW, adopted 21 November 2001, in footnote 155.

44 *Wiers* (2002), (fn. 1), p. 271.

45 Panel in *U.S. – Shrimp (Article 21.5 – Malaysia)*, para. 5.88.

46 OECD (1997), p. 26. Lately the international recognition received on climate change caused by the human activity is growing but countries cannot reach any multilateral agreement addressing such environmental problems. Another example of a long-recognised problem is the protection of migratory turtles but the international legislation on the issue emerged slowly. For details see: *Charnovitz*, (fn. 3), p. 71.

47 OECD (1997), p. 26.

tries may also consider short-term economic advantages of non-participation or non-compliance (free riding). Therefore the governments may use unilateral trade measures to strengthen the implementation or enforcement of regional and MEAs regardless of whether these agreements allow for such PPM-requirements[48] or not. *Boisson de Chazournes* draws also attention to a process called "policy-forging" unilateralism: treaty-making negotiations sometimes succeed because leading countries have manifested a willingness to act alone if necessary.[49]

Taking all these arguments into account it seems clear that when the first-best option of multilateral cooperation is not available, an affected government may consider using trade PPM to address transborder problems indirectly; however, it does not mean that it is the most efficient measure.[50]

7. Extraterritorial and extrajurisdictional protection

PPM-based measures are mentioned also in the context of their "extraterritorial" or "extrajurisdictional" character.[51] The terms "extraterritoriality" or "extraterritorial protection" means influencing behaviour outside the territory of the state taking the measures, and/or protecting environmental resources outside the territory of the state taking the measures.[52]

On the one hand it is argued that the importing country has no jurisdiction to affect the production process in the exporting member as this violates the sovereign rights of the states. However, it is submitted that this view is disputable. *Wiers* argues that trade-restrictive measures (e.g. based on PPMs) may have extraterritorial and extrajurisdictional effects. Firstly, public international law does not prohibit states from protecting the environment outside their territorial jurisdiction. On the contrary: they are obliged to assure that their behaviour within their jurisdiction does not

48 E.g. in the Montreal Protocol; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the U.N. Food and Agriculture Organisation's Committee on Fisheries recommended to consider using trade PPMs to address "illegal, unreported and unregulated" fishing in world fisheries. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (June 23, 2001), p. 66.

49 *Boisson de Chazournes*, (fn. 38), pp. 317, 325. He gives a number of examples from the history of environmental policymaking.

50 *Charnovitz*, (fn. 3), p. 73.

51 *Wiers* (2001), (fn. 8), p. 103.

52 *Bartels*, Article XX of GATT and the Problem of Extraterritorial Jurisdiction. The Case of Trade Measures for the Protection of Human Rights, 36(2) JWT 353 (2002), p. 358. *Nollkaemper* gives such a definition of "extraterritorial jurisdiction" as "the exercise by a state of legislative or enforcement jurisdiction beyond its borders, either over citizens of other countries or over its own nationals", *Nollkaemper*, Rethinking States' Right to Promote Extra-territorial Environmental Values in: Weiss/Denters/de Waart (eds.), International Economic Law with a Human Face, Kluwer Law International, The Hague 1998, p. 188.

cause any environmental damage outside. Secondly, trade restrictive measures do not legally regulate the conduct of legal subjects abroad by legislating foreign nationals or trying them for crimes. They regulate the behaviour of trading entities within the jurisdiction of states taking the measure and therefore are not the assertion of extraterritorial jurisdiction per definition. Thirdly, under public international law a sovereign state has a right to enact trade measures and internal regulations. At the same time, it is recognized in customary international law that there is no right to export products to foreign markets and no duty to grant market access.[53] Such rights can be derived only from the concluded treaties.

III. Article I GATT – Most Favoured Nation (MFN) and PPMs

Article I GATT stipulates that a WTO Member cannot discriminate by treating the product of one WTO Member better than the like product of another Member. It is noteworthy that Article I does not prohibit differential treatment of unlike products.[54]

With regard to PPM-based measures there are only a few cited GATT/WTO cases involving Article I. Some are in the literature misread as including PPMs, e.g. the *Belgian Family Allowances*[55] dispute – one of the earliest GATT decisions concerning violation of Article I. However, the measure in this case was not a PPM as the distinction in question was based on the system of social protection that existed in the country of origin of the goods, not their process and production methods.[56]

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53 *Wiers* (2002), (fn. 1), p. 276 cites: *Nollkaemper/Appleton*, Environmental Labelling Programmes-International Trade Law Implications, London, Kluwer Law International 1997, p. 77.

54 *Charnovitz*, (fn. 3), p. 83.

55 *Belgian Family Allowances*, Working Party Report, adopted 7 November 1952, BISD 1S/59. See e.g. *Charnovitz*, (fn. 3), pp. 83-84.

56 *Howse/van Bork*, (fn. 30). A Belgian law of 1939 imposed a tax on imported goods purchased by local government bodies. This tax was supposed to increase the revenue for Belgium's family allowance program. Until then it had been funded primarily through a payroll tax on Belgian employers. Under the law, products imported from a particular country could be exempted from the tax if that country had a family allowances regime similar to Belgium's. Denmark und Norway, the complainant governments, argued that the tax violated Article I because an exemption had been given to Sweden but not to them, even though they had similar family allowance programs. The panel agreed with the plaintiffs. Firstly, Belgium had granted the exemption to some GATT parties while Article I required Belgium to grant the exemption to every other GATT party regardless of whether a government qualified for the exemption by having a similar family allowance program (*Belgian Family Allowances*, pp. 3, 6). In the panel's view, the nature of an exporting country's family allowance program was "irrelevant" to GATT Article I, which does not permit discrimination dependent on conditions. (*Belgian Family Allowances*, p. 3). Belgium did not invoke an Article XX exception. Therefore the case ended with the finding of an Article I violation. For

In the *Spain – Tariff Treatment of Unroasted Coffee*[57] dispute the GATT panel considered a product-related PPM.[58] At issue was whether different methods of cultivation and processing of coffee beans justified different tariffs for various types of unroasted coffee.[59] The panel found that the two products had to be treated as like, not because of PPMs, but because even physical differences would not be enough to prevent two similar products from being deemed "like". The panel held that Spain's higher tariffs on "unwashed Arabica" and "Robusta" coffee violated GATT Article I.[60] No GATT panel took into account the violation of Article I related to non-product-related PPM-based measure.

Under WTO law two cases concerning Article I and PPMs, both in the area of automobiles: the *Indonesia – Autos* case and *Canada – Autos*, have been cited.[61] In both these cases, the panels found a violation of Article I. In neither of the cases the defendant invoked an Article XX exception. In the *Indonesia – Autos*[62] case Japan, the EC and the U.S. complained that Indonesia applied higher customs duties and sales taxes on imported products if the exporting manufacturer did not utilize a sufficient amount of Indonesian parts or labour.[63] The Panel found that the „advantages" in question were not accorded „unconditionally" to „like" products from other members. According to the panel, GATT case law makes it is clear that, within the meaning of Article I, an advantage „cannot be made conditional on any criteria that is not related to the imported product itself."[64] The panel stated further 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."[65] The panel concluded that Indonesia was levying a PPM-tax and tariff based on producer characteristics and domestic content that was in breach of Article I GATT.[66]

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detailed description see *Charnovitz*, Belgian Family Allowances and the Challenge of Origin-based Discrimination, World Trade Review 4:1 (2005); *Hudec*, The GATT Legal System: A Diplomat's Jurisprudence, in: Hudec (ed.), Essays on the Nature of International Trade Law, 1999, pp. 17, 44-45.

57 *Spain – Tariff Treatment of Unroasted Coffee*, GATT B.I.S.D. (28th Supp.) June 11, 1981 at 102, 112, para. 4.10 (1982) [hereinafter *Spain – Unroasted Coffee*].

58 *Charnovitz*, (fn. 3), p. 84.

59 Panel Report on *Spain – Unroasted Coffee*, para. 4.6.

60 See also *Charnovitz*, (fn. 3), p. 84.

61 Ibidem.

62 Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201 [hereinafter *Indonesia – Autos*].

63 Ibidem, para. 2.1- 2.44.

64 Ibidem, para. 14.143.

65 Ibidem, para. 14.145.

66 *Charnovitz*, (fn. 3), p. 85.

In *Canada – Autos*[67] Japan and the EC complained that Canada provided an import duty exemption for an eligible company under the condition that it has a manufacturing presence and sufficient value-added in Canada.[68] This was therefore a PPM-based measure related to producer characteristics. The panel delivered a more nuanced interpretation of Article I. It referred to the *Belgian Family Allowances* and *Indonesia – Autos* cases to show that they concerned origin-based discrimination.[69] Further it suggested that Article I might allow truly origin-neutral criteria.[70] The panel held that: "We therefore 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."[71][…] "Rather, we must determine whether these conditions amount to discrimination between like products of different origins."[72] *In casu*, however, the Canadian criteria were held to be discriminatory on the basis of origin. The panel held that Article I GATT was violated.[73] On the other hand, a more recent panel in the *EC – Tariff Preferences* discussed in more detail Article I: 1, without even so much as a citation to *Canada – Automotives*, took a very different approach to unconditionality in Article I: 1, holding that it excluded even origin-neutral conditions.[74]

To sum up, it is clear that a PPM-based measure discriminating on the basis of the origin violates Article I GATT *per se*. The situation is not clear in the case of origin-neutral PPM-based measures. On the one hand, the panel in *Canada – Autos* suggested that truly origin-neutral PPM-based measures do not *per se* violate Article I: 1 GATT. On the other hand it seems the findings on "unconditionally" in *EC – Preferences* excludes this possibility. If origin-neutral PPM-based measures were not *per se* excluded from the coverage of Article I, it would be further important to

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67 Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, modified by Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043 [hereinafter *Canada – Autos*], para. 10.4.

68 Panel Report on *Canada – Autos*, paras. 2.1.-2.33.

69 Ibidem, paras. 10.26, 10.28.

70 *Charnovitz*, (fn. 3), p. 85; *Howse/Trebilcock*, (fn. 9), pp. 287-288.

71 Panel Report on *Canada – Autos*, para. 10.24. See also paras. 10.29-30 (elaborating on this point).

72 Panel Report on *Canada – Autos*, para. 10.30.

73 Ibidem, para. 10.50. The panel's findings of the Article I: 1 GATT were upheld by the Appellate Body without addressing specifically the above cited findings, see: AB Report on *Canada – Autos*, pp. 78, 81.

74 *Howse/Trebilcock*, (fn. 9), p. 287. *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report WT/DS246/R adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R, paras. 7.59-7.60. This findings were not questioned by the Appellate Body.

find discrimination between like products of different origins. *Ergo*: the interpretation of "like products of different origins" would be significant for further cases. It is therefore closely related to the problems of "likeness" determination of products based on different PPMs in Article III GATT.[75]

IV. Article III GATT – National Treatment and PPMs

1. Article III – general overview

This general introduction of Article III GATT aims at drawing the frames for the discussion of PPM-based measures.

Article III GATT is very broad. It applies to "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 requiring the mixture, processing or use of products in specified amounts or proportions" as stated in Article III: 1 (introductory sentence of Article III). These measures could potentially comprise regulatory distinctions based on PPMs, e.g. reduced VAT rate for environmentally friendly products carrying the eco-label[76] or regulation forbidding sales of dolphin-unfriendly tuna.

All these measures should not be applied to imported or domestic products so as to afford protection to domestic production. The purpose of Article III, as explained by the Appellate Body in *Japan – Alcoholic Beverages II*, is therefore "to avoid protectionism in the application of internal tax and regulatory measures" and "to provide equality of competitive conditions for imported products in relation to domestic products."[77] That is why it will have a key meaning for the use of PPM-based measures.

Article III: 2 concerns (direct or indirect) internal taxes or other internal charges. The first sentence of this article prohibits imposing taxes or other internal charges in excess of those applied, directly or indirectly, to like domestic products. Article III: 2 second sentence prohibits tax differentiation between directly competitive or substitutable products, if these are applied as to afford protection to domestic production. With respect to regulations other than taxes, Article III: 4 GATT provides

75 See: *Hudec* (2000b), (fn. 22), pp. 109-111.

76 E.g. the European Commission proposed such tax in Green Paper on Integrated Product Policy (adopted on 7 February 2001). For details see: *Quick/Lau*, Environmentally Motivated Tax Distinction and WTO Law, The European Commission's Green Paper on Integrated Product Policy in Light of the 'Like Product'- and PPM-' Debates, 6 JIEL 419 (2003).

77 AB Report on *Japan – Taxes on Alcoholic Beverages* [hereinafter *Japan – Alcoholic Beverages II*], WT/DS8/AB/R,WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November 1996, p. 16. para. 5.5(b).

that imported products "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

The Appellate Body held that in order to establish a violation of Article III: 2 first sentence, it must be established whether domestic and imported products are "like" and the taxes imposed on the imported products are "in excess" of those applied to the like domestic products.[78] The test of Article III: 2 second sentence includes in addition to that a separate finding on protectionist application of the taxation.[79] Article III: 4, according to the Appellate Body, does not need a separate finding of domestic protection[80] but only the examination whether the products are "like" and the imported products are accorded "less favourable treatment" than the like domestic products.[81]

For the further analysis it is also important to draw a distinction between the application of Article III and Article XI: 1, which prohibits instituting or maintaining qualitative restrictions on imports or exports. Internal regulatory measures may apply to both domestic and imported products. With regard to import restrictions, however, a ban by definition apply to imports/exports only. Although the GATT and WTO case law is ambiguous on this point, it is generally assumed that a measure is subject to the application of either Article III or Article XI, and not to both at the same time.[82] An interpretive Note Ad Article III provides that internal regu-

78 Ibidem, pp. 18-19, AB Report on *Canada – Certain Measures Concerning Periodicals* [hereinafter *Canada – Periodicals*] WT/DS31/AB/R, adopted 30 July 1997, pp. 22-23.

79 Ibidem, p. 24, AB Report on *Canada – Periodicals*, pp. 24-25.

80 AB Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R, adopted 25 September 1997 [hereinafter *EC – Bananas III*], para. 216.

81 AB Report on *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 [hereinafter *Korea – Beef*], para. 133.

82 See *Pauwelyn*, Rien Ne Va Plus, Distinguishing Domestic Regulation from Market Access in GATT and GATS, WTR, 4(2) 2005, pp. 142-148; *Wiers* (2001), (fn. 8), p. 103. The GATT panel in *Canada – Administration of the Foreign Investment Review Act (FIRA)* (BISD 30S/I 40), para. 5.14 noted that if Article XI: 1 was interpreted broadly to cover also internal requirements, Article III would be partly superfluous. On the other hand, in *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (BISD35S/37), paras. 4.25-26 the GATT panel suggested that both Article XI and III: 4 could be applicable to one and the same measure. Moreover, the Panel on *India – Measures Affecting Trade and Investment in the Motor Vehicle Sector* held that internal measures which have an impact on the conditions of importation (as opposed to the condition of imported products on the internal market) are covered by Article XI: 1. (Panel Report, WT/DS146/R, WT/DS175/R, adopted 5 April 2002, para. 7.276). For a support of this attitude see *Zedalis*, The United States/European Communities *Biotech Products* Case: Opportunity for World Trade Organization Consideration of Whether Internally Applied Non-Tax Measures Fall Within the Scope of the General Agreement on Tariffs and Trade Article XI(1)'s Reference to 'Other Measures', 38 JWT 647 (2004).

latory measures applicable to both domestic and imported products that are enforced on imports at the point or time of importation are still covered by the rules of Article III. Under the rules of Article III, such a border restriction would be GATT-consistent if its treatment of imported goods was "no less favourable" than the treatment accorded to "like" domestic goods under the same regulation.

2. Article III and PPMs in GATT/WTO jurisprudence

a) "U.S. – Tuna I" (not adopted)

The *U.S. – Tuna I* dispute included a flagship example of a PPM-based measure.[83] The case was decided in 1991 and considered the U.S. Marine Mammal Protection Act of 1988. This Act regulated the taking of tuna by U.S. fishermen in the Eastern Tropical Pacific Ocean (ETP) as well as importation of tuna caught in the area by foreign vessels. On the basis of this Act U.S. fisherman were, firstly, required to use fishing techniques that reduced the taking of dolphins incidental to the harvesting of tuna.[84] Secondly, the U.S. imposed an import ban on tuna and tuna products harvested in the ETP by vessels of Mexico, Venezuela and Vanuatu *(primary nations embargo)* – countries that did not have commercial fishing technology that prevented the incidental killing of dolphins.[85] The embargo was also extended to "intermediary nations" that did not catch but traded Mexican tuna (intermediary nations embargo) unless these intermediary nations proved they, too, banned tuna imports from these countries that were subject to U.S. import embargo.[86]

Mexico, one of the embargoed countries, argued first of all that the U.S. import embargo violated the GATT's prohibition on quantitative trade restrictions (Article XI: 1). Furthermore, Mexico complained that this law violated Article III as the Act introduced distinctions between domestic and imported tuna based on the way they were caught.[87] On the other hand, the U.S. argued that the measure was an internal regulation applied at the border in a manner consistent with Article III: 4 and its

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83 Panel Report on *U.S. – Restrictions on Imports of Tuna*, 3 September 1991, unadopted, BISD 395/155 [hereinafter *U.S. – Tuna I*]. See: *Thaggert*, A Closer Look at the Tuna-Dolphin Case: "Like Products" and "Extrajurisdictionality" in the Trade and Environment Context, in: Cameron et al. (eds.), Trade and the Environment: The Search for Balance (1994), pp. 69-95.

84 The MMPA and its implementing regulations authorised incidental killing of dolphins up to an annual limit of 20,500 by the U.S. fleet fishing in the ETP.

85 The import ban was not applied to harvesting countries under condition that (i) the regulatory regime must include the same prohibitions as are applicable under U.S. rules to U.S. vessels, (ii) the average incidental taking rate (in terms of dolphins killed each time the purse-seine nets are set) for that country's tuna fleet must not exceed 1.25 times the average taking rate of U.S. vessels in the same period. Ibidem, paras. 2.5-2.6.

86 Panel Report on *U.S. – Tuna I*, paras. 2.10-2.11.

87 Ibidem, para. 3.16.

Note, and that in any case the measure was covered by the exceptions contained in Article XX (b) and (g).[88]

The panel examining the language of Article III and the Note Ad to Article III found that they cover only those measures that are applied to the product as such, underlining the word "product" in the text but without elaborating any deepened analysis on its findings. In exemplifying the limitation of Article III to measures "affecting products as such" the panel cited the "border tax adjustment" practice that applied only to products.[89] Taking this into consideration the panel concluded that the U.S. measure neither constituted an internal regulation covered by the Note Ad Article III because the regulations "would not directly regulate the sale of tuna and could not possibly affect tuna as a product."[90] – nor a measure covered by Article III: 4 (contrary to the U.S. argument). According to panel, "Article III: 4 obliges the U.S. to accord treatment to Mexican tuna no less favourable than that accorded to U.S. tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of U.S. vessels."[91] In addition to that, the panel warned that if the regulatory distinction based on PPM *in casu* had been applied then "each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."[92] Eventually, the panel decided that the U.S. measure was an import ban covered by Article XI: 1, and therefore was an automatic violation of this provision.[93] It proceeded to consider whether the US embargo could be justified under Article XX (b) or XX (g).

Nevertheless, the *U.S. – Tuna I* report was never put forward for adoption by the GATT Council in spite of support from all GATT governments who expressed an opinion in the GATT Council meetings reviewing the decision, with the exception of the U.S.[94] This was related to Mexico's concerns on the pending U.S. approval of the NAFTA Agreement.

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88 Panel Report on *U.S. – Tuna I*, paras. 3.1 and 3.6.

89 Ibidem, paras. 5.12-5.13. Border tax adjustment is a widely used practice under which the governments refund certain taxes (e.g. sales taxes and excise taxes) when they export domestic goods, and then apply these national taxes to imports when the imported products enter the national market. These practice is levied on the product rather that on the producer. *Hudec*, The Product-Process Doctrine in GATT/WTO Jurisprudence, in: Bronckers/Quick (ed.), New Directions in International Economic Law: Essays in Honour of John H. Jackson, The Hague [etc.]: Kluwer Law International, 2000 [hereinafter *Hudec* (2000a)] p. 195.

90 Ibidem, para. 5.14.

91 Ibidem, para. 5.15.

92 Panel Report on *U.S. – Tuna I*, para. 5.32 (emphasis added).

93 Ibidem, paras. 5.17-5.19.

94 See GATT Documents C/M/254, -255, -257, -258 (minutes of GATT Council meetings on February 18, March 18, June 19 and July 14, 1992), cited after *Hudec* (2000a), (fn. 89), p. 200.

b) "U.S. – Alcoholic Beverages"

In the next case, the *U.S. – Alcoholic Beverages* dispute,[95] a few months later Canada complained about different state and federal taxes and regulations affecting beer and wine imports. One of these measures was an excise tax credit in the State of Minnesota for microbreweries,[96] regardless of whether they were domestic or foreign.[97] The U.S. claimed that the tax credit, in any event, would have still complied with Article III: 2, as it was available to domestic and Canadian microbreweries alike.[98] Canada argued that the tax credit discriminated against its large breweries and therefore violated Article III: 2.[99]

Although it was clearly a PPM-based measure differentiating burdens according to a producer characteristics (the annual volume of the production),[100] the panel mentioned in its report neither PPMs nor the *U.S. – Tuna I* ruling. When assessing the compatibility with Article III: 2, the Panel did not consider as relevant the fact that the tax credit could have been available to Canadian microbreweries, but found that though produced by a different method beer from micro-breweries is a like product to beer from large breweries, and it came to the conclusion that a tax that distinguishes between two like products thus violates Article III: 2.[101] The U.S. did not raise an Article XX in relation to this tax measure. *Hudec* notices, that the *U.S. – Alcoholic Beverages* is the only adopted GATT panel decision supporting legal considerations based on PPM in Article III.[102]

c) "U.S. – Tuna II" (not adopted)

After less than one year after the first *U.S. – Tuna* report, the EC and the Netherlands, on behalf of the Netherlands Antilles, brought to a GATT panel a second complaint on the U.S. Tuna/Dolphin legislation.[103] The facts and complaints

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95 *U.S. – Measures Affecting Alcoholic and Malt Beverages* [hereinafter *U.S. – Alcoholic Beverages*]. March 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 (1992).

96 Small breweries were defined as producing less than 100,000 barrels/year, table at p. 5 of the Report.

97 Panel Report on *U.S. – Alcoholic Beverages*, para. 5.19.

98 Ibidem, respectively para. 3.21 and para. 3.35.

99 Ibidem, paras. 3.22, 3.36 and 3.16.

100 This tax credit is an example of a producer characteristics PPM. *Charnovitz*, (fn. 3), p. 87.

101 Ibidem, para. 5.19.

102 *Hudec* (2000a), (fn. 89), p. 207.

103 Panel Report on *U.S. – Restrictions on Imports of Tuna* June 16, 1994, 33 I.L.M. 839 at (1994) (not adopted) [hereinafter *U.S. – Tuna II*].

in the two *U.S. – Tuna* cases were essentially the same, although the second case focused more on the intermediary nations embargo.[104]

The EC and the Netherlands, drawing the conclusions from the panel ruling in the first *U.S. – Tuna*, claimed that the measures taken by the U.S. under the intermediary nation embargo were a quantitative restriction of tuna and tuna products violating Article XI: 1 GATT.[105] They further maintained that these measures could not be treated as the enforcement at the time or point of importation of a regulation applied equally to the imported product and the like domestic product, covered by the Note Ad Article III because, firstly, there was simply no equivalent domestic regulation restricting the sale of domestic tuna on domestic market.[106] Secondly, repeating the argument of the *U.S. – Tuna I* ruling, "in any case the Note Ad Article III covered only those measures which were applied to the product as such". They claimed the measures *in casu* applied to the domestic fishing methods but did not apply directly to domestic tuna and tuna products as such.[107] The U.S. did not assert the defence of the tuna embargo on the basis of the Note Ad Article III but instead concentrated on Article XX GATT.

The panel's findings in relation to Article III was similar to that of the first *U.S. – Tuna*. It repeated that "Article III calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation." Therefore the Note Ad Article III did not apply to laws "related to policies or practices that could not affect the product as such."[108] The Panel therefore considered that the U.S. measure should be assessed under Article XI: 1, which was clearly violated by an embargo. This ruling was not adopted as well due to the opposition of the U.S.

d) "U.S. – Automobile Taxes" (not adopted)

The *U.S. – Automobile Taxes* case was the last pre-WTO decision, and was not adopted either.[109] The EC lodged the case due to a series of taxes disfavouring large imported cars. One of the EC' complaints concerned the U.S. Corporate Average

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104 Under the intermediary embargo provisions, the U.S. government was banning tuna imports from countries that had not stopped buying tuna from countries subject to the U.S. primary embargo. Panel Report on *U.S. – Tuna II*, para. 2.15.

105 Ibidem, para. 3.3.

106 Ibidem, para 3.4.

107 Ibidem, para. 3.5.

108 Ibidem, para. 5.8.

109 Panel Report on *U.S. – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted [hereinafter *U.S. – Automobile Taxes*].

Fuel Economy (CAFE) regulation. This regulation established a fuel consumption standard measured by the average fuel economy of all vehicles manufactured by a manufacturer in the U.S. If this standard was exceeded, such U.S. manufacturers or importers of foreign cars had to pay penalty taxes at the end of the year.[110] This was a producer characteristics standard.[111]

Since the contested measure was applied long after the importation and the sale of the car it was considered directly under Article III. The EC argued that the CAFE regulation violated Article III: 4 because it was based on a fleet averaging method that favoured domestically produced cars.[112] The EC considered that the measure was *de facto* discriminatory because U.S. manufacturers could offset the high fuel consumption of their luxury cars with their more fuel-efficient small cars and therefore never incurred in the fines. At the same time, EC exports to the U.S. were almost completely specialized in luxury cars, therefore importers of EC cars – unable to lower their average with smaller cars – regularly had to pay fines.[113]

On the face, these penalty taxes had a strong connection to the product characteristics but the panel held that the CAFE was a PPM-based regulation. The panel noted that "the difference in treatment under the averaging methodology depended on several factors not directly relating to the product as a product, including the relationship of ownership and control of the manufacturer/importer" and "decided to examine fleet averaging first in the light of this distinction."[114] The panel considered whether the CAFE regulation violated Article III: 4. Addressing the broad range of measures covered by Article III the panel held: "these activities relate to the product as a product, from its introduction into the market to its final consumption. They do not relate directly to the producer."[115] Besides, as in the previous cases, the panel in this ruling mentioned as well the existing practice of the border tax adjustments and stated that "Article III: 4 does not permit treatment of an imported product less favourable than that accorded to a like domestic product, *based on factors not directly relating to the product as such*."[116] Thus, fleet averaging violated Article III because this method was "based on the ownership or control relationship of the car manufacturer" and "did not relate to cars as products". Thus,

110 Ibidem, paras. 2.14-2.24.

111 *Charnovitz*, (fn. 3), p. 88.

112 Panel Report on *U.S. – Automobile Taxes*, paras. 3.266. and 3.272. In fleet averaging, the U.S. government sets fuel economy standards based on the average achieved by a foreign manufacturer for all its autos shipped to the U.S. Ibidem, paras. 2.14-2.15.

113 The EC arguments can be found at paras. 3.268-3.269.

114 Ibidem, para. 5.50.

115 Ibidem, para. 5.52.

116 Ibidem, para. 5.54 (emphasis added).

this requirement could result in treatment less favourable than that accorded to like domestic products.[117]

The panel tried also to move the product-process distinction a bit further and gave an explanation of the policy dimension of the PPM-based measures, namely the need to protect the security of tariff bindings and assuring the unconditionality of the MFN clause: "Contracting parties could not be expected to negotiate tariff commitments if these could be frustrated through the application of measures affecting imported products subject to tariff commitments and triggered by factors unrelated to the products as such."[118]

The U.S. did not manage to prove that this violation qualified for GATT's Article XX (g) or Article XX (d) so that the Panel held that the CAFE regulation is inconsistent with Article III: 4.[119] This panel ruling delivered a clearer statement on PPM-based measures as well as "the most extended policy justification for it to date".[120]

e) "U.S. – Gasoline"

U.S. – Gasoline case[121], the first one in the WTO Dispute Settlement Mechanism, concerned the Clean Air Act of 1990,[122] a law designed to prevent and control air pollution in the U.S. The legislation required domestic refiners to respect the individual refinery baseline – a certain level of gasoline cleanliness which depended on the cleanliness level of the gasoline produced by that refiner in the year 1990. On the other hand, all foreign gasoline producers were required to meet the statutory baseline – a standard requiring the gasoline to meet the average quality of all gasoline sold in the U.S. in 1990.[123] Venezuela and Brazil, the complainant countries that produced gasoline with the quality below the statutory baseline, argued that requiring importers of foreign gasoline to respect the statutory baseline while allowing U.S. refiners to produce according to the more lenient individual baseline amounted to a less favourable treatment and a violation of Article III: 4 GATT.[124]

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117 Panel Report on *U.S. – Automobile Taxes*, para. 5.55.

118 Ibidem, para. 5.53.

119 Ibidem, para. 6.1(c).

120 *Hudec* (2000a), (fn. 89), pp. 204-206.

121 Panel Report on *U.S. – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996), (as modified by the Appellate Body Report) [hereinafter *U.S. – Gasoline*].

122 Specifically it concerned *Regulation of Fuels and Fuel Additives-Standards for Reformulated and Conventional Gasoline*, and is commonly referred to as the Gasoline Rule, AB Report on *U.S. – Gasoline*, p. 2.

123 Panel Report on *U.S. – Gasoline*, paras. 2.1-2.12.

124 Ibidem, para. 3.12.

Noteworthy, the U.S. claimed that the regulation in question was applicable to both domestic and foreign suppliers as it denied the option of using individual baselines to any supplier who could not supply adequate data to calculate the cleanliness of the gasoline produced or sold in 1990.[125] That means that the U.S. used a regulatory distinction based on the quality of the producers' record keeping – a producer characteristics that had nothing to do with the characteristics of the gasoline it was now producing.[126] In this way the dispute was related to a producer characteristics PPM regulation for gasoline composition.

The panel rejected the argument of the U.S. and, citing the findings in *U.S. – Alcoholic Beverages*, held that Article III: 4 "does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it."[127] Generally, the panel suggested that the 'likeness test' in Article III: 4 needs to be done "on the objective basis of their likeness as products" and not according to "extraneous factors", like those in the *U.S. – Gasoline* dispute, that would result in a highly subjective and variable treatment of imported goods. "This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III." [128] The panel issued a broad decision and found that the measure was inconsistent with Article III: 4 as imported and domestic gasoline were like products and that allowing domestic refineries to use the individual baseline while imposing the statutory baseline to importers amounted to less favourable treatment.[129] The panel held also that the regulation was neither justified under Article XX (b) nor XX (g) GATT. Article III: 4 holding was not appealed on the contrary to panel's findings under Article XX.

f) "Canada – Periodicals"

The *Canada – Periodicals* dispute concerned an 80 percent tax on advertising revenues imposed on "split run" editions of magazines,[130] that means a Canadian regional edition of a foreign magazine with advertisements targeted on the Canadian market

125 Panel Report on *U.S. – Gasoline*, para. 3.19.

126 *Hudec* (2000a), (fn. 89), p. 209.

127 Panel Report on *U.S. – Gasoline* , para. 6.11.

128 Ibidem, para. 6.12.

129 Ibidem, paras. 6.9-6.10. *Hudec* turns attention to the fact that the GATT legality of the individual baseline method, based on non-product-related criteria, was never challenged. *Hudec* suggests it does not mean that panel allows a PPM-based measure but only that it is a "less GATT-inconsistent" option available to the U.S., *Hudec* (2000a), (fn. 89), pp. 210-211.

130 Panel Report on *Canada – Certain Measures Concerning Periodicals* WT/DS31/R, adopted 30 July 1997 as modified by the Appellate Body Report, WT/DS31/AB/R [hereinafter *Canada – Periodicals*].

(with at least 20 percent of its content of a foreign edition, and at least one advertisement that did not appear in the foreign edition). This tax was accompanied by an import ban of foreign magazines containing advertisements targeted to the Canadian market.[131] The U.S. claimed that the excise tax was based on a distinction depending on the behaviour of the producer instead of the product's characteristics: the same identical magazine could be considered Canadian or split-run depending on whether the producer was selling a similar edition in another market.[132] Furthermore, the U.S. argued that such a distinction based on exogenous factors should be "inherently suspect",[133] "has obvious protectionist implications and is not one that GATT should countenance for distinguishing between two otherwise-like products".[134] On the other hand, according to Canada, all editions of split run periodicals were published in Canada, and were not imported. Therefore Article III was not applicable.[135] Moreover, the distinction between split-run and non-split-run periodicals was based on the editorial content of the magazine, clearly a product-characteristic[136] and split-run editions of U.S. magazines and periodicals with original content were not "like products".[137] Canada claimed that even if split-run editions and non-split-run editions were like products, identical treatment was afforded to domestic and imported products.[138]

The panel followed the argumentation of the U.S. and held that "the definition of 'split-run' essentially relies on factors external to the Canadian market – whether the same editorial content is included in a foreign edition and whether the periodical carries different advertisements in foreign editions".[139] However, the panel, focussing on one example of a periodical, ruled that that "imported 'split-run' periodicals and domestic non-'split-run' periodicals can be like products within the meaning of Article III: 2 of GATT 1994"[140] without addressing the GATT-compatibility of product-process distinction. The Panel concluded that imported split-run periodicals were taxed in excess in comparison to domestic non-split-run periodicals, which was contrary to Article III: 2 first sentence.[141]

131 Panel Report on *Canada – Periodicals*, paras. 2.1-2.9.

132 Ibidem, para. 3.60.

133 Ibidem, paras. 3.64-3.65.

134 Ibidem, para. 3.80.

135 Ibidem, para. 3.57.

136 Ibidem, para. 3.66.

137 Ibidem, paras. 3.66-3.69 and 3.87-3.88.

138 Ibidem, para. 3.99.

139 Ibidem, para. 5.24.

140 Ibidem, paras. 5.25-5.26.

141 Ibidem, paras. 5.29-5.30.

These panel's findings were appealed. The Appellate Body annulled the findings of likeness under Article III: 2 first sentence and considered finally the Canadian tax' consistency with Article III: 2 second sentence.[142] Taking into account that the two products were in competition on the Canadian market and therefore being competing or substitutable products within the meaning of Article III: 2, second sentence the Appellate Body found a breach of Article III: 2, second sentence.[143] With this line of argumentation the Appellate Body avoided ruling on the criteria underlying the distinction between split-run and non-split-run editions.

3. Critics of GATT/WTO jurisprudence on Article III and PPMs

The picture emerging from the presented GATT/WTO jurisprudence is certainly not clear. The *U.S. – Tuna I* brought a lot of confusion by introducing a new doctrine to Article III, namely that it is *prima facie* illegal for governments to introduce measures on imported products based on non-product-related PPMs. *Hudec* describes this attitude as "product-process doctrine"[144]; the others use the term "product-process distinction",[145] which will be used as well further in this paper. The GATT panels seemed to follow the product-process distinction in the later cases. The WTO jurisprudence, on the other hand, has been of indecisive character in this respect.[146] Nonetheless, in most cases the panels agreed with this doctrine which means that is has found broad acceptance.

The GATT/WTO jurisprudence on the product-process distinction in Article III GATT has led to a discussion in the legal literature. Some commentators support the panel's argumentation and deliver additional rationale for product-process distinction. [147] Textually, the wording of Articles I, II, III and XI GATT only refers to

142 AB Report on *Canada – Periodicals*, p. 22.

143 Ibidem, pp. 26-32.

144 *Hudec* (2000a), (fn. 89), p. 187.

145 E.g. *Howse/Regan*, (fn. 23); *Wiers* (2002), (fn. 1).

146 *Hudec* (2000a), (fn. 89).

147 The articles that assume legal validity of the product-process distinction under GATT/WTO law: See: *Schoenbaum*, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, 91 American Journal of International Law 268 (1997); *Zedalis*, Product v. Non-Product Distinctions in GATT Article III Trade and Environment Jurisprudence: Recent Developments, 6 European Environmental Law Review 108-112 (1997); *Wold*, Multilateral Environmental Agreements and the GATT, Conflict and Resolution, 26 Environmental Law 841 (1996); *Cheyne*, Environmental Uniteralism and the WTO/GATT System, 24 Georgia Journal of International and Comparative Law 433 (1995); *Murase*, Perspectives from International Economic Law on Transnational Environmental Issues, 253 Recueil des Cours 283 (1995); *Schlagenhof*, (fn. 39); *Reiterer*, The International Legal Aspects of Process and Production Methods, 17 World Competition 111 (1994); *Jackson*, Comments on Shrimp/Turtle and the Product/Process Distinction, 11(2) EJIL 304 (2000)

"products" as noted by the panels. Annex 1A covers rules applicable to trade in goods.[148] Nevertheless, it appears that the reasons for the rejection of their legality in the GATT law have more to do with policy concerns than with strict legal arguments. One cited argument relates to the bargaining attitude of governments. In the bargain for access to foreign markets the governments assume that if their product meets all the requirements of the importing country (internal taxes and regulatory conditions that apply to domestic products themselves) the product will be admitted to the market. The governments do not expect that they will have to fulfil other criteria related to the characteristics of the producer or the production methods. PPM-based measures are opposed because of their "unilateral" and "extraterritorial" character. The governments can perceive PPM-based measures as an improper intrusion in the regulation of their internal affairs, especially in the case of social standards.[149] In this way the comparative advantages of one country could be diminished by the other one – this is the main argument in the hand of developing countries.[150] Moreover, *Jackson* stresses that if a nation was allowed to use the process characteristics as the basis for trade restrictive measures, then the result would be to open a Pandora's box of problems that could open large loopholes in the GATT. According to him, the governments may then use the term PPM to inhibit and depress international trade and the WTO would face a slippery slope problem.[151]

On the other hand, the opponents of the product-process distinction challenge the legal basis of this distinction under Article III and bring forward different arguments in favour of the consistency of origin-neutral PPM-based measures with Article III.[152] They argue that PPM-based measures in the GATT/WTO cases (e.g. *U.S. – Tuna* I and II, *U.S. – Shrimp* or *U.S. – Gasoline*) were discriminating on the basis of origin and therefore violated Article III GATT.[153]

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148 *Marceau/Trachtman*, TBT, SPS, and GATT: A Map of the WTO Law of Domestic Regulation, 36 JWT 5 (2002), p. 857; *Jackson*, (fn. 141), p. 303-304.

149 *Hudec* (2000a), (fn. 89), p. 192.

150 Ibidem.

151 *Jackson*, (fn. 141).

152 Critics in the further parts of this paper. e.g.: *Howse/Regan* (fn. 23.); *Bronckers/McNelis*, Rethinking the 'Like Product' Definition in GATT 1994: Anti-Dumping and Environmental Protection, in Cottier/Mavroidis (eds.), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, Ann Arbor: The University of Michigan Press, 2000, pp. 345-385. *Charnovitz* (fn. 3); *Pauwelyn*, Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO, 15 EJIL 575(2004), pp. 585-588; *Thaggert*, (fn. 77), pp. 69-95; *Demaret/Stewardson*, Border Tax Adjustment under GATT and EC Law and General Implications for Environmental Taxes, 28 JWT, 4 (1994).

153 *Wiers* (2002), (fn. 1), p. 278.

a) Coverage of Article III

Panels in the *U.S. – Tuna* cases considering the measure at issue introduced the idea that PPM-based measures are not covered by Article III but as an import ban violated Article XI. Some legal commentators claim that panels erred in this interpretation of Article III and the Note to Article III.[154] The *U.S. – Tuna* cases implied that Article III applies only to measures directly regulating product characteristics. As a consequence of these two rulings the complaining parties in *U.S. – Shrimp*, a case with a similar factual background, simply assumed the violation of Article XI and the U.S. concentrated just on the justification under Article XX. However, the panels actually gave no convincing arguments – the repeated (in many places both of the rulings) reference to "the product" (additionally emphasised in the text) does not give any explanation of product-process distinction.[155]

Marceau and *Trachtman* argue that the GATT first of all concerns disciplines on products and thus disciplines on regulations *broadly* affecting the trade in goods.[156] Besides, the coverage of Article III: 4 is determined by the fact whether "an internal law, regulation or requirement affects the internal sale, offering for sale, etc. of products". Giving terms their ordinary meaning the question is whether process and production methods affect the sale of products. *Howse* and *Regan* underline that the answer is clear as the whole complaint about the U.S. regime in *U.S. – Tuna I* showed that it affects the sale of products by reducing the sale of tuna fish.[157] Thus, it seems convincible that measures applied to producers, wholesalers, distributors and importers can also "affect the sale, offering for sale", etc. of products.[158] Moreover, *Howse* and *Regan* point out that the jurisprudence gives a broad reading of "affecting the […] sale" and, more specifically, of the applicability of Article III to process-based measures.[159] The authors cite a number of cases to support their position.[160]

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154 See *Hudec* (2000a), (fn. 89), p. 189; *Howse/Regan*, (fn. 23); *Wiers* (2002), (fn. 1).

155 *Howse/Regan*, (fn. 23), p. 254.

156 *Marceau/Trachtman*, (fn. 145), p. 858. They present generally the arguments pro and contra coverage of PPM-based measures in GATT/WTO law.

157 *Howse/Regan*, (fn. 23), p. 254; Wiers (2001), p. 104; *Hudec* (2000a), (fn. 89), p. 194.

158 *Marceau/Trachtman*, (fn. 145), p. 835. This approach is explicitly present in the area of intellectual property rights where a right holder in the importing country can challenge any infringements of his rights that have taken place in the exporting country, see Article 27 of the TRIPS Agreement. *Wiers* (2002), (fn. 1), p. 278.

159 *Howse/Regan*, (fn. 23), p. 255. Also *Hudec* (2000a), (fn. 89), p. 198.

160 GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958, BISD 7S/60, GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act (FIRA)*, L/5504, adopted 7 February 1984, BISD 30S/140, GATT Panel Report, *U.S. Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345, GATT Panel Report, *U.S. – Measures Affecting Alcoholic and Malt Beverages*, DS23/R,

The *U.S. – Tuna* disputes caused a lot of confusion in particular on the relationship between Note Ad. Article III and Article XI GATT and PPM-based measures. Both Panels said that Note Ad. Article III does not cover or permit such measures as they do not apply to "the product as such" without developing further the concept of product-process distinctions and they assessed the measures under Art. XI.[161] The panel in *U.S. – Tuna I* interpreting Note Ad Article III mentioned vaguely that the regulation of domestic tuna harvesting "could not be regarded as being applied to tuna products as such" for the reason it "would not directly regulate the sale of tuna".[162]

The panel in *U.S. – Tuna I* further argued that the Note Ad. Article III covers only measures applied to imports and domestic products that are of the same nature.[163] However, as *Wiers* notices, a somewhat wider view on the coverage of the Note Ad Article III was presented by the WTO panel in *EC – Asbestos*.[164] The national law in this case did not involve an import restriction based on a PPM, but rather a general prohibition to manufacture, import, sell, or market asbestos fibres. The panel noticed that "the fact that France no longer produces asbestos or asbestos-containing products does not suffice to make […] a measure falling under Article XI: 1." The measure *in casu* was covered by the Note Ad to Article III, as that the cessation of French production of asbestos or asbestos-containing products was the consequence of the regulation *in casu* and not the reverse.[165] The panel emphasised that it is not necessary that "an *identical* measure must be applied to the domestic product and the like imported product if the measure applicable to the imported product is to fall under Article III."[166] It is important that "the regulations applicable to domestic products and foreign products lead to the same result […]".[167] This finding may add new aspects to the examination of the legality of the PPM-based measure.

Furthermore, from a strictly logical point of view it is difficult not to accept *Howse's* and *Regan's* argument that if according to product-process distinction, all PPM-

adopted 19 June 1992, BISD 39S/206, GATT Panel Report, *U.S. – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted.

161 Panel Report on *U.S. – Tuna I*, para. 5.14; *U.S. – Tuna II*, paras. 5.8.-5.9.

162 Panel Report on *U.S. – Tuna I*, para. 5.14. *Hudec* notices in this wording that the panel just rubbed against the simple reading of Note Ad Article III that would give a simple conclusion without introducing tangled product-process distinction, namely that a U.S. regulation is not covered by Note Ad Article III because the domestic side of the tuna regulation does not regulate the sale of domestic tuna. *Hudec* (2000a), (fn. 89), pp. 195-197.

163 Panel Report on *U.S. – Tuna I*, para. 5.10.

164 *Wiers* (2001), p. 104. Notice that this part of panel report in *EC – Asbestos* were not appealed.

165 Panel Report on *EC – Asbestos*, para. 8.91.

166 Ibidem, para. 8.93 (emphasis added).

167 Ibidem, para. 8.92. These panel' findings were not appealed.

based measures *prima facie* are not covered by Article III, it could have "totally unacceptable consequences". An internally enforced PPM-based measure, if it is not considered to be a quantitative restriction or a border measure (also not coming under Article XI), would entirely escape judicial review.[168]

b) "Likeness" and Article III

The concept of "likeness" is very important for the understanding of the PPMs issue because the GATT restricts the right to discriminate between and among foreign and domestic like products and the GATT/WTO jurisprudence has generally relied upon the examination of a product itself in determining whether two products are "like".[169] *Hudec* argues that the most logical conceptual basis for a product-process distinction should be the concept of "likeness" in the "like product" test of Article III.[170] But neither in *U.S. – Tuna I* or *II* nor in *U.S. – Shrimp* a PPM-based measure was assessed in the "likeness" test of Article III: 4. In the *EC – Biotech Products*[171] dispute the panel also did not address the issue of likeness of biotech and non-biotech products for reason of judicial economy having already found a violation of SPS Agreement Annex C(1)(a), first clause.[172] On the other hand, the following products were found to be like: under Article III: 2 beer from microbreweries and beer from not-microbreweries, split-run and non-split run edition of magazines, under Article III: 4 domestic and foreign gasoline.

The question remains how to determine whether two products differentiated on the bases of their PPMs are like. In the literature different approaches towards the "likeness" test of products distinguished on the basis of their PPMs are proposed. The first one is the "market-based approach"[173] derived from the Appellate Body Report in *Japan – Alcoholic Beverages I* and confirmed in *EC – Asbestos*[174] where the

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168 *Howse/Regan*, (fn. 23), p. 256.

169 *Appleton*, Environmental Labelling Schemes Revisited: WTO Law and Developing Country Implications in Sampson/Whalley (ed.), The WTO and Environment. Critical Perspectives on the Global Trading System and the WTO, Edward Elgar Publishing Limited, 2005, p. 551.

170 *Hudec* (2000a), (fn. 89), p. 198.

171 Panel Report on *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293, adopted November 21 2006 [hereinafter *EC – Biotech Products*].

172 Panel Report on *EC – Biotech Products*, para. 7.2516.

173 See: *Bronckers/McNelis*, (fn. 141), pp. 345-385. See also commentaries: *Wiers* (2001), (fn. 1), p. 105; *Quick/Lau* (fn. 76).

174 AB Report on *EC – Asbestos*, para. 99. Appellate Body stated that a determination of "likeness" under Article III: 4 is, "fundamentally, a determination about the nature and extent of a competitive relationship between and among products."

Appellate Body applied a concept of "likeness" in the "market" based on the consumer perception rather than the perspective of the regulating government.[175]

While determining the likeness, panels and Appellate Body rely upon the criteria derived from the Report of the Working Party on Tax Border Adjustment: physical characteristics, end-users, consumer tastes and habits and tariff classification. The Appellate Body makes it clear that by making an overall determination of whether the products at issue could be characterized as "like" the evidence relating to each of those four criteria should be examined and then weighed all of that evidence along with any other relevant evidence.[176] In the case of products distinguished on the basis of product-related PPMs even the slightest differences in physical characteristics would justify such a distinction.[177] And what about two physically identical products distinguished on the basis of non-product-related PPM?

The Appellate Body suggested in *EC – Asbestos* that products that have "pronounced physical differences" may be found to be "like" under Article III: 4 when there is a competitive relationship between the products such that all other criteria including end-users and consumer tastes and habits provide evidence of likeness.[178] In the literature the question was raised whether the reverse statement may also be true, namely whether those products which are physically identical could be nonetheless "unlike".[179] Theoretically it cannot be excluded. Taking into account the above cited criteria they will be physically identical, end-users seem to consider them to be the same, tariff classification would be blind on two physically identical products. Therefore it seems that a determination of non-likeness might only be made on the basis of the criterion "consumer tastes and habits".[180] The Appellate Body's reasoning in *EC – Asbestos* strongly suggests that products may be considered "like" or "unlike" based on consumer tastes and habits that may be decisive for PPM-based measures.[181] In such a case it will be generally difficult to prove that the PPM-based product and the non-PPM-based product are "unlike".[182] Con-

175 *Wiers* (2002), (fn. 1), p. 283.

176 AB Report on *EC – Asbestos*, para. 109.

177 *Marceau* and *Trachtman* notice that the Appellate Body in *EC – Asbestos* (para. 121) arguably gave a heavier weight to physical characterisation. *Marceau/Trachtman*, (fn. 145), p. 659.

178 AB Report on *EC – Asbestos*, para. 121.

179 *Wiers* (2002), pp. 283-284; *Marceau/Trachtman*, (fn. 145), p. 659. *Howse/Regan*, (fn. 23), give a very good example that can help to understand the problem. They consider two pairs of products – one is *vodka* and *shochu* that were held to be like product in *Japan – Taxes on Alcoholic Beverages* mainly on the basis of their physical similarity. The second pair of products are two chemicals, which are physically very similar as they may e.g. differ only with one atom but one is harmless and the other is dangerous e.g. explosive or hideous neurotoxin. They will without doubts be found unlike.

180 *Quick/Lau*, (fn. 76), pp. 431-433.

181 AB Report on *EC – Asbestos*, paras. 117-124.

182 *Marceau/Trachtman*, (fn. 145), pp. 659- 660; *Quick/Lau*, (fn. 76), pp. 432-433.

sumers could differentiate between two physically identical products if they dispose of enough additional information about products, such as their PPM. A number of legal commentators draw attention to the fact that the governments may want to steer the consumers' choices imposing a requirement to provide such information *per* mandatory labelling or certification.[183] That means that consumers may not be autonomous in their choices due to the governments' regulatory perspective. *Quick* and *Lau* notice that relying exclusively on the criterion of consumer tastes and habits "poses the risk of abuse for protectionist purposes" of governments. Further, they indicate that this criterion can only be used in these rare cases where the consumer preferences developed without the interference of the government.[184] However, it should be noticed that nowadays the consumers are more and more aware of PPMs, for example with regard to genetically modified food or the purchases in „fair trade shops" in the EC.[185] Besides, in the *EC – Asbestos* case the Appellate Body emphasized that the principle of avoiding protectionism stated in Article III: 1 should be taken into account when determining "likeness."[186] Therefore the panels in evaluating consumer preferences, should be attentive to the possibility of protectionist manipulation or abuse.[187]

The second approach toward "likeness" test has been developed by *Howse* and *Regan*. Their concept considers the problem of likeness in with regard to origin-neutral process measures from a point of view which is slightly different. It can be assumed that the focus emphasising exclusively on the competitive relationship between the products is problematic because it does not take into account the fact that the regulation may have been adopted only for the reason that consumers cannot find the difference between products.[188] *Howse* and *Regan* define, therefore, "like" as approximately "not differing in any respect relevant to an actual non-pro-

183 *Wiers* (2002), (fn. 1), p. 284.

184 They cite *Davey/Pauwelyn*, MFN unconditionality: a Legal Analysis of the Concept in View of is evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Products", in: *Cottier/Mavroidis* (eds.), Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, Ann Arbor: The University of Michigan Press, 2000, pp. 13-50; *Bronckers/McNelis* (fn. 142) also opt for a market-based approach towards PPM-based measures. "When assessing market conditions under Article III, government regulation cannot be deemed to anticipate or guide consumer perception", p. 374.

185 For elaboration of consumer tastes and habits in the context of PPMs see: *Kysar*, Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice, 118 Harvard Law Review 525 (2004).

186 AB Report on *EC – Asbestos*, para. 98.

187 *Howse/Trebilcock*, (fn. 9), p. 288.

188 *Green*, Climate Change, Regulatory Policy and the WTO, How Constraining Are Trade Rules?, 8 JIEL 143 (2005), p. 158. He cited (in footnote 77) *Trebilcock/Giri* who argue that a test based on competitive relationships undercuts, or is biased against, such legitimate exercises of domestic autonomy by states (although a state can still invoke the exceptions under Article XX to justify measures that violate Article III).

tectionist policy".[189] Putting it differently, it is not the physical similarity that determines likeness of the products, but the regulatory purpose of the distinction operated by the government. If the distinction between physically similar products is justified on the basis of non-protectionist policy then these products will not fulfil the likeness test of Article III.[190] This approach is similar to the concept of "aims and effects doctrine",[191] that was, however, rejected by Appellate Body in *Japan – Alcoholic Beverages*.[192] Nontheless, the authors claim that nevertheless Article III: 1 "informs" the rest of the article that the non-protectionist policy of Article III: 1 should be "interiorised" in the definition of "like" under paragraph 2, first sentence and under paragraph 4.[193]

Regan developed this concept in his further papers trying to combine the "market based approach" with the "regulatory" one for Article III: 4 and underlinig that „products should be regarded as "like" if (a) they are in a competitive relationship, and (b) they are not distinguished by any non-protectionist policy which actually underlies the challenged regulation".[194]

Theoretically, the Appellate Body could also add further criteria to those derived from the Report of the Working Party on Tax Border Adjustment while determining whether two products are like. One possibility of this additional criterion is simply the "process and production method". However, it seems that such a solution would be too radical to be implemented and it brings a risk of protectionist abuse.

c) Less favourable treatment

Even if two products are deemed to be "like" there is no violation of Article III unless a like imported product is accorded less favourable treatment in relation to a domestic product. The Appellate Body addressing Article III: 4 in *Korea – Beef* found that "[w]hether or not imported products are treated 'less favourably' than like

189 *Howse/Regan*, p. 260.

190 Ibidem, pp. 249-289.

191 It was a treaty interpretation developed in GATT case law that aimed at examining whether the measures under Article III had a protective aim or effect. If they did not have such a protective aim or effect they could avoid a classification as like products. *Charnovitz*, (fn. 3), p. 89-90, See: *Hudec*, GATT/WTO Constrains on National Regulation: Requiem for an "Aims and Effects" Test, 32 International Law 619 (1998). *Howse/Regan*, (fn. 23) distinguish their concept from "aims and effect test" at p. 264.

192 See: AB Report on *Japan – Alcoholic Beverages II*, p. 28.

193 *Howse/Regan*, pp. 260-268. For further developed concept see: *Regan*, Regulatory Purpose and Like Products' in Article III:4 of the GATT (With Additional Remarks on Article III:2), 36 JWT 443 (2002); *Regan*, Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec, 37 JWT 737 (2003).

194 *Regan* (2002), (fn. 187), p. 447 et. seq.

domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products".[195] In *EC – Asbestos* it extended further that "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' ".[196]

Marceau and *Trachtman* notice that it is not excluded that a particular PPM-based measure does not violate Article III if the treatment of the non-PPM product was to be considered "different" but not less favourable (or protectionist).[197]

Very important for the examination of national treatment in respect of PPM-based measures is whether the comparison includes treatment of an imported product and a domestic one or whether the comparison comprises treatment received by the entire group of imported products and the entire group of domestic ones.[198] In *EC – Asbestos* the Appellate Body held that it is possible that Article III: 4 is not violated when the group of "like" imported products is not treated less favourably than the group of "like" domestic products.[199]

What difference do these two approaches make then for PPM-based measures? The difference is significant. If one compares the treatment of individual products, a PPM-based distinction would always violate Article III. Putting it simply, imported "turtle-unsafe" shrimp would always be treated less favourably than domestic "turtle-safe" shrimp.[200] In the second case, the legality of a measure would depend on the relation between these two groups of products. It is not sufficient that some domestic products bear the heavier regulatory burden. Instead, it is necessary that, as a whole and relatively, the entire groups of imports and domestic products bear the burden in an equivalent proportion.[201] E.g. "if 20 percent of imported shrimp

195 Panel Report on *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R and WT/DS169/R, adopted 10 January 2001 as modified by the Appellate Body Report WT/DS161/AB/R and WT/DS169/AB/R, para. 137 (emphasis in original).

196 AB Report on *EC – Asbestos*, para. 100.

197 *Marceau/Trachtman*, (fn. 145), p. 660.

198 See: *De Carli*, Internal Fiscal And Regulatory Distinctions Based on Process and Production Methods and GATT Article IIII Different Ways to Argue in Favour of Their Compatibility, Master Thesis, College of Europe Bruges Campus, 2005; *Wiers* (2002), (fn. 1), p. 284. *Ehring* builds a theoretical architecture towards these two approaches, respectively "diagonal test" to compare the treatment of individual products and "asymmetric impact test" comparing the groups of products. See *Ehring*, *De Facto* Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?, 36 JWT 921 (2002).

199 AB Report on *EC – Asbestos*, para. 100. *Ehring* analysis the GATT/WTO case law to conclude that the asymmetric impact test was often used. Hardly ever the panels and the Appellate Body use the "diagonal test".

200 *De Carli*, (fn. 192), p. 35.

201 *Ehring*, (fn. 192), p. 5.

is banned because turtle-unsafe and 80 percent is allowed into the country because it is turtle-safe, and 20 percent of domestic shrimp is forfeited because it is turtle-unsafe, and 80 percent can be sold freely because it is turtle-safe, the measure has an equal impact on the entire group of imported shrimps and on the entire group of domestic shrimps."[202] Article III assuring the "equality of competitive conditions"[203] is then not infringed. However, the application of this test would lead to a lot of practical problems for panels to take into account in this comparison.[204]

In the *EC – Biotech Products* dispute panel addressed the "no less favourable treatment" of Article III:4 in relation to treatment of non-biotech products and biotech products by the EC. Argentina claimed less favourable treatment of biotech products because they might be marketed in the EC, whereas the biotech products may not be marketed. According to panel, Argentina did not provide specific factual information but even if this were the case, "this would not be sufficient, in and of itself, to raise a presumption that the EC accorded less favourable treatment to the group of like imported products than to the group of like domestic products." The panel explained further that Argentina "does not assert that domestic biotech products have not been less favourably treated in the same way as imported biotech products, or that the like domestic non-biotech varieties have been more favourably treated than the like imported non-biotech varieties."[205]

To sum up, although the *EC – Asbestos* itself did not concern PPM-based measures, it could imply the possibility of making regulatory distinctions based on PPMs without violating Article III: 4.[206] It seems that, even if the regulatory purpose is not taken into account for the determination of „likeness" (against the idea of *Howse* and *Regan*), it is surely relevant to the determination of the „less favourable treatment". The reference to „so as to afford protection" already relates directly to the regulatory purpose.[207]

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202 This example is included in *De Carli*, (fn. 192), p. 35.

203 AB Report on *Japan – Alcoholic Beverages II*, p. 16.

204 *Ehring* analysing the application by panels and Appellate Body "the asymmetry test" turn attention to different problems that are with it connected and depending on the case the solution is left to the normative judgement of the panels. *Ehring*, (fn. 192), pp. 34-40.

205 Panel Report on *EC – Biotech Products*, para. 7.2509-2515.

206 *Howse/Türk*, The WTO Impact on International Regulations – a Case Study of the Canada – EC Asbestos Dispute, in: de Búrca/Scott (ed.), The EU and the WTO: Legal and Constitutional Aspects, London, Hart Publishing, 2001; *Wiers* (2002), (fn. 1), p. 284. But although *Porges* and *Trachtman* agree that the test for the "less favourable treatment" appears to permit consideration of "legitimate regulatory categories" in assessing compliance with Article III: 4 they are unsure whether different treatment based on non-protectionist goals (such as environmental objectives) is permitted under Article III. See: *Porges/Trachtman*, Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects, 37(4) JWT 783 (2003), p. 796.

207 *Regan* (2003), (fn. 187), p. 444.

V. Article XX GATT-general exceptions and PPMs

1. Article XX – general overview

Article XX GATT includes a closed list of ten exceptions to GATT disciplines. In this way it recognises that legitimate government policies may justify measures contrary to basic GATT market access rules.[208] These exceptions are limited and conditional. They must not be 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" as stated in the introductory clause ("chapeau") of Article XX.[209] The *chapeau* expresses therefore the principle of good faith. The nature and purpose of Article XX is described as a balance of rights to invoke an exception under Article XX and the duty to respect the treaty rights of the other members.[210] Therefore each measure in question should be put to assessment of a two-tired test under Article XX GATT[211]: firstly, "provisional justification" by reason of characterization of the measure under the particular exceptions – paragraphs (a) to (j) listed under Article XX. The paragraphs (a), (b), (e) and (g) of Article XX will be important for the further analysis of PPM-based measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(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;

Secondly, further appraisal of the same measure under *chapeau* of Article XX is required.

2. Article XX and PPMs in GATT/WTO jurisprudence on environmental protection

a) "U.S. – Tuna I" (not adopted)

After deciding that the U.S. measure was an import ban violating GATT law the panel in *U.S. – Tuna* proceeded to consider whether the U.S. embargo could be jus-

208 *Marceau/Trachtman*, (fn. 145), p. 825.

209 AB Report on *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products* [hereinafter *US – Shrimp*], WT/DS58/AB/R, adopted 6 November 1998, para. 157.

210 AB Report on *U.S. – Shrimp*, paras. 156 and 159.

211 AB Report on *U.S. – Gasoline*, p. 22.

tified under Article XX (b) or XX (g). With regard to Article XX (b) the panel held that this article did not cover such an "extrajurisdictional" measure to safeguard dolphins outside the U.S., otherwise: "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."[212] Moreover, the panel found that even if Article XX (b) was interpreted as to allow such extrajurisdictional protection, the U.S. would not meet the necessity test "that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with GATT, in particular through the negotiation of international cooperative arrangements."[213] Besides, the panel further held that the U.S. maximum incidental dolphin-taking rate was based on such unpredictable conditions that could not be regarded as necessary to protect the health or life of dolphins.[214]

With respect to Article XX (g) the panel held that this Article "was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption *within their jurisdiction*".[215] And therefore the exception could not apply to resources falling outside one country's jurisdiction as *in casu*. Besides, according to the panel the U.S. embargo was not primarily aimed at the conservation of dolphins, as the Mexican authorities "could not know whether, at a given point of time, their conservation policies conformed to the U.S. conservation standards".[216] In conclusion, the U.S. ban was found to be not justified under Article XX GATT.[217]

b) "U.S. – Tuna II" (not adopted)

In the *U.S. – Tuna II* dispute the U.S. concentrated on the justification of its tuna embargo on the basis of Article XX (g), (b) and (d). The panel gave a broad ruling on these Articles. In relation to Article XX (g), the panel this time observed that the text of Article XX (g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved. The panel considered that dolphins are "exhaustible natural resources" and, reversing the *U.S. – Tuna I* Panel finding,

212 Panel Report on *U.S. – Tuna I*, para. 5.27.

213 Ibidem, para. 5.28.

214 Ibidem, para. 5. 28.

215 Ibidem, para. 5.31 (emphasis added).

216 Ibidem, para. 5.33.

217 Ibidem, para. 7.1.

held that the exception could in principle be applied to measures aimed at the conservation of dolphins outside the jurisdiction of the U.S.[218] Further, the panel examined whether the U.S. measure was "related to" the conservation of an exhaustible natural resource, and concluded that these measures were not "primarily aimed at" the conservation of tuna. It noticed that the primary and intermediary embargo did not distinguish between dolphin-safe tuna and dolphin-unsafe tuna, but between the policies adopted by the country of origin. The embargoes could further fulfil the U.S. conservation objectives only under the condition that the exporting country changed its policy. On these bases, the panel observed that both embargos on tuna "were taken so as to *force other countries to change their policies* with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins"[219] and therefore endangered the basic objectives and principles of the GATT as "the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired".[220] Therefore the U.S. embargoes were not justified under Article XX (g).

With regard to Article XX (b) the panel followed the same line of argumentation. It concluded that a measure adopted in order to force a change of policy in other countries could not be considered "necessary" to protect the health and life of dolphins.[221] Since the U.S. embargo was inconsistent with Article XI: 1 the panel also rejected justification under Article XX (d) because of the explicit terms of this article.[222]

c) "U.S. – Automobile Taxes" (not adopted)

In this case the panel held that the fleet averaging method of CAFE could meet the requirements of paragraph (g) of Article XX.[223] Firstly, the policy underlying the fleet averaging method was designed to conserve a natural resource. Secondly, and more significantly, the panel found that the specific measure, the fleet averaging provision, could meet the „related to" and „in conjunction" test under Article XX(g).[224] The Panel noted that "the inconsistency of the CAFE regulation with Article III: 4 arose from the fact that the treatment of imported products was dependent on factors not directly relating to the products as products."[225] Accord-

218 Panel Report on *U.S. –Tuna II*, para. 5.20.

219 Ibidem, para. 5.24 (emphasis added).

220 Ibidem, para. 5.25.

221 Ibidem, paras. 5.36-5.39.

222 Ibidem, para. 5.41.

223 Panel Report on *U.S. – Automobile Taxes*, para. 5.49.

224 Ibidem, para. 6.55.

225 Ibidem, para. 5.65.

ing to the panel Article XX, on the contrary to Article III, does not exclude such factors.[226] The panel ruled that the PPM-based measure (producer characteristics) could be justified by Article XX. But in conclusion the panel held that the separate foreign fleet accounting, which was alternated with the fleet accounting provisions, could not be justified under Article XX(g).[227] The GATT Council did not adopt this decision.

d) "U.S. – Gasoline"

The panel in the *U.S. – Gasoline* dispute found that the discriminatory treatment in the gasoline regulation was not "necessary to protect human, animal or plant life or health" within the meaning of Article XX (b), nor "relating to" the conservation of exhaustible natural resources within the meaning of Article XX (g). This ruling was appealed. In examining whether the measure at issue was "primarily aimed at" the conservation of exhaustible natural resources, the Appellate Body considered that the baseline establishment rules, taken as a whole, were "designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the 'non-degradation' requirements."[228] On this basis, the Appellate Body found that the baseline establishment rules were "primarily aimed at" the conservation of clean air in the U.S. in terms of Article XX (g). The Appellate Body completed the panel's analysis and examined whether the measure was "made effective in conjunction with restrictions on domestic production or consumption".[229] It concluded that this clause should be read as a requirement that the measures concerned impose restrictions on both imported and domestic gasoline, that is – an "even-handedness" requirement. On this basis, the Appellate Body found that the measure fell within the terms of Article XX (g).[230]

While examining the *chapeau* of Article XX, the Appellate Body noted that, by its terms, the *chapeau* addresses the manner in which the measure at issue is "applied".[231] The Appellate Body found two omissions on the part of the U.S. First, the U.S. failed to explore adequately means of moderating the administrative problems relied on as justification by the U.S. for rejecting the use of individual baselines for foreign refiners, including e.g. cooperation with the governments of Venezuela and Brazil. Second, the U.S. failed to find ways of counting the costs for foreign refiners that would result from the imposition of statutory baselines.[232] On this basis,

226 *Charnovitz*, (fn. 3), p. 94; *Phillips*, World Trade and the Environment: The CAFE Case, 17 Michigan Journal of International Law 827 (1996).

227 Panel Report on *U.S. – Automobile Taxes*, para. 5.65.

228 AB Report on *U.S. – Gasoline*, p. 19.

229 Ibidem.

230 AB Report on *U.S. – Gasoline*, p. 19-21.

231 Ibidem, p. 21.

the Appellate Body found that the baseline establishment rules constitute "unjustifiable discrimination" and a "disguised restriction on international trade" under the Article XX *chapeau*, and therefore are not justified under Article XX.[233]

This was the first adopted GATT/WTO ruling stating that an environmental PPM-based measure could be justified by one of Article XX paragraphs.[234]

e) "U.S. – Shrimp"

This dispute concerned the U.S. regulations, pursuant to the Endangered Species Act, under which all U.S. shrimp trawlers were required to use turtle excluder devices (TEDs)[235] in specified areas where there was a significant mortality rate of sea turtles in shrimp trawls.[236] One of them, Section 609, required initiating negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of countries that were engaged in commercial fishing operations likely to harm sea turtles. In the meantime, Section 609 imposed also an embargo applied to all "shrimp or shrimp products harvested in the wild by citizens or vessels of nations which have not been certified." Section 609 foresaw an exception from the embargo when the harvesting nation has a regulatory program and an incidental take rate for sea turtles comparable to that of the U.S.[237]

India, Malaysia, Pakistan and Thailand, the complaining countries, argued that the import ban imposed by the U.S. was inconsistent with GATT Article I, XI and XIII. The U.S. did not rise the Article III defence but claimed straight that the import ban was justified under GATT Article XX (b) and Article XX (g).[238] The panel held that the import ban *in casu* could not be justified by Article XX. The U.S. measure con-

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232 AB Report on *U.S. – Gasoline*, p. 28.

233 Ibidem, p. 30.

234 *Charnovitz*, (fn. 3), pp. 94-95.

235 A TED is a trap door installed inside a trawling net that is designed to allow shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

236 Panel Report on *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS58/AB/R [hereinafter *US – Shrimp*]. See the rich literature on the case: *Neuling*, The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate, 22 Loyola of Los Angeles International and Comparative Law Review 1 (1999); *Howse*, The Turtles Panel: Another Environmental Disaster in Geneva, 32(3) JWT 73 (1998); *Mavroidis*, Trade and Environment after the Shrimp-Turtles Litigation, 34 (1) JWT 73 (2000); *Chang*, Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT, International Law Symposium, 8 Chapman Law Review 25 (2005).

237 Panel Report on *US – Shrimp*, para. 2.7.

238 Argument of the parties in the III and IV part of the Panel report.

ditioning market access on the adoption of certain conservation policies by the exporting member was considered as "unjustifiable" discrimination.[239] If allowed, the GATT/WTO system "could no longer serve as a multilateral framework for trade among members as security and predictability of trade relations under those agreements would be threatened" and "it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements."[240]

The Appellate Body upheld the panel's conclusion that the U.S. ban violates Article XX but based it on a different reasoning. The Appellate Body, taking into account international environmental agreements, concluded that turtles were "exhaustible natural resources" [241] and, noting that there was a "sufficient nexus" between the turtles and the U.S., declined to comment on the jurisdictional limitation of Article XX (g).[242] Afterwards, it examined whether the measure "relates to" the conservation of exhaustible natural resources by checking if there is "a close and genuine relationship of ends and means." It held that the means are "reasonably related" to the ends. The Appellate Body also held that the U.S. embargo was "relating to" the conservation of turtles and that it was "made effective in conjunction with domestic restriction" on the harvesting of shrimp, and that therefore the measure was provisionally justified by Article XX (g).[243] The Appellate Body while examining the measure under the Article XX *chapeau* criticised the panel approach: "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."[244] Eventually, the Appellate Body concluded that the U.S. measure was an "unjustifiable discrimination between coun-

239 Panel Report on *U.S. – Shrimp*, para. 7.34.

240 Ibidem, para. 7.45. The panel referred also to a ban on prison labour in order to show that this applies only to the products of such labour and not the exporting country's policy on prison labour. Para. 7.45, supra footnote 649.

241 The Appellate Body argued that firstly the words of Article XX(g) must be interpreted in light of "contemporary concerns" of the "community of nations" about the protection and conservation of the environment; secondly, that the Preamble to the WTO Agreement shows that the signatories to that agreement were "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy," as it explicitly acknowledges "the objective of sustainable development."; thirdly, that modern international conventions and declarations make reference to natural resources as embracing both living and non-living resources, fourthly, that two adopted GATT 1947 panel reports had found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). Ibidem, paras. 128-131.

242 AB Report on *U.S. – Shrimp*, paras. 127-133.

243 Ibidem, paras. 135-145.

244 Ibidem, para. 121.

tries where the same conditions prevail" giving following arguments. Firstly, it said that "perhaps the most conspicuous flaw in this measure's application relates to its intended and actual *coercive effect* on the specific policy decisions made by foreign governments, Members of the WTO."[245] It held that it is impermissible for a WTO member to use an embargo in order to "require" other members to adopt the same standards, without taking into consideration different conditions that may occur in the territories of those other Members.[246] Secondly, under the measure at issue, the U.S. did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs if those shrimp originated in waters of countries not certified under Section 609. The Appellate Body noted that the resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles.[247] Thirdly, the U.S. failed to engage the appellees and other Members exporting shrimp to the U.S. 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.[248] Fourthly, Section 609 was applied in a manner that unjustifiably discriminated among WTO Members where the same conditions prevail. The U.S. negotiated seriously with some, but not with other, Members that export shrimp to the U.S.[249] Moreover, according to the Appellate Body, this rigidity and inflexibility in applying U.S. legislation and the informal and casual procedure adopted by the US government in the certification process also constitutes an "arbitrary discrimination" within the meaning of the *chapeau*.[250]

In conclusion, the Appellate Body held that although the measure of the U.S. serves an environmental objective recognized as legitimate under paragraph (g) of Article XX, this measure was applied by the U.S. in a manner which constitutes an arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the *chapeau* of Article XX.[251]

The U.S., by complying with the WTO decision, revised its regulation. In 2000, Malaysia complained that the new regulation also violated the GATT.[252] The panel ruled in favour of the U.S. arguing that the U.S. made "serious good faith efforts to negotiate an agreement taking into account the situations of the other negotiating

245 AB Report on *U.S. – Shrimp*, para. 161 (emphasis added).

246 Ibidem, para. 163.

247 Ibidem, para. 165.

248 Ibidem, paras. 166-171.

249 Ibidem, paras. 172-175.

250 Ibidem, paras. 177-184.

251 Ibidem, para. 186.

252 Panel Report on *U.S. – Shrimp (Article 21.5 – Malaysia)*, paras. 2.21-2.31.

countries".[253] Besides, the panel took into account the increased flexibility in the application of the certification requirements, the redress of the inequalities in the period of adjustment and in the transfer of technology and the respect of due process in the certification procedure.[254] Malaysia appealed the panel ruling but the Appellate Body upheld the panel's findings in their entirety.[255]

3. Critics of the GATT/WTO jurisprudence on Article XX and PPMs

The product-process distinction was introduced under Article III and was based on the reference to "product" in the text of this Article. Even if a PPM-based measure was found to be a violation of Article III, this does not preclude its justification under Article XX.[256] Article XX does not refer to "product". Consequently, the assertion that the doctrine has a textual basis due to the word "product", does not apply to Article XX.

a) PPMs, "extraterritoriality" and Article XX

The issue of extraterritoriality in the context of Article XX concentrates on the question whether the "important state interests" protected by Article XX[257] are subject to "jurisdictional limitation" as specified by the Appellate Body in *U.S. – Shrimp*[258] – in other words, whether Article XX applies only to measures protecting things located within the territory of the importer, or whether it also extends to measures protecting things located within the territory of other members, or, indeed, outside of the territorial jurisdiction of any member.[259]

The text of paragraph (b) and (g) of Article XX does not include any explicit limitations as to the location of resources protected or the behaviour targeted. The object and purpose of the WTO expressed in the preamble do not mention either any kind of limitation on a state's sovereign rights to protect resources, life or health as well as any other relevant public international law.[260] The GATT/WTO case law

253 Panel Report on *U.S. – Shrimp (Article 21.5 – Malaysia)*, para. 5.73.

254 Ibidem, paras. 5.87-5.88; 5.104; 5.111; 5.120; 5.136.

255 AB Report on *U.S. – Shrimp (Article 21.5 – Malaysia)*.

256 On the relation between Article III and XX: AB Report in *EC – Asbestos* para. 115. See also *Nordrum*, Labelling a Legal Trade Route to Sustainable Fisheries? The Legality of Ecolabells for the Promotion of Sustainable Fisheries, under the Provisions of the GATT and the Agreement on Technical Barriers to Trade within the WTO, Master Thesis, University of Oslo 2005, p. 59.

257 AB Report on *U.S. – Gasoline*, p. 29.

258 AB Report on *U.S. – Shrimp*, para. 133. For a deepen analysis of the existing approaches towards extraterritoriality and Article XX see *Bartels*, (fn. 52).

259 *Bartels*, (fn. 52), p. 358.

is not conclusive in this aspect. Both the *U.S. – Tuna* cases and the *U.S. – Shrimp* dealed with measures expressly directed at extraterritorial activities, namely the killing of dolphins and turtles. In each case the U.S. presented different relations between the country and the protected animals.[261] In the *U.S. – Tuna I* case the U.S. did not argue that the dolphins protected are those appearing within the territorial waters of the U.S. but rather that "dolphins roamed the sea and were therefore common resources within the jurisdiction of no one contracting party".[262] The panel seemed to assume that the U.S. had no jurisdiction to enact the measure and held that Article XX (b) and (g) did not allow such measures located outside the jurisdiction of the party imposing the measure.[263]

In the *U.S. – Tuna II* case the panel extended the definition of "jurisdiction" from the first *U.S. – Tuna* case to allow extraterritorial measures under the condition that they did not force other countries to change their policies within their own jurisdiction. Therefore the measures *in casu* forcing other countries to change their environmental policies could neither be justified by Article XX (g) ("primarily aimed at" the conservation of natural resources) nor by Article XX (b) ("necessary").[264] Generally, the panel appears to accept that Article XX (g) can have extraterritorial reach, but only insofar as international law permits governments to exercise jurisdiction over their nationals and vessels outside their territory.[265] *Bartels* suggests that *in casu* the U.S. may not have had any jurisdictional basis for the measure, or that they had a basis for the measure but acted non-proportionately or "otherwise impermissibly infringed the rights of other States".[266] However, although the parties used the term "extrajurisdictional" and the panel identified the importance of the case for rules on legislative jurisdiction, it unfortunately did not address the term explicitly.

The question of jurisdiction was also raised in the *U.S. – Shrimp* dispute. This time the U.S. claimed that the sea turtles were a "shared global resource" and additionally that "all species of sea turtles except the flatback […] regularly spent all or part of their lives in waters subject to U.S. jurisdiction in the Atlantic and Pacific Oceans

260 *Wiers* (2001), (fn. 8), p. 108.

261 *Bartels*, (fn. 52), p. 386.

262 Panel Report on *U.S. – Tuna I* , para 3.32.

263 Ibidem, para 5.27.

264 Panel Report on *U.S. – Tuna II*, paras. 5.27, 5.38-9, respectively.

265 See ibidem, para. 5.17. The panel held that "under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory". *Bartels*, (fn. 52), p. 387 citing *Cheyne*, Environmental Unilateralism and the GATT/WTO System, 24 Georgia Journal of International and Comparative Law 453 (1995).

266 *Bartels*, (fn. 52), p. 390.

and the Caribbean Sea".[267] This was a significant change of focus.[268] The Appellate Body addressed this "territorial" element of the U.S. argumentation.[269] It expressly refused to rule on jurisdictional limitation in Article XX (g) but noted 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 U.S. for purposes of Article XX (g)."[270] *Bartels* notices that "the Appellate Body gave a strong indication that Article XX will allow a measure that can be justified under the rules of customary international law governing legislative jurisdiction."[271] This shows that PPM-based measures targeting other states are not *a priori* excluded from being covered by the exceptions in Article XX.[272]

In conclusion, in *U.S. – Shrimp* the Appellate Body recognised that the U.S. had jurisdiction to protect the migratory turtles; thus, in this context the way in which the U.S. had exercised their jurisdiction was criticised. In the *U.S. – Tuna* cases the situation was different. *Bartels* held that in these cases there was no jurisdictional basis for the measure and this led both panels to determine that these U.S. measures were coercive, and therefore not justifiable under Article XX.[273]

b) Necessity test and Article XX

Article XX requires that a relationship between the measure and the protection or conservation goal is established as required by the words "relating to" and "made in conjunction with" in paragraph (g) and "necessary" in paragraph (b). The cited GATT/WTO jurisprudence shows that it is generally more difficult for PPM-based measures to demonstrate its necessity than in the case of any other measures.[274]

With relation to Article XX (g) the Appellate Body in *U.S. – Gasoline* introduced the "means-ends test". It tries to answer the question whether the means (namely the challenged regulation) are, in principle, reasonably related to the ends.[275] This approach was also used in *U.S. – Shrimp* and showed that a PPM-based measure can meet the means-ends test.[276] It may be assumed that this test may also be used to paragraph (b).[277]

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267 Panel Report on *U.S. – Shrimp*, para. 3.36.

268 *Bartels*, (fn. 52), p. 388.

269 AB Report in *U.S. – Shrimp*, para. 133.

270 Ibidem, para. 133, emphasis added.

271 *Bartels*, (fn. 52), p. 388. See also AB Report on *U.S. – Shrimp*, paras. 121, 161.

272 *Wiers* (2002), (fn. 1), pp. 292-293.

273 *Bartels*, (fn. 52), p. 389.

274 *Wiers* (2001), (fn. 8), p. 108.

275 AB Report on *U.S. – Gasoline*, pp. 20-22.

276 AB Report on *U.S. – Shrimp*, para. 141.

Although not involving PPM-based measures the Appellate Body Reports have thrown a new light on the necessity test in case of PPM-based measures in *Korea – Various Measures on Beef* and *EC – Asbestos*. The Appellate Body interpreted the necessity test of Article XX (d) in *Korea – Various Measures on Beef*[278] and called for a balance between at least of three variables: "contribution made by the compliance measure to the enforcement of law or regulation at issue, the importance of the common interests or value protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports".[279] Additionally, it held: "the more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument".[280] The Appellate Body in *EC – Asbestos*, examining Article XX (b), tried to reconcile its new balancing test with the "least trade restrictive reasonably available test". Taking into account that the protection of life is vital and important to the highest degree, the Appellate Body concluded that "the remaining question is whether there is an alternative measure that would achieve the same end and that is less restrictive than a prohibition".[281] Therefore it seems that the multilateral instruments will be probably taken into consideration in order to assess the importance of the objective hidden against the PPM-based measure.

c) "Chapeau" of Article XX[282]

As expressed by the Appellate Body in *U.S. – Gasoline* the purpose and object of the *chapeau* of Article XX is generally the prevention of "abuse of exceptions in Article XX".[283] Therefore it seems that the *chapeau* of Article XX fulfils a role of a tough gatekeeper, also against the discriminatory use of PPM-based measures. According to the Appellate Body in *U.S. – Shrimp*, the *chapeau* of Article XX is the recognition of a need to maintain a balance between the right of a Member to invoke one of these exceptions laid down in Article XX specified in paragraphs (a) to (j) and the substantive rights of other Members under the GATT rules.[284] *Wiers* rightly notices that if the *chapeau* is really to reflect this balance of rights and obligations, the "sub-

277 *Marceau/Trachtman* (fn. 145).

278 AB Report on *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001.

279 Ibidem, para. 164.

280 Ibidem, para. 162.

281 AB Report on *EC – Asbestos*, para. 172.

282 For a deepen analysis of chapeau of Article XX see: *Gaines*, The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22(4) University of Pennsylvania JIEL 739 (2001).

283 AB Report on *U.S. – Gasoline*, p. 20.

284 AB Report on *U.S. – Shrimp*, para. 156.

stantive rights" e.g. tariff bindings or expectations of market access should not be given preference over the right to invoke an exemption basing on environmental policy's aims. Noteworthy with regard to the interpretation of the *chapeau* is the emphasis on the objective of sustainable development in the preamble of the WTO Agreement given by the Appellate Body when it began with its analysis.[285] Keeping this in mind the presumption against the PPM-based measures is not well-founded.[286] Moreover, the Appellate Body also added that "[t]he location of the line of equilibrium [between rights], as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and shape of the measures at stake vary and as the facts making up specific cases differ".[287] Therefore justification of a PPM-based measure should be examined on a case-by-case basis. This balancing of rights will differ depending on the policy purpose and the design of the measure.[288]

As far as the substantial standards established in the *chapeau* are concerned "they may be read side-by-side; they impart meaning to one another." The broadest range has "a disguised restriction" that covers "restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX."[289] The Appellate Body in *U.S. – Gasoline* pointed out three elements that have to exist for a measure to constitute an "arbitrary or unjustifiable discrimination." First, the application of the measure must result in a discrimination. Second, the discrimination must be arbitrary or unjustifiable in character. Third, this discrimination must occur between countries where the same conditions prevail.[290] From this wording of the *chapeau* follows that a "provisionally justifiable" PPM-based measure may discriminate between foreign and domestic products generally under condition when it is viewed as necessary, or otherwise appropriately or proportionally related to the implementation of the policies listed in Article XX.[291] The question is when e.g. environmental policy aims can be sufficient to justify a PPM-based measure. The Appellate Body in *U.S. – Shrimp* even after finding a U.S. measure "provisionally justifiable" seemed to perform therefore also some kind of necessity test under the *chapeau* of Article XX.[292] It examined namely whether less trade restrictive alternatives were reasonably available to the U.S. and whether the restrictiveness of the measure was disproportionate as the domestic producers did not bear the same costs. [293]

285 AB Report on *U.S. – Shrimp*, para. 152 *et seq.*

286 *Wiers* (2001), (fn. 8), p. 108.

287 AB Report on *U.S. – Shrimp*, para. 159.

288 *Kelly*, (fn. 32), p. 489.

289 AB Report on *U.S. – Gasoline*, p. 25. See also AB Report on *U.S. – Shrimp*, para. 184.

290 AB Report on *U.S. – Shrimp*, para. 150.

291 *Marceau/Trachtman*, (fn. 145), p. 830.

292 Ibidem, also *Kelly*, (fn. 32), p. 488-490.

293 AB Report on *U.S. – Shrimp*, paras. 164-165.

Some commentators suggest that the decisive role in justifying a PPM-based measure under Article XX might have been played by the phrase "a disguised restriction on international trade" which should be read as to include not just the form of a measure but also the application of the abusive policy or the application of an abusive policy design.[294]

International agreements on environmental issues at stake play an important role for the interpretation of the *chapeau*. The Appellate Body and the implementation panel in U.S. – *Shrimp* stated that "recourse to a unilateral measure cannot *a priori* be excluded under Article XX of the GATT 1994"[295] but at the same time suggested that a unilateral measure may only be taken in order to address the environmental problems that are coped with by an multilateral agreement or where negotiations about a multilateral approach are pending.[296] When evaluating lawfulness of PPM-based measures this becomes highly relevant. It could imply that firstly, PPM-based measures are not *a priori* excluded from Article XX and, secondly, nations seeking to enforce a PPM-based measure have to base their measure on a multilateral agreement or initiate negotiations with those countries that may be affected by this measure.

It is noteworthy that PPM-based measures targeting producers are more easily justifiable under the *chapeau* of Article XX than PPM-based measures targeting the government.[297] In case of the first ones, the importing country does not tell the producers in the exporting country how to produce in generally, only how to produce if it wishes to compete on its market. The situation changes when the importing country makes access to its market depending on whether the authorities in the exporting country regulate how their producers produce ("coercive effect").[298] Then, as rightly emphasised above, such measures include discriminatory elements. Therefore such PPM-based measures, like these in the *U.S. – Turtles* cases, which are targeting government arise concerns among legal commentators. Exemplarily, *Jackson* warns against the risk of Article XX to become a large loophole that governments can use to justify almost any measures that are motivated by protectionist considerations.[299] But in my view a rigorous case-by-case application of the requirements of Article XX will arguably suffice to avoid a "slippery slope".[300]

294 *Kelly*, (fn. 32), p. 490.

295 Panel Report on *U.S. – Shrimp (Article 21.5- Malaysia)*, paras. 5.64-5.65.

296 Ibidem, para. 5.88.

297 *Wiers* (2002), (fn. 1), pp. 294-295. See AB Report on *U.S. – Shrimp* interpreting "unjustifiable discrimination" in para. 161.

298 *Wiers* (2002), (fn. 1), p. 294-295.

299 *Jackson*, (fn. 141), pp 304. See also *Jackson*, Greening the GATT: Trade Rules and Environmental Policy", in Cameron/Demaret/Gerardin (eds.), Trade and the Environment: The Search for Balance, London: Cameron May, 1994, pp. 39-51.

300 *Wiers* (2002), (fn. 1), p. 296; also *Kelly*, (fn. 32), pp. 488-492.

4. Article XX, PPMs and the protection of human rights

The GATT/WTO case law cited above was related to the environmental protection and sought to find justification of a PPM-based measure under paragraph (b) and (g) of Article XX. But PPM-based measures are enacted as well in order to protect human and labour rights.[301] *Francioni* notices that import restrictions based on human rights considerations are by definition almost always based on the way the products are produced.[302] Until now there have been no rulings on a case including these kind of PPM-based measures under WTO dispute settlement.[303] But it is not excluded that such a case might be considered by the WTO panel.[304]

This part will try to examine the legacy of a PPM-based measure connected to the protection of human and labour rights under paragraph (a), (b) and (e).

a) Article XX (e) – prison labour

Paragraph (e) of Article XX GATT relates to the products of prison labour. It is the only paragraph in Article XX that explicitly justifies a measure distinguished on the basis of PPM, namely prison labour.[305] Some authors suggest that such an exception should, *a fortiori*, cover situations where the deprivation of liberty engenders

301 See the broad literature on the relationship between trade and human rights. e.g. *Cottier*, Trade and Human Rights. A Relation to Discover, 5(1) JIEL 111 (2002), Cottier (ed.), Human Rights and International Trade, Oxford University Press 2005.

302 Francioni (ed.), Environment, Human Rights and International Trade, Hart Publishing, Oxford 2001, p. 17.

303 However, potentially the "*Myanmar case*" (WT/DS88) would have been the first one including human rights. In 1997, the EC and Japan initiated dispute-settlement consultations with the U.S., arguing that the Massachusetts legislation prohibiting companies doing business with Myanmar from bidding for major public contracts violated provisions of the WTO Government Procurement Agreement (GPA). The military government of Myanmar has been recognized by many human-rights groups and the U.S. State Department as an violator of basic human rights. The WTO challenge was allowed to lapse in 2000 because two U.S. courts had struck down the Massachusetts law as an unconstitutional restriction by a state of federal foreign-policy prerogatives. See: *Schaefer*, Lessons from the Dispute over the Massachusetts Act Regulating State Contracts with Companies Doing Business with Burma (Myanmar), EUI-SCAS Working Papers 2002/35.

304 For example, in 1997 the U.S. Congress forbade the importation of products made by forced or indentured child labour. That is an obvious PPM-based measure related to protection of core labour right. As *Charnovitz* mentions this was the first US trade ban specifically aimed at helping children in other countries. If implemented by the Clinton Administration, it seems likely to provoke WTO litigation. *Charnovitz*, The Moral Exceptions in Trade Policy, 38 Va. Journal of International Law 689 (1998), pp. 740-742. See also *Garg*, A Child Labour Social Clause: Analysis and Proposal for Action, 31 New York University Journal of International Law and Politics 473 (1999).

305 See: Panel Report on *U.S. – Tuna II* at para. 3.35.

serious violations of workers' rights.[306] A teleological interpretation of this clause should allow the adoption of import restrictions on products made by means of forced labour (e.g. unacceptable confinement and personal coercion, such that it amounts to slavery and servitude).[307]

On the other hand, the other commentators are more restrained[308] and argue that such interpretations are unsustainable under the Vienna Convention on the Law of Treaties taking into account the ordinary meaning of the word "prison".[309] Besides, it seems that this provision has originally been motivated more by unfair competition concerns that by human rights considerations. *Meng* suggests that at the time the GATT was drawn up, people knew that there are other forms of "odious labour", but they were not included into the text of Article XX.[310] Moreover, the international standards elaborated by the ILO try to clarify the limits of this analogy and prevent possible abuses for protectionist purposes.[311]

So far, this provision has never been invoked or dealt with by the DSB. However, in the *U.S. – Shrimp* case, the Panel stated in a footnote that the provision does not allow Member States to make the import of products conditional upon the exporting country' policy on prison labour,[312] hence the provision would very likely be interpreted restrictively.

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306 *Francioni*, (fn. 302), p. 18; *Bartels*, (fn. 52), gives further references at 355.

307 *Francioni* points out that the past practice favours this analogy. See the U.S. position in the instrument of the adhesion to the 1927 Convention for the Abolition of Import and Export Restriction according to which prison labour was to include „goods the product of forced and slave labour however employed". *Francioni*, (fn. 302), p. 18.

308 Contra: *Garcia*, Trading Away the Human Rights Principle, 25 Brooklyn Journal of International Law 1 (1999), pp. 79-80; *McCrudden*, International Economic Law and the Pursuit of Human Rights: A Framework for Discussions of the Legality of "Selective Purchasing" Laws under the WTO Government Procurement Agreement, 2 JIEL 1 (1999), p. 39; *Charnovitz* (1998), (fn. 304); *Vazquez*, Trade Sanctions and Human Rights – Past, Present, and Future, 6 JIEL 797 (2003).

309 See: *Howse*, Back to Court After Shrimp/Turtle? Almost But Not Quite yet: India's Short Lived Challenge To Labour and Environmental Exceptions In The European Union's Generalized System of Preferences, 18 American University International Law Review 1333 (2003), p. 1373 cites *EC – Beef Hormones*, (illustrating the Appellate Body's decisions that continuously establish unsustainable interpretations).

310 *Meng*, (fn. 33), p. 387. See also *Howse*, The World Trade Organisation and the Protection of Workers' Rights, 3 Journal of Small and Emerging Business Law 131 (1999), p. 142. He mentions that the explicit language on labour rights that was in the failed Havana Chapter suggests that if GATT Article XX was to include an exception related to labour rights it would be explicitly written. *Emmert*, Labour, Environmental Standards and World Trade Law, 10 U.C. Davis Journal of International Law and Policy 75 (2003), p. 124.

311 ILO Declaration on Fundamental Principles and Rights at Work also points out the necessity to limit the use of unilateral measures, at. No 5. *Francioni*, (fn. 302), p. 18.

312 Panel Report on *U.S. – Shrimp*, para. 7.45, note 649.

b) Article XX (a) – public morals and (b) protection of human health

Another general exception in Article XX which may be relevant for the justification of a PPM-based measure in the area of human rights is paragraph (a) concerning the protection of public morals[313] and (b) the protection of human health.[314]

The concept of "public morals" is a difficult one to handle for international adjudicative bodies. The difficulty comes from the absence of commonly accepted definition of public morals as expressed in international agreements.[315] Until now there was no GATT/WTO case concerning PPM-based measures falling under Article XX (a). Besides, only one panel had been asked to interpret GATT Article XX (a).[316] The recent *U.S. – Gambling* case[317] is the first WTO dispute in which the Appellate Body broadly addressed an exception relating to public morals in GATS Article XIV (a).

Nonetheless, the Appellate Body found previous decisions under Article XX of the GATT relevant for the analysis under GATS Article XIV.[318] With regard to the interpretation of the term "public morals", the panel found that "[it] denotes standards of right and wrong conduct maintained by or on behalf of a community or nation"[319] It was also aware of "sensitivities associated with the interpretation of the terms "public morals" and "public order" in the context of Article XIV GATS" as "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[320] (e.g. the exclusion of alcoholic beverages on the grounds of religious principle in one country is totally extraneous to other societies). Further, "members, in applying similar societal concepts, have the right to determine the level of pro-

313 See *Charnovitz* (1998), (fn. 304); *Feddersen*, Focusing On Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, 7 Minnesota Journal of Global Trade 75 (1998). Under public morals PPM-based measures connected to the protection of animal welfare can be also examined.

314 For a deepened analysis see: *Eres*, The Limits o GATT Article XX: A Back Door for Human Rights?, 35 Georgetown Journal of International Law 597 (2004).

315 *Eaton/Bourgeois/Achterbosch*, (fn. 10).

316 In *U.S. – Malt Beverages* the panel duked the issue. In *U.S. – Tuna* the representative of Australia argued that Article XX (a) could justify measures regarding inhumane treatment of animals, but the panel did not address the issue.

317 Panel Report, *U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, modified by Appellate Body Report, WT/DS285/AB/R [hereinafter *U.S. – Gambling*].

318 AB Report on *U.S. – Gambling*, paras. 291, 349-351.

319 Panel Report on *U.S. – Gambling*, para. 6.465. This panel's findings were upheld by the Appellate Body. AB Report on *U.S. – Gambling*, para. 296.

320 Panel Report on *U.S. – Gambling*, para. 6.461.

tection that they consider appropriate."[321] More particularly, members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[322] This very relative concept of "public morals" may be applied, however, only territorially and should not affect the production process abroad. [323]

Nonetheless, many commentators point out that there are also "international public morals" that emerged from the evolution of fundamental human rights.[324] In the context of such PPM-based measures the interpretation of paragraph (a) of Article XX with regard to the term "public morals" could be restricted to moral values common to all WTO members.[325] So it might cover cases of violation of universal human rights or quasi-universal core labour rights according to the ILO statement[326] as part of the "international public order".[327] According to *Francioni* they can include e.g. the prohibition of slavery, the extreme forms of child labour, and the prohibition of gross and systematic violations of human rights including workers' rights.[328] However, the other issue to take into account is whether such an interpretation of public morals in Article XX (a) is possible at all. At the beginning of GATT, it is most likely that this term did not refer to internationally protected human rights. Many commentators, however, notice that the history of the introduction of concepts of environmental protection into GATT law shows that this field of law is also developing gradually.[329] But it no longer leaves any doubts that human rights are part of the ethical foundation of states that, under public international law, must be guaranteed and protected.[330] Therefore a dynamic interpretation is needed.

In addition to being justified by a dynamic interpretation of public morals in Article XX (a), some labour rights related measures might also be justified under

321 See AB Reports on *Korea – Various Measures on Beef* , para. 176 and *EC – Asbestos*, para. 168

322 AB Report on *U.S. – Gambling*, para. 6.461.

323 *Francioni*, (fn. 302), p. 18-19.

324 Ibidem, p. 19.

325 *Meng*, (fn. 33), p. 387

326 The ILO Declaration on core labour rights of 1998. Core labour rights include (a) freedom of association and the effective recognition of the right to collective bargaining, (b) the elimination of all forms of forced or compulsory labour, (c) the effective abolition of child labour, and (d) the elimination of discrimination in respect of employment and occupation.

327 *Howse*, (fn. 309), p. 169.

328 *Francioni*, (fn. 302), p. 18-19.

329 *Howse*, (fn. 309). Broader on the issue, e.g. in *Marceau*, WTO Dispute Settlement and Human Rights, EJIL, Vol. 13 No. 4 (2002).

330 *Meng*, (fn. 33), p. 387.

Article XX (b), which refers to measures "necessary to protect human life and health". Practices violating certain rights referred to in the ILO Declaration, such as elimination of forced or compulsory labour or the abolition of child labour,[331] could conceivably involve threats to the life or health of the workers in question. In this case one should also consider a dynamic interpretation of the term "health" in international law and policy.[332]

Taking this argument into account it can be argued that the extraterritoriality should not be a problem for human rights PPMs, at least to the extent that the condition for the imposition of the trade measure is the exporting country's violation of a standard that is binding on the exporting state under international law. Under such circumstances the importing state is not unilaterally imposing a rule of conduct on persons in other countries but on the basis of international law to which the exporting state is independently bound. On this basis, commentators have argued that Article XX (a) and/or (b) should be interpreted to permit PPMs-based measures seeking to induce compliance with universally recognized human rights.[333]

To be justified under Article XX (a) or (b), measures must be shown to be "necessary" for the purposes in question. As described above the word "necessary" has been understood to imply a strict justification of the measures undertaken as the least trade-restrictive measure available to achieve the policy goal.[334] According to the Appellate Body in *U.S. – Gambling* in determining whether there is "the least trade restrictive measure reasonably available" an assessment of the weighting and balancing process should be conducted. It should include firstly "relative importance" of the interests or values furthered by the challenged measure and further, not "exhaustive" factors such as "the contribution of the measure to the realisation of the ends pursued by it" and "the restrictive impact of the measure on international commerce."[335] *Marceau* suggests that in order to assess these factors a panel should be entitled to examine the participation of concerned members in relevant human rights treaties.[336] Other factual elements could include declarations in

331 See: *Stevenson*, Pursuing an End to Foreign Child Labour Through U.S. Trade Law: WTO Challenges And Doctrinal Solutions, 7 UCLA Journal of International Law and Foreign Affairs 129 (2002); *Howse/Trebilcock* (fn. 9).

332 *Howse*, (fn. 309), p. 144.

333 *Charnovitz* (1998), (fn. 304), p. 742; *Cleveland*, Human Rights Sanctions and International Trade: A Theory of Compatibility, 5 JIEL 133 (2002), pp. 157-158; *Bal*, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT, 10 Minnesota Journal of Global Trade 62 (2001), p. 108.

334 AB on *Korea – Measures on Beef*, para. 180; AB on *EC – Asbestos*, paras. 172-174.

335 AB Report on *U.S. – Gambling*, para. 306.

336 Besides, *Marceau* notices that in *U.S. – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body made clear that the examination of the U.S.' participation in other similar regional or bilateral treaties was a factual matter relevant in the assessment of its good faith efforts. She argues that the same

national and international fora, decisions of human rights jurisdictions, other relevant general declarations by states on the importance and primacy of human rights, and relevant resolutions of the ILO or the General Assembly, all of which would constitute public knowledge or factual information which the panel can obtain pursuant to Article 13 of the DSU.[337] However, such an interpretation of "necessary" will often be very complex and delicate.[338]

In my view, the exclusion of PPM-based measures based on human rights or labour rights from Article XX would unduly restrict the ability of members to protect public morals according to Article XX (a) or human health according to Article XX (b). Generally, the exclusion of PPM-based measures *a priori* would deprive Article XX of its *effet utile* and would be against the principles of interpretation.[339] *Howse* notices correctly that Article XX allows, but does not require countries to take measures that would otherwise violate the WTO rules in certain limited circumstances. Important is, however, that countries do have a "lifebelt" for special circumstances. It must be admitted that the usage of such PPM-based measures needs to be carefully scrutinized, consistently applied as not to put only imported products in a trade-disadvantaged position.[340]

VI. Future of PPMs in WTO law

The issue of PPMs, very controversial and highly political, will surely still occupy the WTO Dispute Settlement as well as the legal commentators in the near future. For the time being the member states seem to avoid touching Pandora's box, as they perceive PPMs in the WTO. Opening the policy door to PPM-based trade measures raises such complex, uncomfortable choices that most WTO members have so far taken an intransigent "just say no" attitude.[341] PPM issues are not even directly mentioned in the Doha Ministerial Declaration. Paragraph 32 of this Declaration has called only on the Committee on Trade and Environment to increase its analytical focus on the effects of environmental measures on market access, especially with regard to developing countries. Another important provision is paragraph 16,

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could be done with relevant human rights treaties. *Marceau*, WTO Dispute Settlement and Human Rights, EJIL, Vol. 13 No. 4 (2002), pp. 790-791.

337 *Marceau*, (fn. 336), pp. 790-791.

338 *Howse*, (fn. 309), pp. 144-145. He poses the question e.g. how far a member must go, for instance, to exhaust avenues such as negotiation and representations at the ILO before it can show that sanctions have now become the least restrictive alternative.

339 *Howse*, (fn. 309), p. 144.

340 *Eaton / Bourgeois / Achterbosch*, (fn. 10).

341 *Gaines* (2002), (fn. 29).

which calls for negotiations to reduce tariff and non-tariff barriers to trade in non-agricultural products.[342] However, it seems that no substantial improvements in this respect have been achieved.

Many legal commentators cited in this paper call for a broader discussion on PPMs. Firstly, it is needed to "debunk the myth" that PPM-based measures *per se* violate the WTO law. A common legal understanding should be shared by the negotiators if they want to begin constructive discussions on this very controversial issue. Otherwise it will be difficult to bargain when governments have considerably divergent views on the law.[343] Secondly, deepened economic research on the impact and effectiveness of the PPM-based measures should be conducted in order to base the discussion on facts, especially in the context of developing countries. This would be an indispensable platform for the legal discussions. Thirdly, the discussion between WTO member states on the future status of PPMs in the WTO should be initiated.[344] In this respect the position of *Quick* and *Lau* properly throws light on the problem: "We urge the WTO membership not to continue to be politically inactive and ignore important issues such as environment, animal welfare or even labour standards. If the lawmaker is unable to adapt the law to new developments, the judge will be tempted to step in and 'regulate'."[345]

Although better disciplines of PPMs can emerge through WTO adjudication, some commentators turn their attention to a risk of "overjudicialization" of the WTO system.[346] These concerns are expressed especially in the context of PPM-based measures and the interpretation of Article XX. The contextual approach deprives WTO Members of the guarantee that exceptions to the basic GATT principles are only available if specifically mentioned by the text itself.[347] Besides, further concerns include the balancing test. *Charnovitz* rightly points out that "balancing is inappropriate because there is no way for a panel to objectively weigh incommensurate concerns, such as the value of commercial freedom versus the value of environmental

342 State of Trade and Environment Law, Working Paper IISD & Ciel, 2003, p. 23.

343 *Charnovitz*,(2002), (fn. 3), p. 103.

344 It is noteworthy that the EC in preparation for the WTO Seattle Ministerial Conference suggested as one of the priority issues "a clarification of the relationship between WTO rules and Non-Product-Related Process and Production Methods requirements and in particular, of the WTO compatibility of eco-labelling schemes". In respect to the latter the EC stated that "there should be scope for a clear understanding that there is room within the WTO to use such market-based, non-protectionist instruments as a means of achieving environmental objectives and of allowing consumers to make informed choices". But after the failure of Seattle Conference the issue disappeared from the ambitious priorities of the EC. See documents WT/GC/W/194 and WT/GC/W/274 and "The EU Approach to the Millennium Round", Communication from the Commission to the Council and the European Parliament, July 1999.

345 *Quick/Lau*, (fn. 76), p. 458.

346 *Kelly*, (fn. 32), p. 483.

347 *Quick/Lau*, (fn. 76), p. 456.

protection, where the litigant governments will likely have different metrics for these values. The problem is not just that balancing by trade experts will tend to value trade more than environment. Rather, the problem is one of legitimacy. WTO governments show no willingness to delegate basic policy judgments to independent panels."[348]

Therefore it would be reasonable for the WTO to negotiate a common understanding on Article XX/Article III[349] analogous to the seven GATT understandings negotiated during the Uruguay Round and the interpretation on labelling schemes.[350] The latter one is of rising importance because it seems that labelling or certification requirements in relation to imported products are the only viable way for truly origin-neutral and non-discriminatory PPM-based measures to be effectively applied to imports leaving the choice to consumers. In the negotiations the situation of developing countries should be taken into special account. As the negotiation process is usually prolonging some provisional solution may be sought as well. The WTO should promote a greater transparency of PPMs. At the same time, the controversies among PPMs are to be seen in the broader context. The unilateral use of PPM-based measures as mentioned at the very beginning is a symptom of inadequate international cooperation in the area of environmental protection and the protection of human rights. The WTO could show more activism and with recommendations turn to appropriate multilateral institutions designated to address the environmental and social considerations.

In the light of inevitability of the new trade and environment (and not excluded – based on the violation of human or labour rights) disputes, more activism of the WTO General Director in offering mediation and reconciliation services. Another idea – brought by *Marceau* – is for the WTO to establish an Environmental Advisory Body that would seek a solution to trade and environment conflicts.[351]

348 *Charnovitz*, (fn. 3), p. 108, in the same spirit see: *Kelly*, (fn. 32), p. 483.

349 It is noteworthy that the European Parliament in 1998 passed a resolution reflecting the view that PPMs should play a role in "likeness" test under Article III GATT.

350 *Charnovitz*, (fn. 3), p. 108.

351 *Charnovitz*, (fn. 3), p. 110; *Marceau*, A Call for Coherence in International Law. Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33 JWT 87 (1999), pp. 148-149.

VII. Conclusions

– PPMs are one of the most controversial issue in the GATT law. Problematic is the lack of an agreed definition of PPMs which causes a number of misunderstandings related to their legality and applicability. States are willing to use PPM-based measures to address environmental, value-based and competitive considerations. Such measures are usually taken by developed countries raising the opposition of developing countries.

– GATT Article I has not played until now an important role while assessing the legality of PPM-based measures. On the contrary, Article III has an essential meaning for the use of PPM-based measures in the trade policy of importing countries. The text of Article III brings a lot of ambiguities for the examination of PPM-based measures. The GATT/WTO jurisprudence seems to interpret these ambiguities to the PPM-based measures' disadvantage by following a product-process distinction as introduced by the GATT panel in *U.S.– Tuna I*. Accordingly, PPM-based measures are excluded from the coverage of Article III or violate Article III.

– According to the panels Article III relates only to the comparison of treatment of the imported and domestic products as such but not to the comparison of policies of importing and exporting countries. However, this case law does not offer convincing argumentation support for a product-process distinction. It appears that the reasons for the rejection of the legality of the distinction based on PPMs have more to do with policy concerns than with legal arguments. First of all, the textual interpretation of Article III shows that PPM-based measures are not *per se* excluded from the coverage of Article III. They could even possibly comply with the strict requirements of Article III. Secondly, products distinguished on the basis of their PPM can be found unlike taking into account the consumer tastes and habits or/and the regulatory purpose of the government while introducing such a regulatory distinction. It is also conceivable that a PPM-based measure passes the "no less favourable" requirements of Article III. This would be possible by considering the comparison between treatment of group of domestic and group of imported products distinguished on the basis of their PPM.

– Even if a PPM-based measure addressing environmental concerns may be inconsistent with GATT Articles III, or XI, such a measure still may qualify for Article XX exceptions. The panel in *U.S. – Automobile Taxes* seems to suggest that truly origin neutral PPM-based measures could not violate Article XX. The central meaning in examining PPM-based measure has the existence of "the least trade restrictive measure reasonably available". In determining such an alternative the GATT/WTO case law points strongly on the international cooperation and agreements aiming at solving problems addressed in PPM-based measures.

– In the weighting and balancing process under the *chapeau* of Article XX, the chances for the justification of a PPM-based measure increase when the interests or

values furthered by the challenged measure are of relative importance, the measure contributes practically to the realisation of the ends pursued by it and the measure does not have any restrictive impact on international trade. In this light a origin neutral how-produced standard might be justified more easily under Article XX. Besides, states taking PPM-based measures will have to prove their efforts to reach an international agreement on the protection objective with all countries it is targeting.

– Leaving the problem of PPMs solely for the consideration of panels and the Appellate Body may not be the optimal solution. It is called for a broader discussion on PPMs in order to negotiate understanding among WTO member states on how to treat trade measures based on PPMs under the GATT law. On the other hand, the legality of PPMs-based measures in the WTO is a part of the larger group of issues such as poor stewardship of the global commons, lack of liability for transboundary environmental harms and free riding in international treaties.