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The Compatibility of recent MEAs with the WTO Rules

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TABLE OF CONTENTS

1. Summary	1
2. Overview of Trade/Environment relationship	2
2.1 Use of trade measures in MEAs	2
2.2 Measures subject to challenge	3
2.3 Categories of TREMs	3
2.3.1 Conflicts between parties to the MEA	3
2.3.2 Conflicts between parties and non-parties to the MEA	4
2.3.3 Relevant GATT provisions/relevant to TBT/SPS Agreement	4
3. The Development of WTO Jurisprudence on TREMS	5
3.1 Two-tiered analysis of Article XX	5
3.2 Judicial Activism?	7
4. WTO Compatibility of Recent MEAs	9
4.1 The Rotterdam Convention on the application of the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in International trade	10
4.1.1 Convention's purpose and methods	10
4.1.1.1 Objective	10
4.1.1.2 Main Articles	10
4.1.1.3 Identification of WTO relevant provisions	11
4.1.2 GATT compatibility	12
4.1.2.1 Art. XX(b): "necessary to protect human, animal or plant life or health"	13
4.1.2.2 Art. XX(g): "relating to the conservation of exhaustible natural resources..."	16
4.1.2.3 The Hurdle of the Introductory Clause	19
4.1.3 TBT/SPS Compatibility of measures taken under PIC Convention	20
4.1.3.1 TBT/SPS relationship to GATT	21
4.1.3.2 Import ban/subject to specified conditions justified under the TBT agreement	22
4.2 Cartagena Protocol on Biosafety to the Convention on Biological Diversity	25
4.2.1 The Protocol's purpose and method	26
4.2.1.1 Objective	26
4.2.1.2 Main Articles	27
4.2.2 Identification of WTO-relevant provisions	29
4.2.3 General GATT Articles	33
5. Conclusion	34

The Compatibility of recent MEAs with the WTO Rules

1. Summary

The international community has continued to use trade measures in a variety of multilateral environmental agreements (MEAs) in order to contain harm to human, animal and plant life and health. In some of the more important MEAs, trade measures have proved particularly valuable, e.g. the 1973 Convention on International Trade in Endangered Species (CITES). Not surprisingly, some recent MEAs, including the Kyoto Protocol to the UN Framework Convention on Climate Change and the Rotterdam Convention on Prior Informed Consent Procedures on Hazardous Chemicals, also contain trade measures.

Generally restraint on trade is inconsistent with the rules of the World Trade Organisation (WTO). A clear distinction can be seen between trade measures expressly directed by the MEA and the measures permitted to be taken in compliance with its trade provisions by implementing parties. The former category of measures have so far not been challenged under the WTO dispute settlement system. However, the latter category continue to be subject to challenge in the WTO, and have provided useful raw material for the GATT/WTO panels and Appellate Body to rule on the relationship between trade and environment in the multilateral trading system.

A slight evolution in the approach of the WTO dispute settlement organs is perceptible in the lines of reasoning taken by the Appellate Body in the trade and environment cases which have come before the Dispute Settlement Body since its inception. This evolution is evidenced by flexible interpretation and an acknowledgement of the place of the WTO in wider public international law. The implication is that trade related environmental measures (TREM) may more easily satisfy the criteria in the Article XX exceptions than had previously been the case.

In any event, modern MEAs are carefully crafted to include GATT-like language to preempt any inconsistency with the trade rules. The possibility of conflict is therefore avoided or minimised.

2. Overview of Trade/Environment relationship

The objectives of trade liberalisation on the one hand and global environmental protection on the other interface when trade measures are adopted to ensure/ameliorate compliance with a multilateral environmental agreement (MEA). Trade measures taken pursuant to MEAs may conflict with the WTO goal of free trade. Unrestricted free trade on the other hand may lead to further environmental degradation as economic pressure could result in un-sustainable exploitation of natural resources.¹ Several MEAs, e.g. the Basel Convention, CITES, the Montreal Protocol contain trade measures.²

The relationship between MEAs and the WTO is presently being discussed by the Committee on Trade and Environment (CTE) which was established on completion of the Uruguay Round in April 1994 by a Ministerial Decision.³ In its first report, however, the CTE could not reach consensus on how to resolve the conflicts posed by the inter-relationship of trade and environment issues.⁴ At the same time, over the past few years, the panel process has provided useful insight into some of the most important aspects of the relationship between international trade rules and national measures for environmental protection. This paper will consider the relationship between the WTO rules and potential trade measures taken pursuant to recently concluded MEAs, such as the Rotterdam Convention on Prior Informed Consent Procedures on Hazardous Chemicals and the Biosafety Protocol to the Convention on Biological Diversity.⁵

2.1 Use of trade measures in MEAs

The need to respond to global environmental problems started with the understanding by the international community that only multilateral solutions to such problems were possible or effective, since many of the problems are transboundary. Each agreement shows a preference for a first-best solution to environmental problems. But non-participation would frustrate the purposes of the

¹ However, some view free trade as benefiting the goal of environmental protection as it generates greater wealth which could lead to higher levels of environmental protection.

² Wold, C., *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 *Environmental Law* (1996) 3, 84; *Trade Measures in Multilateral Environmental Agreements, Synthesis Report of Three Case Studies*, OECD-Joint Working Party on Trade and Environment, at: <http://www.oecd.org>

³ Decision of 14 April 1994

⁴ Report of the Committee on Trade and Environment (WT/CTE/1, 12 November 1996)

⁵ The history and development of the trade/environment debate in the WTO is beyond the mandate of this paper. For more of the background to the trade/environment debate, see the selected bibliography at the end of this paper.

MEAs. To solve this, most MEAs have a combination of incentives and disincentives to promote wider participation. One of the most common disincentives is the use of trade measures.

Thus, trade measures in MEAs, such as bans, quotas, notifications and labelling, aim most importantly at, a) reducing environmental harmful trade flow, where trade is perceived to be the source of the environmental damage; b) encouraging participation and adherence of as many states as possible by putting those states at a trade disadvantage that may want to stay outside the regulatory regime, thereby avoiding “free riding” and ensuring the MEA’s effectiveness by preventing “leakage”.⁶

2.2 Measures subject to challenge

A clear distinction must be drawn between the provision in the MEA which calls for the adoption of trade restrictive measures and the national implementation of an MEA provision which is drafted so as to permit the taking of such measures (usually referred to as trade-related environmental measures (TREMs)). It is not necessarily the provision in the MEA itself that is WTO inconsistent. But the national implementation of that provision may be subject to challenge under the WTO. The distinction between these two categories is too often blurred and may give the impression that the trade provision in the MEA is subject to challenge. To date, no dispute has arisen directly between the provisions of an MEA and the WTO rules. The adoption of a MEA which contains provisions obliging parties to that agreement to enact/take trade measures is not itself trade restrictive as trade flows are not immediately threatened by that obligation. Only the TREM taken in compliance with that obligation may actually restrict trade and amount to a breach of the WTO Agreements.

2.3 Categories of TREMs

2.3.1 Conflicts between parties to the MEA

Usually trade measures aimed at exercising control over trade itself will occur between parties to a MEA. For instance, the import and export certificates required under CITES or the prior informed consent procedure of the Basel Convention. Such trade measures as between parties to the MEA

⁶ OECD Synthesis Report, p. 5

are not likely to be challenged under the WTO. Nevertheless, the dispute provisions of the MEA would govern any dispute arising between parties to the MEA in question.

2.3.2 Conflicts between parties and non-parties to the MEA

Trade provisions designed to act as an incentive to join and adhere to an MEA are usually directed against non-parties. For instance, the bans on trade in ozone depleting substances and products containing them with non-parties mandated by the Montreal Protocol. In such instances, where the rules applied to non-parties differ from those applied to parties to the MEA they are clearly discriminatory and may violate the core principles of the GATT.

2.3.3 Relevant GATT provisions/relationship to TBT/SPS Agreement

TREMs taken pursuant to MEAs might violate Articles I, III or XI of the GATT. Article I requires any trade advantage conferred by one country on another to be extended to all WTO members (Most-Favoured-Nation Clause). Article III prohibits discriminatory treatment between “like” or competing domestic and imported products (National Treatment Clause). Article XI GATT forbids any quantitative restrictions other than duties, taxes or other charges. Even if a country breaches any of these provisions the measure might still be justified under Article XX GATT, which contains the general exceptions' clause. The relevant parts of Article XX are the following:

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

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

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;...

A TREM may also fall within the scope of the provisions of the Agreements on Technical Barriers to Trade (TBT) or Sanitary and Phyto-Sanitary Measures (SPS). Therefore, their relationship to the main GATT 1947 has to be clarified. The TBT and SPS Agreements could be considered as *lex specialis* in relation to the GATT as they apply to certain technical regulations or sanitary or

phytosanitary measures whereas GATT 1947 applies to all products.⁷ However, the GATT Panels /Appellate Body have not taken that view.⁸ The question could then arise: if a measure falls within the scope of the TBT Agreement, for example, and is justified under the specific rules of the TBT Agreement would that measure still have to satisfy the conditions set out in the GATT itself?⁹ This is a useful question to be answered because of the differences between the approaches to TREMs in the TBT Agreement and GATT 1947.¹⁰

3. The Development of WTO Jurisprudence on TREMs

Early on in its existence, the Appellate Body appeared to signal its willingness to interpret WTO rules in a more progressive manner than previous GATT panels dealing with TREMs. Thus, it has carefully crafted a flexible approach to balancing conflicting trade and environmental policy objectives underlying the disputes before it.

3.1 Two-tiered Analysis of Article XX

In the *Reformulated Gasoline* case (United States - Standards for Reformulated and Conventional Gasoline),¹¹ Venezuela and Brazil brought a complaint concerning standards for conventional and reformulated gasoline prescribed under the US Clean Air Act. The substance of the issue was whether the extremely technical specifications issued by the US Environmental Protection Agency for gasoline being sold in the US, which applied to US refiners, blenders and importers, were discriminatory. The rules were established in an effort to address the ozone and pollution damage experienced by US cities as a result, principally, of car exhaust fumes. The net effect of the rules was to leave foreign producers at a competitive disadvantage, which the panel held was contrary to GATT Articles I and III. The US unsuccessfully sought to have the rules brought within the Article XX exceptions, (b), (d) and (g). On appeal, the Appellate Body agreed with the US that clean air is an exhaustible natural resource. It went on to say that measures to

⁷ Under the *lex specialis* rule, specific treaties or provisions control general treaties or provisions, even if the general provisions are later in time.

⁸ See Report of the Panel. United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R.

⁹ This question has never really been addressed by experts. Some are of the view that the TBT and SPS Agreements should take precedence; See Petersmann, E-U., *The GATT/WTO Dispute Settlement System*, The Hague, 1997, p.120.

¹⁰ See section 4.1.3.1.

¹¹ WT/DS2/AB/R, adopted 20 May 1996, reprinted at 1 *International Trade Law Reports* (1996), p.68.

protect clean air were legitimate environmental policy measures, which qualified under the Article XX (b) and (g) exceptions. However, the matter was ultimately decided with reference to the *chapeau* of Article XX, the measure being found to be an unjustifiable discrimination and a disguised restriction on international trade.

“... WTO members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the general agreement and the other covered agreements.”¹²

The Appellate Body appears to have buttressed and broadened the importance of the environmental exceptions in Article XX. Deciding whether the measure in question is justified under Article XX now involves a two-tiered analysis: examination of the measure in the context of the specific exceptions contained in the paragraphs, and then assessment of whether the measure complies with the *chapeau* to Article XX. The rigorous application of the *chapeau* effectively narrows the application of Article XX. In effect, each case must be analysed to determine if the implementation of the measure violates the *chapeau* in the context of a violation of the other rules under the GATT. The Appellate Body uses a kind of balancing approach.¹³ The door is left slightly open for trade-related environmental protection within the WTO: because the two-tiered analysis starts with examination of the specific exceptions, and examines the whole measure, it is more likely that the requirements in the Article XX paragraphs will be more easily satisfied, leaving the matter at issue whether the measure is unnecessarily discriminatory.

3.2 Judicial Activism?

The recent *Shrimp/Turtle* case (United States - Imports of Certain Shrimp and Shrimp Products¹⁴) produced the same result: the TREM was deemed to be GATT-illegal. The case involved a complaint by Thailand, India, Pakistan and Malaysia regarding a provision in the US

¹² *Ibid.*, at 83.

¹³ Although the measure was characterised environmental, it was nonetheless inconsistent with the trade rules because, the measure, in its application constituted "unjustifiable discrimination" and a "disguised restriction on international trade". *Ibid.*, at 82.

Endangered Species Act (section 609). Section 609 placed an import ban on shrimp and shrimp products from countries not certified by the US. Certification under Section 609 required that countries mandate the use of methods which prevent the incidental drowning of turtles from trawlers used to catch shrimp. The law applied within the US territorial waters and outside the jurisdiction in the waters of those countries exporting shrimp to the US market.

At the panel stage, the US admitted that section 609 violated GATT Article XI:1 in that it amounted to a restriction on the import of shrimp, but argued that the measure was justified under Article XX (b) and (g) as a means of protecting a species recognised as highly endangered by the international conservation agreement to which all the disputants were parties: CITES. The panel decided that the measure was not justified under Article XX (b) or (g), and declared that to uphold the security of the multilateral trading system, measures such as section 609 must be prohibited. Thus the *Shrimp/Turtle* panel appeared to be dismissive of the status of the international community's priorities on environmental protection. The emphasis, which the panel places on the WTO's central focus as "economic development through trade", seemed to subjugate those priorities.¹⁵

By contrast, the Appellate Body decided that those priorities, which were "contemporary concerns of the community of nations about the protection and conservation of the environment", were precisely relevant to its interpretation of the Article XX paragraphs.¹⁶ Those contemporary concerns are reflected in several MEAs such as the Convention on Biological Diversity, and the UN Convention on the law of the Sea, as well as Agenda 21.¹⁷ Moreover, the Appellate Body treated the reference to sustainable development in the preamble to the WTO Agreements with some deference, declaring that it "add[ed] colour, texture and shading to [their] interpretation of the agreements annexed to ...the GATT 1994".

¹⁴ WT/DS58/R, 15th May 1998.

¹⁵ *Ibid.*, para. 42.

¹⁶ WT/DS58/AB/R, 12 October 1998.

¹⁷ It used the United Nations Convention on the Law of the Sea (UNCLOS) to affirm that exhaustible natural resources includes living resources, and implied that the US had a public policy interest in protecting endangered migratory species that pass through its waters. *Ibid.*, at para. 131.

The final result of the Appellate Body's reasoning is the same as the panel's. Nevertheless, the Appellate Body's interpretative reasoning appears to have taken a further evolutionary step. The Appellate Body does not merely stop at references to Article 31.1 of the Vienna Convention on the Law of Treaties as it did in *Reformulated Gasoline*; it uses all the possible sources of public international law available to it - the jurisprudence of the International Court of Justice (ICJ) and provisions of relevant MEAs.

One commentator's view is that the Appellate Body's reasoning has the potential to significantly expand the scope of the Article XX exceptions.¹⁸ The focus no longer appears to be that the measure is applied unilaterally and extra-jurisdictionally (so as to change behaviour or policy outside of a state's jurisdictions), but on whether the application of the measure arbitrarily discriminates between countries, i.e. the spotlight again falls on the *chapeau* to Article XX.¹⁹ In this case, it is the manner in which the measure was applied which was considered GATT-illegal.²⁰

The measures:

- (a) inflexibly required the importing country to adopt essentially the same measures adopted by the US, and;
- (b) did not allow for shipment by shipment distinctions.²¹

Some of the most fundamental questions centring on the trade/environment relationship to which the answers had previously been in the negative, appear to have been left open by the Appellate Body's reasoning in the *Shrimp/Turtle* case.²² Thus it appears that there is the possibility that TREMs may be applied unilaterally in some limited circumstances; that they may be applied with intent to change another state's environmental behaviour or policy; and that they may discriminate

¹⁸ See Jacob Werksman, Case Notes: United States – Import Prohibition of Certain Shrimp and Shrimp Products, Vol 8:1, *Review of European Community and International Environmental Law (RECIEL)* (1999), p. 78ff.

¹⁹ "... although the measure of the United States in dispute in this appeal serves an environmental objective that is recognised as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX." See para. 186.

²⁰ The Appellate Body said in its ruling: "The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX." See para. 149.

²¹ See paras. 164-165. And the Appellate Body went on: "For all the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognised legitimate environmental purposes." See para. 186.

²² Werksman, at p. 81.

between otherwise “like” products on the basis of their process and production methods (PPMs).²³

The wealth of reasoning in the Appellate Body decision in the *Shrimp/Turtle* case significantly contributes to the jurisprudence of the WTO on the trade and environment relationship. However, because the WTO dispute settlement system does not offer a system of *stare decisis* (where previous tribunal rulings bind later ones), it is difficult to tell to what extent panels will follow this line of reasoning and develop it further in arriving at their decisions. This of course depends on the nature of the particular trade/environment dispute they are considering. Nevertheless, despite the final ruling on the dispute being the same as that in *Reformulated Gasoline*, it appears we are further along in the reconciliation of trade and environment policy within the multilateral trading system than we have ever been. The only other possible evolution that would further clarify the trade/environment relationship is a dispute involving a trade measure specifically dictated by an MEA.

4. WTO Compatibility of Recent MEAs

4.1 The Rotterdam Convention on the application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International trade

4.1.1 Convention's purpose and methods

4.1.1.1 Objective

The Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention) was adopted and opened for signature in Rotterdam in September 1998. The Convention aims at monitoring and controlling the trade in highly dangerous pesticides and chemicals that - when released into the environment - may poison

²³ The Appellate Body declared that “conditioning access to a member’s domestic market on whether exporting members comply with or adopt, a policy or policies unilaterally prescribed by the importing member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.” Furthermore the Appellate Body went on, “[i]t 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.” See para. 121.

water and land and eventually human, animal and plant life. The Convention enables importing countries to decide whether they want to receive certain substances and refuse others. If countries agree to trade in those substances, procedural rules like labelling and information on potential health and environmental effects will promote the safe use of those chemicals.²⁴

4.1.1.2 Main Articles

The PIC Convention applies to banned or severely restricted chemicals and to severely hazardous pesticide formulations.²⁵ Chemicals in quantities not likely to affect human health or the environment that serve research/analysis or individual purposes do not fall within the scope of the Convention. Article 5 of the Convention requires the Parties to notify any final regulatory action that has been adopted for banned or severely restricted chemicals according to the notification guidelines set out in Annex 1. The Secretariat forwards the acquired information to all Parties.²⁶ A Chemical Review Committee, to be established by the Conference of the Parties (COP) at its first meeting, reviews the information provided in such notifications and recommends to the COP whether the chemical in question should be made subject to the Prior Informed Consent procedure and accordingly be listed in Annex III.²⁷

Developing countries or countries with economies in transition may propose to the Secretariat the listing of hazardous pesticide formulation in Annex III to be subject to the PIC procedure.²⁸ Each party is obliged to implement appropriate legislative or administrative measures with respect to the import of chemicals listed in Annex III.²⁹ A response concerning the future import of the chemical concerned shall be transmitted to the Secretariat, consisting of a final decision to:

- (i) consent to import
- (ii) refuse import
- (iii) consent to import only subject to specified conditions.³⁰

²⁴ See <http://www.unep.ch/pic>

²⁵ Art. 3 (1).

²⁶ Art. 5 (3).

²⁷ Art. 18 (6).

²⁸ Art. 6.

²⁹ Art. 10.

³⁰ Art. 10 (2), (4); Art. 10(4) (b) allows an interim response.

A party that takes a decision to refuse import of a chemical or to consent to its import only under specified conditions shall simultaneously prohibit or make subject to the same conditions:

- (i) the import of the chemical from any source and
- (ii) domestic production of the chemical for domestic use.³¹

Each party must take appropriate measures to ensure that exporters within its jurisdiction comply with decisions that have been notified to the Secretariat under Article 10.³² Article 12 requires any party to provide an export notification to the importing Party when it exports chemicals that are banned or severely restricted in its territory.

4.1.1.3 Identification of WTO relevant provisions

Article 5 of the PIC Convention obliges parties to notify all national action relating to the ban or restriction of a chemical. Article 5 itself does not require any trade measures to be taken but presupposes them. Definite action, however, is authorised by Article 10 of the Convention. Parties may take legislative or administrative measures:

- (i) to import a chemical listed in Annex III only under specified conditions, or
- (ii) to ban its import completely.

Article 10(9) requires Parties to take decisions, which prohibit or restrict import, in a non-discriminatory manner, therefore, measures taken pursuant to Article 10 will not violate GATT Article I or Article III.³³ However, an import ban amounts to a breach of Article XI, as it is a quantitative restriction on trade. Whether Article XI also applies to measures that make imports dependent on the fulfilment of specific conditions is not entirely clear. It has been suggested that Article XI is comprehensive in scope, i.e. deals with everything other than fiscal matters.³⁴ The view that Article XI concerns more than just quotas and extends to measures that make importation dependant on specific conditions can be supported by the wording of the Article: “No

³¹ Art. 10 (9).

³² Art. 11 (1)(b).

³³ Assuming that Parties comply with Art. 10 (9), i.e. prohibit or make subject to the same conditions imports from the chemical from any source (Art. I) and domestic production of the chemical for domestic use (Art. III)

³⁴ Schoenbaum, T., *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 *American Journal of International Law* (1997), p. 273.

prohibition or restriction ... made effective through ... *other measures*, shall be instituted or maintained ... on the importation of any product.”³⁵ According to this view, measures that make importation contingent on specific conditions would also violate Article XI.

4.1.2 GATT Compatibility

An import ban (or the less trade restrictive measures that make imports subject to specific conditions) on an Annex III chemical would thus breach GATT Article XI. Furthermore, the exceptions of Art. XI (2) do not apply. If a non-party was to challenge an import ban or import preconditions taken pursuant to Article 10 of the PIC Convention as violating Article XI of the GATT, would the measure nevertheless survive under Article XX GATT?

The policy upon which the measure is based (in this case, protection from trade in hazardous chemicals) must fall within the range of policies covered by the relevant Article XX provision. Import measures under the PIC Convention are aimed at protecting human health and the environment.³⁶ It is therefore primarily Article XX (b) that is applicable to trade measures taken pursuant to the PIC Convention. One could argue that the aim to protect human health and the environment would also fall within the scope of Article XX (g) which allows for justification of GATT-inconsistent measures when they are “related to” the conservation of exhaustible natural resources.

Following the Appellate Body’s reasoning in the *Reformulated Gasoline Case*, the examination of the trade measures should involve the following steps:³⁷

1. Is the import ban (or the less stringent importation under specific conditions) ***necessary*** to protect human, animal or plant life or health? or,
2. Does it **relate to** the conservation of exhaustible natural resources (... and is it made effective in conjunction with restrictions on domestic production or consumption)?³⁸

³⁵ If interpreted this broadly Art. XI covers virtually all measures (apart from the exemptions of the second paragraph) that do not fall within the scope of Art. III, which are those that are non-discriminatory. See Schoenbaum, p. 273.

³⁶ The overall objective of the PIC Convention is the protection of human health and the environment, Art. 1 PIC Convention

Assuming it passes the foregoing tests:

3. Does the TREM nevertheless violate the chapeau of Article XX, i. e. constitute:
 - a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or
 - a disguised restriction on trade?

4.1.2.1 Art. XX (b): “necessary to protect human, animal or plant life or health”

As stated above, the objectives of the PIC Convention fall within the range of policies generally covered by Art. XX (b). However, the language used in paragraph (b) has been construed rather narrowly by past GATT panels.

The “necessity test” was first applied in the *Thai Cigarettes* Case requiring that:

*“ the import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Art. XX (b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”*³⁹

This interpretation of the term “necessary” was reaffirmed by the *Tuna/Dolphin* panels and by the *Reformulated Gasoline* panel. The Appellate Body in the *Reformulated Gasoline* Case upheld the decision with amendments, but did not provide any further clarification of the language of paragraph (b). The *Shrimp/Turtle* panel dealt with paragraph (g), and therefore provided no further guidance on the “necessity-test”. In essence, it involves a two-stage process. A country employing import bans or making imports contingent on specified conditions (Article 10 PIC Convention) has to prove⁴⁰ that i) it has no reasonably available alternative measure consistent with GATT provisions and ii) the measure taken is the least trade-restrictive possible.

³⁷ The Appellate Body clarified in *Reformulated Gasoline*, that the subparagraphs of Art. XX have to be examined before the chapeau.

³⁸ Parties to the PIC Convention are already obliged to do this under the PIC Convention itself (Art. 10(9)) .. the second precondition of Art. XX (g) is thus not problematic.

³⁹ Report of the Panel. Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. DS/10/R., B.I.S.D. 39, at para. 75.

⁴⁰ The burden of proof is always on the party invoking an Art. XX exception to justify a GATT-inconsistent measure.

This reasoning has been criticised.⁴¹ Schoenbaum argues first that the interpretation does not accord with the grammar and syntax of Article XX (b). The word “necessary” in the paragraph is part of a purpose clause that has as its object the protection of living things. The “least trade restrictive” interpretation turns the clause on its head; thus “necessary” no longer relates to the protection of living things, but to whether or not the measure is a “necessary” departure from the trade agreement, the GATT. The measure is therefore only “necessary” if it is the least possible derogation from the GATT. In Schoenbaum’s view, this interpretation is wrong.

Second, the interpretative gloss is an important substantive change – in effect an amendment – of the wording of Article XX (b). If the “least inconsistent” requirement had been intended to be part of Article XX, it would have been easy to include it in the appropriate exceptions or in the chapeau. Thirdly, this interpretation of “necessary” introduces a strange division between paragraphs (b) and (g). The least trade restrictive requirement applies to the protection of life and health, but *not* to the conservation of exhaustible natural resources. Could the original GATT contracting parties have been making a deliberate value judgement, implying that exhaustible natural resources are more important than human life and health? Schoenbaum questions whether this could have been the intention.

Fourth, the interpretation seems to have led to the quiet demise of the third prong of the three-part test of Article XX (b), i.e. the chapeau. Panels appear to have found it unnecessary to examine whether a measure meets the tests set out in the chapeau: arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. Because their interpretation of “necessary” makes these tests unnecessary. This latter result seems to violate Article 31 of the Vienna Convention which provides that interpretation must give meaning and effect to all the terms of a treaty. The interpretation of one part of the GATT in effect, appears to have reduced the others to redundancy.

As the objective of the PIC Convention is the control of trade in hazardous chemicals, i.e. to avoid human or environmental harm resulting from trade in those chemicals, measures taken to fulfil this

⁴¹ The interpretation of the term “necessary” in Art. XX (b) has been strongly criticised by Schoenbaum, p. 276, 277

objective are naturally trade restrictive. As a consequence there is no alternative measure available that would be consistent with GATT provisions. However, the party invoking Article XX (b) has to prove that the import ban is the least trade-restrictive measure. The PIC Convention itself “suggests” a less trade restrictive measure, namely one that allows the import of the chemical subject to specific conditions.

However, there may be reasons why a WTO panel could hold that an import ban on an Annex III chemical is the least trade-restrictive measure available. One suggestion could be if the country imposing the ban could prove that it does not have the facilities to manage the Annex III chemical properly. This would mean that the less trade restrictive import subject to certain conditions could not be considered a reasonable alternative as that would still pose a threat to health and environment in the importing country itself.⁴² A second reason could be based on the ruling in the *Tuna/Dolphin 1* decision.⁴³ The panel in that case reasoned that the US had not demonstrated that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the GATT, in particular through the negotiation of international co-operative arrangements. As the import ban would be in accordance with an international environmental treaty (the PIC Convention) the respondent party could claim that it had fulfilled the necessity requirement of Article XX (b).⁴⁴ Nevertheless, such measures, were they to be challenged, have yet to be tested under the WTO’s dispute settlement system.

Import as part of the prior informed consent procedure - could be made contingent on labelling or handling requirements, or on certain safety standards. However, treatment by a WTO panel as to whether the measure was the least trade restrictive measure to achieve the goal of the PIC Convention would depend on the specific requirements. An import condition setting such high standards as would equal a complete ban would most likely not be regarded as the least trade restrictive measure possible. On the other hand, if import was made subject to a specific labelling or handling condition it could 'survive' the necessity test of Article XX (b).

⁴² The specific conditions could, of course, require the exporting country/firm to handle the chemical in the importing country, i.e. hand the responsibility for the particular chemical over to the importing country.

⁴³ Report of the Panel. United States-Restrictions on Imports of Tuna, GATT Doc. DS 21/R, B.I.S.D. 155

⁴⁴ Wold, p. 858.

In summary, a complete ban - even if taken pursuant to/ authorised by the PIC Convention – may not pass the necessity test in the strict sense of the previous GATT/WTO rulings. However, import under specific conditions may meet the necessity test set out by the GATT/WTO panels.

4.1.2.2 Art. XX (g): “relating to the conservation of exhaustible natural resources...”

To fall within the ambit of Article XX (g) the measures taken under the PIC Convention must be *related to the conservation of natural resources*. Furthermore, the import ban must be *made effective in conjunction with restrictions on domestic production or consumption*. Clearly, measures taken to fulfil objectives of the PIC Convention are within the range of policies generally covered by Article XX (g): The PIC Convention enables countries to control trade in dangerous substances. Many of those substances, when released into the environment, can cause devastating problems and may poison soil and water resources and eventually endanger human, animal and plant life. Importing countries can decide which chemicals they want to receive and exclude those they cannot manage safely. An import ban on an Annex III chemical is therefore part of a policy that aims to protect natural resources, namely soil and water resources.⁴⁵

Nevertheless, the import ban must qualify under paragraph (g) by being “related to” the conservation of natural resources. Ever since the *Salmon and Herring* case the term “relating to” has been interpreted as meaning “primarily aimed at” conservation.⁴⁶ Applying this interpretation, none of the prior panels ruling on TREMs found that the trade measures at issue had met the criteria of Article XX (g). The Appellate Body ruling in the *Reformulated Gasoline* departed from these prior panel decisions, asserting that there was nothing in the GATT treaty language that supported the interpretation of “relating to” as “primarily aimed at”.⁴⁷ The Appellate Body nonetheless applied this test, stating that

“...all the participants and the third participants in this appeal accept the propriety and applicability of the view of the Herring and Salmon report and the Panel Report that a measure must be “primarily aimed at” the conservation of exhaustible natural resources in order to fall within the scope of Article XX (g). Accordingly, we see no need to examine this

⁴⁵ See <http://www.unep.ch/pic>; and Art. 1 PIC Convention.

⁴⁶ Report of the Panel. Canada – Measures Affecting Exports of Unprocessed Herring and Salmon 37th suppl. B.I.S.D. 1989-90.

⁴⁷ Report of the Appellate Body. United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R. at para. 18, 19

*point further, save, perhaps to note that the phrase “primarily aimed at” is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Art. XX (g).”*⁴⁸

Moreover, the Appellate Body corrected a view held by panels prior to the Appellate Body's decision in the *Reformulated Gasoline* Case that “related to” could be interpreted as “necessary or essential”.⁴⁹ It reversed the panel's ruling, stating that the panel had “overlooked a fundamental rule of treaty interpretation”. It said that a treaty should be interpreted in accordance with its ordinary meaning in the light of its object and purpose, as provided for in Article 31 of the Vienna Convention on the Law of Treaties.⁵⁰ The Appellate Body analysed the text of the various paragraphs in Article XX and found that given the different relative terms utilised, it would be unreasonable to require the same degree of connection or relationship between the trade measures at issue and the different policy interests protected by various Article XX paragraphs.⁵¹ As the term “necessary” had been employed for policy objectives enumerated in paragraphs (a), (b) and (d), the term “relating to” in paragraph (g) could not be interpreted to mean “necessary”.

This clarification from the Appellate Body in *Reformulated Gasoline* may help an import ban taken pursuant to the PIC Convention to survive under Article XX (g). To interpret “relating to” (via “primarily aimed at”) as “necessary” would create the same hurdle for environmental measures as the narrow interpretation of Art XX (b) (least trade restrictive test). The Appellate Body shed further light on the “relating to” requirement with its reasoning in the *Shrimp/Turtle* Case. It stuck to the original meaning of “relating to” rather than reading any other meaning into that clause by examining the general structure and design of the US measure and the conservation goal, stating that “*the means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one...*”⁵² The Appellate Body therefore seems to have abandoned the “primarily aimed at” test. This now appears to alleviate the burden of proving that a measure falls within the scope

⁴⁸ See on this Appleton, A.E., GATT Article XX’s Chapeau: A Disguised ‘Necessary’ Test? Vol. 6:2, *RECIEL*, p.131; Schoenbaum, p. 278.

⁴⁹ This error was also committed by the *Reformulated Gasoline* panel (WT/DS2/R), at para. 6.40. See Appellate Body Report, supra note 46, at para 14.

⁵⁰ Appellate Body Report, at para. 16

⁵¹ Appellate Body Report at para. 17, 18- analysis should be based on case-by-case application of the relevant provisions of Art. XX

of Article XX (g). A “close means and ends relationship” is certainly a more proximate interpretation of the term “relating to”. The absence of a system of *stare decisis* in the WTO dispute settlement system means again it is difficult to assess the extent to which future panels ruling on TREMs will follow this line of reasoning. However, the reasoning may eventually become persuasive.

An import ban taken pursuant to the PIC Convention is therefore more likely to survive under Article XX (g) than it would have prior to the Appellate Body's ruling in *Reformulated Gasoline* and *Shrimp/Turtle*. Obviously, a country would have to prove that the import of the chemical would exceed its abilities to manage that chemical safely and that pollution of water and soil resources would be the consequence of importation. As long as the country invoking the import ban could prove that it was indeed incapable of managing the chemical safely the import ban could be regarded as a means to conserve soil and water resources in that country. An import ban taken pursuant to the PIC Convention may therefore pass the “close means and ends relationship” test.

The second precondition for Article XX (g) that the trade measures must be made effective in conjunction with restrictions on domestic production or consumption does not pose a problem. Under Article 10 (9)(b) of the PIC Convention Member States are required to prohibit or make subject to the same conditions the domestic production of the chemical for domestic use.

4.1.2.3 The Hurdle of the Introductory Clause

Both kinds of measures (import ban or import subject to specified conditions) must be applied in conformity with the requirements of the introductory clause of Article XX. The import measures must not be applied in a manner which would, a) constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or b) a disguised restriction on trade.

The Appellate Body in *Reformulated Gasoline* stated that the analysis under the chapeau should be independent of the analysis used to determine a violation of the substantive provisions of the

⁵² Report of the Appellate Body. United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R., at para. 141

GATT (Articles I, III and XI). An inconsistency with Article I or III could not automatically lead to the conclusion that the measure does not comply with the chapeau. Such reasoning would confuse the question of whether inconsistency with a substantive rule existed, with the separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. It would eventually deprive the introductory clause of its content.⁵³ Article 10(9) of the PIC Convention prevents Parties from employing discriminatory measures. Parties complying with that provision would therefore satisfy the criteria in Article XX's chapeau, thereby ensuring justification under the Article.

Similarly, import measures taken pursuant to the PIC Convention will not be disguised restrictions on international trade. Such restrictions can only be taken in relation to Annex III chemicals. The chemicals listed in Annex III are prescribed by a decision of the Conference of the Parties upon recommendation of the Chemical Review Committee. They do not depend on the judgement of an individual party to the Convention. Therefore, it is difficult to establish that an import ban or an import restriction is a disguised restriction on international trade.

In summary, trade measures taken pursuant to the PIC Convention are more likely than not to be GATT-consistent. Whether a Panel would also take that view, remains unclear. However, the recent Appellate Body decisions seem to support a more flexible interpretation of subparagraph (g). If that is the case, it will be easier for trade measures to be justified under Article XX (g) than under Article XX (b). That is rather surprising, because at first sight Article XX (b) protects the more legitimate interest (human life).

4.1.3 TBT/SPS Compatibility of measures taken under PIC Convention

Import restrictions are also subject to the disciplines of the TBT and SPS Agreements. The two Agreements are mutually exclusive. The SPS Agreement deals with additives, contaminants, toxins and disease-carrying organisms in food, beverages and feedstuffs, while the TBT applies to all other product standards. Both agreements seek to balance state autonomy with the concern that complete freedom to set standards would undermine the GATT/WTO basic aims. The Agreements discourage non-tariff barriers but allow states reasonable freedom to set

⁵³ Appellate Body Report, *supra* note 46, p. 20

environmental standards. Import restrictions authorised by the PIC Convention could constitute technical barriers to trade;⁵⁴ therefore such restrictions would have to comply with the TBT Agreement.

4.1.3.1 TBT/SPS relationship to GATT

The relationship between the GATT and the TBT/SPS Agreements seems unclear. Two views of how the Agreements interrelate with GATT can be identified. On the one hand, one could argue the Agreements concern specific topics (i. e. technical barriers and sanitary measures), which are not covered by GATT. It could thus be concluded that the SPS/TBT Agreements are *lex specialis* in relation to GATT, which covers all trade in products.⁵⁵ Moreover, both Agreements seem to set broader exceptions for environmental measures than GATT Article XX. Article 2(2) of the TBT Agreement calls for technical regulations to be no more trade-restrictive than necessary.⁵⁶ However, the risks of non-fulfilment of legitimate objectives have to be taken into account. Trade goals and environmental goals are therefore weighed against each other. Such a balancing process has not been applied in the case of Article XX.⁵⁷ That supports the ‘*lex specialis*’ view as those environmental exceptions would essentially be deprived of their purpose if all measures which fell under the SPS/TBT Agreement had to comply with GATT and therefore had to meet the stricter requirements of Article XX.⁵⁸ However, previous GATT Panels do not support the *lex specialis* view. The Panel in *Reformulated Gasoline* apparently was of the opinion that the SPS/TBT Agreements have to be applied jointly (“parallel to each other”), so that

⁵⁴ TBT Agreement, Annex 1 (1): “*Technical regulation: Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*”

⁵⁵ See Petersmann, p.120; Nissen, J., Achieving a Balance between Trade and the Environment: The Need to amend the WTO/GATT to include Multilateral Environmental Agreements, 28 *Law and Policy in International Business* (1997), p. 909.

⁵⁶ Art. 2 (2): “*Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements, the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.*”

⁵⁷ See Montini, M., The Nature and Function of the Necessity and Proportionality Principles in the Trade and Environment Context, Vol. 6:2 *RECIEL*, p. 124.

if a measure is justified under the TBT Agreement it might still violate GATT and not be justified under Article XX and vice versa. Since the Panel in *Reformulated Gasoline* found that the Gasoline rules could not be justified under GATT and did not proceed to examine the TBT Agreement it must have been of the opinion that the SPS/TBT Agreements are not *lex specialis* to GATT but are applied parallel to it. A measure incompatible with GATT Articles can therefore not be “saved” by those two Agreements.⁵⁹

4.1.3.2 Import ban/subject to specified conditions justified under the TBT Agreement?

Import bans or imports subject to specified conditions must fall within the scope of the TBT Agreement. Where a product contains a chemical that is banned under the PIC Convention, it may be banned from import because of its chemical content. In relation to that product the import ban constitutes a technical regulation. Hence, both kinds of measures (import ban and import subject to specified conditions) may fall within the scope of the TBT Agreement.

Article 2(1) incorporates the Most-Favoured-Nation and National Treatment obligations. However, since Art. 10(9) of the PIC Convention contains the same obligations, technically, a breach of Art 2(1) TBT by a country that is complying with the PIC Convention is thus not possible. The import restrictions “foreseen” by the PIC Convention might violate Article 2 (2) of the TBT Agreement. However, measures taken pursuant to the PIC Convention may be rebuttably presumed not to create unnecessary obstacles to trade, if they are construed as “legitimate” in the sense of Article 2(5) of the TBT Agreement.⁶⁰ If the listing of the chemicals in Annex III of the PIC Convention were considered to be in accordance with international standards the ban or restricted import would be rebuttably presumed not to be unnecessarily trade restrictive.⁶¹

⁵⁸ This view implies that the SPS/TBT Agreements as *lex specialis* over GATT would have to be examined before GATT. If a measure fell within their scope, the question of whether a measure also complied with GATT would be academic.

⁵⁹ See Petersmann, p. 10.

⁶⁰ Art. 2 (5): “... Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”

⁶¹ Annex I, paragraph 2 TBT Agreement, a standard:

However, WTO Panels would most likely not consider MEAs necessarily as standards in the meaning of the TBT Agreement. However, the argument could be made that risk assessment (as required by Art. 2 (2) TBT Agreement) has been carried out by the Chemical Review Committee under the PIC Convention. The trade in chemicals listed in Annex III PIC Convention may therefore be said to have been evaluated and weighed with the risks arising from it. If a chemical is listed in Annex III it is considered too dangerous to allow unlimited trade in relation to that chemical. The listing - practically universally agreed upon by the Conference of the Parties - should therefore suffice as risk assessment. In this way, measures taken pursuant to the PIC Convention could be justified under the TBT Agreement.

4.2. Cartagena Protocol on Biosafety to the Convention on Biological Diversity

Advances in medicine, agriculture and industry through modern biotechnology have been accompanied by growing concern about potential adverse effects on ecological systems and human health. Ecological concerns about releases of living modified organisms into the environment include: adverse impact of LMOs on non-target ecosystems and species, unintended changes in competitiveness by replacing existing plants and transfer of genes to wild plants resulting in traits like herbicide or antibiotic resistance.

Article 19(3) of the Convention on Biological Diversity (CBD) addresses this concern, and calls for the parties to consider the need for and modalities of a Protocol setting out procedures in the field of the safe transfer, handling and use of LMOs. After the Conference of the Parties (COP) had initiated negotiations most delegations favoured the development of an international framework on biosafety under the CBD. Negotiations of the Open-ended Ad Hoc Group of Experts on Biosafety (BSWG) focused on the transboundary movements of LMOs that could have an adverse effect on biological diversity, and developed procedures for the advanced informed agreement procedure (AIA). Attempts were made to finalise a Protocol on Biosafety during BSWG 6 (14. Feb.1999 - 22. February 1999 in Cartagena, Colombia), which was to have been

“Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory...”

adopted by an Extraordinary Meeting of the Conference of the Parties (ExCOP), held from 22-23 February 1999 in Cartagena. However, delegates were not able to agree on a Protocol at that time. One area of contention was the relationship between the proposed Protocol's provisions and the WTO rules.⁶² The Cartagena Protocol on Biosafety was finally agreed on 29th January 2000 in Montreal.

4.2.1 The Protocol's purpose and method

4.2.1.1 Objective and Scope

According to Article 1 of the Cartagena Protocol on Biosafety (Biosafety Protocol), the objective of the Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of LMOs resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account, risks to human health. The scope of the Protocol does not extend to “contained” LMOs, i. e. those that are used “internally” and are not meant to be introduced into the external environment, such as those used in the industrial production of enzymes or in fermentation processes.⁶³ Articles 7 to 10 contain the Advance Informed Agreement (AIA) procedure which is similar to the Prior Informed Consent procedure under the Rotterdam Convention. The procedure shall apply to intentional transboundary movements of living modified organisms intended to be introduced into the environment of the importing Party.⁶⁴ Article 7(2) limits the scope of the AIA procedure providing that “intentional introduction into the environment” in Article 7 (1) does not refer to LMOs intended for direct use as food or feed, or for processing (so called LMO-FFPs). This includes such commodities as genetically modified corn, soya, wheat and tomatoes.⁶⁵ LMOs in transit are also excluded from the scope of the AIA procedure. Some LMOs may be subsequently excluded from the AIA procedure by an importing party,⁶⁶ or (similar to the Chemical Review

⁶² See <http://www.biodiv.org> (UNEP/CBD/ExCOP/1/L.2/Rev.1); Earth Negotiations Bulletin: <http://www.iisd.ca/linkages/vo109/enb09117e.html> on BSWG-6 in Cartagena/Colombia

⁶³ Art. 6.

⁶⁴ Art. 7 (1).

⁶⁵ It had been argued that since commodities are not intended for introduction into the environment, they pose no threat to biodiversity and should not be the subject of a Protocol.

⁶⁶ Art. 13 (1) (b) permits importing parties to adopt simplified procedures.

Committee in the Rotterdam Convention) by the governing body of the Protocol which can identify a list of LMOs that are not likely to have adverse effects.⁶⁷

4.2.1.2 Main Articles

Prior informed consent

Article 8 requires exporting parties to notify or to require the exporter to notify the competent national authority of the importing party. Notification must contain the information specified in Annex I of the Protocol, including a risk assessment. Under Article 10 the importing party is required to decide whether it consents to import unconditionally or subject to specified conditions or whether it prohibits the import. It can also extend the period for decision making. In all cases apart from unconditional import, the importing party must give reasons for its decision. However, a failure to respond to the notifying exporter and to communicate its decision within the specified time frame of 270 days does not imply the consent of the importing party.⁶⁸

A Biosafety Clearing House is established in order to deal with the significant trade in LMO-FFPs.⁶⁹ It will serve as a multilateral information exchange mechanism. Within 15 days of taking a final decision regarding the domestic use of an LMO, the party taking such a decision is obliged to inform the other parties through the Clearing House. The information must include details about the producer, the particular LMO and a risk assessment.⁷⁰ Pursuant to Article 11 (4), other parties may request additional information, and may make their own decision on the import of the LMO-FFP through their domestic regulatory framework. All parties must make available to other parties through the Biosafety Clearing House, copies of their national laws, regulations and guidelines applicable to LMO-FFPs.⁷¹

Article 14 of the Biosafety Protocol allows the parties to enter into multilateral, bilateral and regional agreements with Parties or non-parties regarding intentional transboundary movements of

⁶⁷ Art. 7 (4).

⁶⁸ Art. 10 (5)

⁶⁹ See Art. 20

⁷⁰ See Art. 11 (1) and Annex III.

⁷¹ Article 11 (1), (5).

LMOs, provided that such agreements do not result in a lower level of protection than that of the Biosafety Protocol.⁷² This is similar language to the Montreal Protocol and the Basel Convention.

Science and Precaution

The Protocol contains strong provisions on the precautionary principle. Article 1 states that the objective of the Protocol is to be pursued “in accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development.” A commitment to the precautionary approach is also expressed in the preamble. That commitment is further operationalised in Article 10, which governs the procedure by which parties decide on the import of LMOs. Article 10 (6) states that “lack of scientific certainty... shall not prevent a party from taking a decision, as appropriate, with regard to the import of the living modified organism in question...” A similar clause is contained in Article 11, which covers the special case of LMO-FFPs. This gives the precautionary principle a significant role in the decision to restrict or prohibit import of LMOs.⁷³ However, the provisions on precaution are not formulated as obligations but as rights to take precautionary action.⁷⁴ The right may be limited by the obligation in Article 12 on the importing party to review the decision in the light of new scientific evidence on request of the exporting party.

Identification and Labelling

Article 18 elaborates on identification and labelling issues. LMOs subject to intentional transboundary movement shall be handled, packaged and transported under conditions of safety, taking into consideration relevant international rules and standards.⁷⁵ There is a distinction in requirements between LMO-FFPs and LMOs intended for release into the environment.⁷⁶ The latter category of LMOs shall be clearly identified in accompanying documentation, specifying relevant traits and other specified information. Again commodities are prescribed different

⁷² Article 24 requires that transboundary movements of LMOs between parties and non-parties shall be consistent with the Protocol's objective and principles.

⁷³ See Cosbey, A. and S. Burgiel, *The Cartagena Protocol on Biosafety: an analysis of results*, An IISD Briefing Note, IISD, 2000.

⁷⁴ See Eggers, B., and R. Mackenzie, *The Cartagena protocol on Biosafety*, *Journal of International Economic law*, Vol. 3, No.3, 2000 (forthcoming).

⁷⁵ Art. 18 (1)

⁷⁶ Art. 18 (2) (a) and (c).

treatment. Their accompanying documentation need only specify that they “may contain” LMOs not intended for introduction into the environment.

Article 26 allows parties to take socio-economic considerations into account in reaching a decision on the import of LMOs in so far as they arise from their impact on the conservation and sustainable use of biodiversity.

4.2.2 Identification of WTO-relevant provisions

Preamble

The Biosafety Protocol provides in its Preamble:

“Recognising that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasising that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.”

This language, especially the words “mutually supportive” would suggest that there is no prima facie conflict between the Protocol and WTO rules.⁷⁷ Another interesting use of language is the term “interpreted”. Again this supports the way in which trade provisions in recent MEAs are carefully crafted to avoid legal conflicts with WTO rules through skilful interpretation.

SPS/TBT Agreement

Having said that, conflict may arise over how parties implement the Protocol’s provisions. For instance, a party with limited scientific evidence may decide to ban imports of GM soya products arguing that it is allowed to do so under Article 11’s precautionary principal provisions. Although compliance with the Protocol’s provisions may not be at issue, an exporter could allege that benefits under the WTO agreements have been nullified and impaired.⁷⁸

⁷⁷ However, the significance of the clauses on the precautionary principle may make this situation a bit more complicated.

⁷⁸ Cosby and Burgiel, op cit, n. 73.

The scope of the Biosafety Protocol means that its implementation has implications for both the SPS and TBT Agreements. Approval procedures for import of LMOs are likely to fall under the SPS Agreement, while labelling of the products for consumer information purposes, such as those required under Article 18 of the Protocol will likely fall under the TBT Agreement.

The SPS Agreement sets out a number of requirements with which an SPS measure must comply. Measures must be based on sufficient scientific evidence, and a risk assessment. Where relevant scientific evidence is lacking, a provisional measure may be taken. However, a party to the Biosafety Protocol wishing to take a decision about LMOs may find that the risk assessment procedures under the protocol do not match those required by the SPS Agreement. Cosbey and Burgiel identify several differences in the approach to risk assessment between Article 5.7 of the SPS Agreement and the relevant provisions of the Biosafety Protocol. First, the SPS Agreement does not specify exactly what a risk assessment is, but the Protocol elaborates this in detail in Annex II. Secondly, the SPS does not mention risk management, but merely risk assessment. The Protocol mentions both exercises, defining the latter as the gathering of the data, and the former as the building of a regulatory regime based on that data. It gives detailed guidance as to the establishment of the regime, e.g. asking parties to try to ensure that any LMO should undergo an appropriate period of observation commensurate with its life-cycle or generation time before it is put to its intended use. The Protocol explicitly allows parties to take into account socio-economic considerations in making their decisions whereas the SPS Agreement is silent on this issue. Furthermore, the Protocol is specific about the process for review of decisions in the light of new evidence, but the SPS is ambiguous about how to treat measures adopted provisionally in the face of uncertainty. The provisions in Article 15 indicate that the onus is on the exporter to establish the harmless nature of the LMO in question. The importing party may require the exporter to carry out the risk assessment and it may require the notifying party to foot the bill. On this issue the SPS Agreement is silent.

Cosbey and Burgle argue that the significance of the precautionary provisions in the Protocol is that they fill in some of the gaps in the SPS Agreement, and that in effect an MEA is giving

specificity to a trade agreement. Indeed the precautionary provisions of the Biosafety Protocol are even stronger than the general expression of the precautionary principle in Principle 15 of the Rio Declaration.⁷⁹ However, it is important to remember that the precautionary language in the Protocol is LMO-specific and obviously geared towards an area in which there is a great deal of uncertainty and concern. The risk assessment provisions in the SPS Agreement are more general and targeted at a range of SPS measures taken in several different contexts. Nevertheless the incongruence between the Protocol and SPS precautionary provisions may present some problems in the future.

Recent WTO jurisprudence has attempted to shed some light on the ambiguity in the SPS Agreement.⁸⁰ Panels are required to consider each case on its merits to discover if there is a rational and objective relationship between the SPS measure and the scientific evidence or risk assessment.⁸¹

Although the Appellate Body's interpretation of the SPS Agreement has contributed to more certainty in the method of application of SPS measures, there are still some ambiguities present. On the one hand, a minimum magnitude of risk is not necessary and a divergent opinion coming from qualified and respected sources can be sufficient evidence.⁸² On the other hand, the precise conditions for risk assessments may be quite specific and onerous.⁸³ At the same time, the Appellate Body has rejected 'studies that lend more weight to the unknown and uncertain elements'⁸⁴ It found that under Article 2.2 and 5.1, the risk must be ascertainable as opposed to theoretical uncertainty.⁸⁵ Having said that, the Appellate Body has nevertheless stressed that an overly broad and flexible interpretation of Article 2.2 would render Article 5.7 meaningless.

⁷⁹ See Eggers and Mackenzie, *op cit*, n.---, at 10.

⁸⁰ See EC – Measures Affecting Meat and Meat Products (Hormones) ('Beef Hormones case'), WT/DS26, 48/AB/R, adopted 13 February 1998.; Australia – Measures Affecting the Importation of Salmon ('Australia Salmon case'), WT/DS18/AB/R, adopted 6 November 1998; Japan – Measures Affecting Agricultural Products ('Japan Varietals'), WT/DS76/AB/R, adopted 19 March 1999.

⁸¹ Appellate Body Report, Japan Varietals, para 84.

⁸² Appellate Body, Beef Hormones case, para 186.

⁸³ See Pauwelyn, J., *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes*, 2 *Journal of International Economic Law* (1999), p. 633.

⁸⁴ Appellate Body Report, Australia Salmon case, paras 120-130.

⁸⁵ *Ibid*, para 125.

As far as Article 5.7 is concerned, the Appellate Body in the Japan Varietals case gave four conditions under which the WTO members may provisionally adopt an SPS measure. The measure must be: a) imposed in respect of a situation where relevant scientific evidence is insufficient; b) adopted on the basis of available pertinent information and may not be maintained unless the member that adopted the measure: c) seeks to obtain the additional information necessary for a more objective assessment of risk and; d) reviews the measure accordingly within a reasonable period of time.⁸⁶ The focus of interpretation is on the second sentence (the procedural requirements) of the Article. The Appellate Body noted that the information must be germane to conducting such a risk assessment, and that the length of the reasonable period of time depends on the specific information necessary for the review, and the characteristic of the provisional SPS measure.⁸⁷ However, the Appellate Body's adoption of a case by case assessment of SPS measures rather than applying particular rules of thumb means that there is little guidance to SPS regulators about the chances of their biosafety-specific measures passing WTO scrutiny. Eggers and Mackenzie suggest that where countries cannot refer to specific scientific studies, but rather on "what if..." concerns to justify their AIA decisions, this would not be a sufficient risk assessment under Article 2.2 and 5.1. However, the precise guidelines set out in the Protocol's main provisions and Annexes surely is intended to ensure that parties under the Protocol rely on more substantial evidence in their risk assessment exercises for LMOs than "what if" concerns.

The more dangerous area in terms of WTO litigation would appear to be the commodities sector that is governed by the LMO-FFPs provisions in the Protocol. Article 11 (4) does not explicitly require a risk assessment for decisions about the import of LMO-FFPs. Moreover there is no language suggesting the LMO-FFPs provisions are meant to be compatible with WTO rules as with the provisions on imports of LMOs.⁸⁸ This may be because such imports are not subject to any possible trade restriction on environmental grounds, and therefore there is a presumption that

⁸⁶ Appellate Body Report, Japan Varietals, para. 89

⁸⁷ *Ibid.*, para. 93.

⁸⁸ Eggers and Mackenzie, *op cit*, n--., p. 18.

the clauses in this section will be compatible with WTO rules anyway (?). This grey area in the Protocol may need to be clarified through dispute settlement.

The TBT Agreement

The most pertinent provision of the TBT Agreement relevant to biosafety related measures would be the necessity test under Article 2.2 which requires that technical regulations should not be more trade restrictive than necessary to achieve a legitimate objective, taking into account the risks that non-fulfilment would create. Legitimate objectives include environment and human health protection. These provisions have not been tested yet in a WTO case; however, it is expected that clarification will come in the findings of the panel in the Asbestos dispute between the EC and Canada.⁸⁹

4.2.3. General GATT Articles – I, III, XI and XX

Of course, any other kinds of measures taken pursuant to the Biosafety Protocol which do not involve risk assessment or technical regulations, will fall under the national treatment, quantitative restrictions and general exceptions provisions of the GATT. Such measures would include for instance, the prohibition of genetically modified tomato seeds on the basis of socio-economic considerations.

A Party violates Article I or Article III if it accords different treatment to “like products”. The term “like products” is of crucial importance in the trade and environment relationship. Under WTO rules, products cannot be distinguished for environmental purposes on the basis of their production process. Central to the examination of whether a measure taken under the Biosafety Protocol violates Article III is the question whether products containing LMOs are “like” conventional products. Assistance can be found in the definition section of the Biosafety protocol. An LMO is defined as any living organism that possesses a novel combination of genetic material obtained

⁸⁹ EC- Measures Affecting Asbestos and Products containing Asbestos, WT/DS135.

through the use of modern biotechnology.⁹⁰ A living organism is defined as any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids.⁹¹ Modern biotechnology is defined through a list of in vitro nucleic acid and cell fusion techniques that overcome natural physiological reproduction or recombination barriers. This list does not include traditional breeding techniques and selection, and therefore organisms produced using traditional breeding or selection techniques are not within the definition of LMO used in the Protocol.⁹² Thus the Protocol expressly acknowledges that products containing LMOs and conventional products are not “like products”. This suggests that these different products may be treated differently for trade purposes without giving rise to conflict with WTO rules.

The issues that arise under Article XX are essentially similar to those that arise in relation to the PIC Convention. Clearly, trade measures taken pursuant to the Biosafety Protocol are part of a policy that falls within the scope of Article XX (b) or (g). The import ban or the measure that makes import of the LMO subject to specified conditions have to be either “necessary” for the protection of human, animal or plant life or “relating to” the conservation of natural resources. As has been seen above, the Appellate Body in *Reformulated Gasoline* and in *Shrimp/Turtle* has lowered the hurdle to allow a TREM to pass the “relating to” test in Article XX (g). This leads to the curious case where it is easier for a trade measure to be justified for conservation reasons (Article XX (g)) than for reasons of the protection of human life and health (Article XX (b)).

5. Conclusion

Both the PIC Convention and the Biosafety Protocol, as well as the future convention on the control of persistent organic pollutants (POPS) aim at essentially the same idea, namely to limit dangers that result from trade in dangerous substances. Thus, they employ similar or even the same mechanisms. It follows that all of them will face the same hurdles in their relationship with the

⁹⁰ Art. 3 (g), 4.

⁹¹ Art. 3 (h)

⁹² Art. 3(i)

GATT and the other WTO Agreements. Both the PIC Convention and the Biosafety Protocol allow complete import bans or imports that may be made subject to specified conditions.

Prima facie, national measures to implement the trade provisions in either MEA would violate Articles I and III. Both MEAs discriminate between countries on the basis of their environmental performance, requiring parties to restrict trade to a greater extent with non-parties than they do with parties. Indeed such discrimination is one of the underlying premises of these MEAs, since they are aimed at promoting sustainable activities while punishing unsustainable behaviour. GATT Article XI forbids any restrictions other than duties, taxes or charges on imports from and exports to other WTO members, yet both MEAs require precisely such quantitative restrictions.

Examined under the criteria of GATT Article XX, it seems to be easier to justify a trade measure under paragraph (g) than under (b). The Appellate Body in the *Reformulated Gasoline* Case and again in the *Shrimp/Turtle* Case has significantly altered the previous interpretation of the “relating to” test in Art. XX (g) ruling that it means neither “primarily aimed at” nor “necessary”.

Neither the PIC Convention nor the Biosafety Protocol contains the most blatant form of confrontation with the WTO: trade bans with non-parties. As the negotiating history of the Biosafety Protocol shows, a trade ban as against non-parties would not survive due to the likely GATT/WTO inconsistency. This “trade chill” effect has also surfaced in other MEAs. There is hostility towards the amendment in the Basel Convention banning trade in waste between OECD and non-OECD countries. Attempts to include trade provisions in the International Convention for the Conservation of Atlantic Tuna (ICCAT), and in agreements to control driftnet fishing, were halted because of the fear that such provisions would be GATT inconsistent. Similar issues were raised in the negotiations for the Kyoto Protocol to the UN Framework Convention on Climate Change.

Despite the foregoing, the trade measures employed by the PIC Convention and the Biosafety Protocol (once it is adopted), and the national measures taken pursuant to them are unlikely to be challenged in the WTO dispute settlement system. These MEAs have wide international acceptance and they have been constructed with greater care regarding their WTO-consistency

and the WTO consistency of TREMs taken pursuant to them. Moreover, new MEAs incorporate their own anti-discrimination clause in order to ensure WTO-consistency.

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