DUAL FACETS OF HARMONIZING ENVIRONMENTAL PROTECTION POLICIES

IN INTERNATIONAL TRADE

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Submitted to the

Faculty of the Washington College of Law

of American University

in Partial Fulfillment of

the Requirements for the degree

of Doctor of Juridical Science

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8/16/2012

Date

2012

American University

Washington, DC 20016

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ABSTRACT

A State or an international trade institution, the World Trade Organization (WTO), may recognize that harmonizing environmental policies is necessary when differences of environmental regulations in each State significantly affect competition in international trade. To do so, a State often requires another State to adopt the same environmental policies as a condition of market access, while the WTO requires its Member States to conform their national economic policy goals to coincide with WTO rules. When a State uses a trade measure to enforce its environmental policies, the measure has the effect of indirect or *de facto* harmonization in that the trading partner must meet its environmental requirements as a condition of market-access. Similarly, even if the WTO agreements do not require its Member States to adopt the same economic policies, they also have an indirect harmonization effect because its Member States' economic policies must be legislated and implemented in accordance with their obligations and commitments under the WTO.

The State and the WTO harmonization requirements have different approaches to offset the competitive advantages generated from differences in environmental policies. The State harmonization requirement has a protective effect and affects other States' right

to choose their own policies when it unilaterally compells foreign producers to adopt uniform environmental standards. This State protectionist or unilateral measure is not preferred in the WTO because the WTO's primary goal is to prevent protectionist measures in international trade and to secure international trade system by encouraging its Members to use multilateral resolutions.

However, in certain circumstances, a State's trade measures are explicit, and this can constrain the rights of the country that is its trading partner. The exporting country must satisfy requirements of the importing country's policies to access the importing country's market. Thus, a certain level of constraint on a State's policy choices is inevitable in international trade relations. In this context, a State can choose trade measures requiring its trading partners to comply with its environmental laws and policies. The WTO agrees that the trading country can require its trading partners to meet its policies and laws as a condition of market-access. Meanwhile, a State that takes measures against its trading partners is also constrained in exercising its rights because a WTO Member State has to legislate and implement their market-access requirements in accordance with WTO rules. Thus, as constraints exist in both the State taking measures and the State accessing the market, rights and responsibilities are given to both in international trade.

The WTO Dispute Settlement Bodies (DSBs) have excluded the State's value preferences related to environmental protection in their rulings, even while theoretically recognizing that States have the autonomy to legislate their policies on the basis of value preferences. This approach suggests that the WTO balances the State's policy choices and the DSBs' uniform application of WTO rules. By excluding value preferences in their

ruling procedure, the WTO DSBs prevent Member States from misusing *de facto* harmonization requirements for environmental protection, and contribute to balancing rights between Member States.

Even though not every unilateral or protectionist measure shall be prohibited in the WTO, trade measures are not optimal policy choices to deal with environmental problems because many trade measures do not necessarily prevent environmental degradation. Reconciling the State and WTO harmonization effects lies in whether the balance between a State's policy choice and the WTO's goals is achieved through respect and cooperation both between States and between States and the WTO.

ACKNOWLEDGEMENTS

I gratefully acknowledge the academic and personal support and help that I received from many people on the way to completing my dissertation. Throughout the long journey of this project, I have received a lot love, support, and help which enabled me to finally complete it. However, I know that this is not the end, but rather the beginning of what I am sure will be another great journey.

First of all, I would like to thank Professor David Hunter who greatly inspired me to delve into international environmental law and provided motivation for this project. If I had not come across and read his great book, *International Environmental Law and Policy*, I would never have thought to start this project about trade and the environment. I would also like to thank Professor Padideh Ala'i who has always provided me with great insight and shared with me her deep knowledge about the law of international trade. Lastly, I would like to thank Professor William Snape who gave me significant critiques on the topic and dissertation which allowed me to find my own way and develop new ideas for this project. All three professors provided me with different perspectives and with invaluable guidance and support, and I could not have completed it without them.

I would also like to give thanks to Professor Mary Clark, the former director of the SJD program at American University Washington College of Law, for all of her help and support, which was given with great consideration. Her passion and energy for the SJD program has led to great improvement of the program.

My special thanks go to Nohyoung Park, Dean of Korea University Law School, who allowed me to step into the world of international trade law.

Other very special thanks go to my family: my mother, my two sisters, my brother, my sister-in-law, and my brother–in-law. Throughout my life, they have always supported me with love and given me all of the help I needed along the way.

Lastly, I thank Erika Lennon. As an international environmental law attorney, she has helped by not only reading through my dissertation, but also by giving me great opinions about international environmental law.

TABLE OF CONTENTS

ABSTRACT ii

ACKNOWLEDGEMENTS v

Chapter

1. INTRODUCTION 1

2. BACKGROUND: INTRODUCTION TO THE ENVIRONMENT, INTERNATIONAL TRADE, AND TRADE LIBERALIZATION 10

2.1. The Nature of Environmental Problems and International Trade 10

2.2. Trade Liberalization and Environmental Protection 12

2.2.1. The Negative Impact of Trade Liberalization on the Environment 13

2.2.1.1. Unsustainable Development through Trade Liberalization 13

2.2.1.2. Competitiveness in the Global Market and Race to the Bottom 16

2.2.2. The Positive Impact of Trade Liberalization on the Environment 18

2.2.2.1. Economic Growth for Sustainable Development 18

2.2.2.2. Environmentally-friendly International Trade System 21

3. HARMONIZING NATIONAL POLICIES IN THE INTERNATIONAL TRADING SYSTEM 27

3.1. The Concept of Harmonization in International Relations 27

3.2. Harmonizing National Economic or Environmental Policies in the International Trading System 29

3.2.1. Harmonizing National Economic Policies in the International Trading System 29

3.2.2. Harmonizing National Environmental Policies in International Trade 34

3.3. Harmonization in the WTO' Multilateral Trading System 38

3.4. Dual Facets of Harmonizing Environmental Policies in the WTO 42

4. WTO RULES AND ENVIRONMENTAL PROTECTION 46

4.1. Introduction 46

4.2. The Fundamental Principles in the WTO 47

4.2.1. GATT Article I: Most-Favored-Nation Treatment 48

4.2.2. GATT Article III: National Treatment 52

4.2.2.1. Domestic Tax under Article III:2 53

4.2.2.2. Domestic Regulation under Article III:4 56

4.2.2.3. The Relationship between National Treatment and MFN 59

4.2.3. GATT Article XI: Non-Quantitative Restriction on Trade 60

4.2.4. The Concept and Criteria of Like Product 63

4.3. Environmental Exceptions to International Trade in the WTO 67

4.3.1. GATT Article XX(b): Measures Necessary to Protect the Environment 69

4.3.2. GATT Article XX(d): Measures Necessary to Comply with Domestic Laws 74

4.3.3. GATT Article XX(g): Measures Relating to Environmental Conservation 76

4.3.4. The Chapeau of GATT Article XX 81

4.4. Summary 86

5. A STATE'S PROTECTIONISM AND THE WTO'S NON-PROTECTIONISM TO HARMONIZE ENVIRONMENTAL POLICY 89

5.1. Introduction 89

5.2. Protectionism in International Trade 90

5.3. Protectionism as a Goal of a State's Environmental Policy 94

5.3.1. Hidden Protectionism of a State's Environmental Policy 94

5.3.2. A State's Protectionism Implemented through the Harmonization Requirement 97

5.4. The Non-Protectionist Orientation of the WTO 99

5.4.1. The Non-Discrimination Principle to Prevent Protectionism 100

5.4.2. Non-Quantitative Restriction to Prevent Protectionism 101

5.4.3. The Transparency Requirement as Non-Protectionist Devise 102

5.5. A State's Environmental Protectionist Measures in International Trade 106

5.5.1. Environmental Taxes and Border Tax Ajustment as Protectionist Measures 107

5.5.2. PPMs as Protectionist Environmental Measures 109

5.5.3. Labeling as Protectionist Environmental Measures 113

5.6. Legitimacy of a State's Environmental Protection Policy in the WTO 116

5.6.1. Safeguard Measures for a State's Economic Injury 117

5.6.2. Regulations on Technical Standards and SPS Measures 118

5.6.3. Exceptional Measures for Environmental Protection 121

5.7. Summary 124

6. A STATE'S UNILATERALISM AND THE WTO'S MULTILATERALISM TO HARMONIZE ENVIRONMENTAL POLICY 128

6.1. Introduction 128

6.2. A State's Unilteralism and the WTO's Multilateralism as the Harmonization Requirement 129

6.2.1. A State's Unilateralism as the Harmonization Requirement 129

6.2.2. The WTO's Multilateralism as the Harmonization Requirement 132

6.3. A State's Unilateral Measures to Implement Environment Policies in the WTO 135

6.3.1. Unilateral Measures as a Countermeasure 137

6.3.2. Unilateral Measures as an Enforcing Tool 142

6.3.2.1. Unilateral Measures as an Enforcing Tool of Domestic Rules: A State's Unilateral Measures to Compel Other States to Harmonize toward its Domestic Policies.. 143

6.3.2.2. Unilateral Measures as an Enforcing Tool of International Rules: A State's Unilateral Measures to Compel Other States to Comply with International Obligations 147

6.3.2.2.1. Unilateral Measures in Support of International Agreement 147

6.3.2.2.2. Unilateral Measures without Support of International Agreement 151

6.4. Legitimacy Requirements of Unilateral Measures in the WTO 152

6.5. Summary 155

7. A STATE'S SOVEREIGN RIGHTS AND OBLIGATIONS IN THE WTO TO HARMONIZE ENVIRONMENTAL POLICIES 158

7.1. Introduction 158

7.2. The State Sovereignty Principle in International Relations 160

7.3. A State's Unilateral Action Affecting Other States' Sovereignty 163

7.3.1. A State's Unilateral Action Affecting Other States' Sovereignty to Enforce Environmental Policies 163

7.3.1.1. A State's Unilateral Action Affecting Other States' Sovereignty to Enforce Domestic or International Environmental Policies 163

7.3.1.2. A State's Rights of Environmental Protection and Other States' Rights under the WTO 168

7.3.2. A State's Unilateral Measures Acting Extra-territorial Jurisdiction for Environmental Protection 171

7.4. The WTO Harmonization Requirement and a State's Sovereignty Rights 176

7.4.1. The WTO's Harmonization and a State's Diversity of Environmental Policies 176

7.4.2. A State's Rights and Contractual Obligations in the WTO 181

7.4.2.1. State Sovereignty and Contractual Obligations in International Law and the WTO. 182

7.4.2.1.1. State Sovereignty and Contractual Obligations under International Law 182

7.4.2.1.2. WTO Dispute Settlement Decisions as International Law Obligations 184

7.4.2.2. A State's Right to Determine its Environmental Policies in the WTO 186

7.4.2.2.1. WTO Rules on States' Authority of National Environmental Policies 186

7.4.2.2.2. WTO Jurisprudence on States' Authority of National Environmental Policies 190

7.4.3. WTO's Limited Adjudication to Judge National Environmental Necessity 193

7.5. Summary 196

8. CONCLUSION 198

BIBLIOGRAPHY 204

1. INTRODUCTION

1.1. Background of Research

Different costs due to different environmental policies can lead to different competition in international trade. Each country chooses and implements different environmental policies that vary in strength and reflect its domestic needs for environmental protection.[1] Differences between stringent and lax environmental standards generate different competitiveness at the global market.[2] A country with lax standards is more likely to be competitive in the global market because it externalizes pollution costs as it consumes and produces, which results in less cost and more environmental degradation.[3] Thus, lax standards and regulations can lead to environmental degradation and trade distortion by providing domestic producers with lower standards with a competitive advantage.[4] Meanwhile, a country with stringent standards is more likely to be less competitive at the global market because it internalizes its pollution

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[1] *See* Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations, in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS 59, 59 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

[2] *See* General Agreement on Tariffs and Trade (GATT), *Trade and the Environment* 17, GATT/ 1529 (Feb. 3, 1992) [hereinafter GATT Report 1992].

[3] *See* Organization for Economic Co-operation and Development (OECD), *The Environmental Effects of Trade* 8-9 (1994) [hereinafter OECD 1994]; *see also* MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 790 (2nd ed. 2003).

[4] Edith Brown Weiss & John H. Jackson, *The Framework for Environment and Trade Disputes, in* RECONCILING ENVIRONMENT AND TRADE 1, 33 (Edith Brown Weiss, John H. Jackson & Nathalie Bernasconi-Osterwalder eds., 2nd ed. 2008).

costs in the price of goods and servies.[5] Internalizing pollution costs makes a nation less competitive in the global market because it pays pollution costs for producing and consuming, which causes less environmental damage, but costs more and raises products' prices.[6] Thus, a country with stringent standards will argue that different costs from different environmental policies generate unfair competition in international trade.[7]

This notion of unfair competition can necessitate harmonization of environmental regulations in international relations to compensate for the unfair competition that is caused by different costs of production.[8] Harmonization in international trade can be distinguished between harmonization toward a State's law and harmonization toward international law.[9] Harmonization toward a State's law is that States desire to have the policies of the exporting country be in harmony with their own policies, throughout this dissertation this will be referred to as the State harmonization requirement. Similarly harmonization toward international law is that international trading institution, the World Trade Organization (WTO), wants to create harmonized international policies across the

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[5] *See* DANIEL C. ESTY, THE GREENING OF THE GATT 155-79 (1994); Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreement*, 21 HARV. ENVTL. L. REV. 265, 269 (1997). The concept of internalization is the basis of the "polluter pays principle." OECD Report recommends its members apply the polluter pays principle in determining environmental control policies and measures. OECD 1994, *supra* note 3, at 8-9.

[6] *See* OECD 1994, *supra* note 3, at 8-9.

[7] Jagdish Bhagwati, *Trade and Environment: The False Conflict, in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY 159, 166 (D.Zaelke et al. eds., 1993) [hereinafter Bhagwati 1993].

[8] *See* Jagdish Bhagwati & T.N.Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?, in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?: ECONOMIC ANALYSIS 159, 162 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); *see also* David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims, in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?: ECONOMIC ANALYSIS 41, 60-61 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); *cf.* Esty & Geradin, *supra* note 5, at 271.

[9] *See* Leebron, *supra* note 8, at 78.

world, this will be referred to as the WTO harmonization requirement throughout.[10]

1.2. *De facto* Harmonization by a State or the WTO

Neither the State nor WTO harmonization necessarily implies explicit harmonization. An example of the State harmonization requirement is Guideline 1996 for the Implementation of Section 609 of the United States Public Law 101-162 (Guideline 1996), which requires an exporting country to implement the same program for sea turtle conservation that the United States does in order to be able to export shrimp to the United States.[11]

Although Guideline 1996 provides an explicit harmonization requirement for environmental protection through a trade sanction. A State does not necessarily enact this type of explicit harmonization requirement under its legislation. In environment-related disputes in the General Agreement on Tariffs and Trade (GATT) and the WTO, only a few cases addressed a State's explicit harmonization requirement to enforce national environmental policies.[12] Mostly, a State's regulations do not require foreign producers to adopt the same environmental policies, but a State can take trade measures when its trading

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[10] *See* Leebron, *supra* note 8, at 41.

[11] The Guideline 1996 for the Implementation of Section 609 of the United States Public Law 101-162, 61 Fed. Reg. 17342 (Apr. 19, 1996). It provides that "[c]ertification shall be made under Section 609(b)(2) ... if an exporting country's program includes a requirement that all commercial shrimp trawl vessels ... use ... TEDs comparable in effectiveness to those used in the United States."

[12] *See* Report of the Panel, *United States-Restrictions on Imports of Tuna*, DS 21/R (Sep. 3, 1991) (*unadopted*), GATT B.I.S.D. (39th Supp.) [hereinafter US-Tuna (Mexico)]; Report of the Panel, *United States-Restrictions on Imports of Tuna*, DS29/R (Jun. 16, 1994) (*unadopted*) [hereinafter US-Tuna (EEC)]; Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter US-Shrimp Appellate Body Report]. Considering that the *US-Tuna (Mexico)* and *US-Tuna (EEC)* decisions were not adopted, the *US-Shrimp* decision is the only case of explicit harmonization.

partner does not meet requirements under its environmental policies or regulations. The State's trade measures on the basis of environmental policies can result in the same economic effects as the harmonization requirement. In this context, the State's trade measures are led by not direct or *de jure* harmonization, but rather by an indirect or *de facto* harmonization requirement.[13] Further, this State harmonization requirement will only work "if a country requiring harmonization has a large market" that is big enough to influence the export of other countries.[14] Thus, throughout this dissertation, the State harmonization discussion largely refers to the *de facto* harmonization requirement, but also includes the *de jure* one as a possibility.

Similarly, the WTO does not require its Member States to adopt explicitly the same economic policies and laws.[15] WTO rules do not cover Member States' harmonization of regulations or standards, but rather provides Member States with a framework for economic policies and rules in international trade.[16] What the WTO requires its Member States to do is to implement their national economic policies and law in accordance with their commitments and obligations under the WTO. A WTO Member State has an obligation to incorporate its commitments and agreements under the WTO into its domestic laws.[17]

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[13] Interview with Padideh Ala'i, Professor, American University Washington College of Law, in Washington D.C. (Jun. 11, 2012) [hereinafter Ala'i interview]

[14] *Id.*

[15] David Robertson, *Trade and Environment: Harmonization and Technical Standards, in* INTERNATIONAL TRADE AND THE ENVIRONMENT 309, 310-11 (The World Bank 1992).

[16] John H. Jackson, *Comments on Initial Draft of Chapter* [for Bhagwati], *in* ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 599, 600 (Alan V. Deardorff & Robert M. Stern ed., 1994) [hereinafter Jackson 1994]; Ala'i Interview, *supra* note 13.

[17] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 205-18 (1994).

Accordingly, throughout this dissertation, WTO harmonization implies that the WTO Member States implement their economic policies and laws to comply with their concessions or commitment under the WTO.

1.3. Necessity of Research

The harmonization requirement of either the State or international level related to environmental policies is important in the international trading system in two ways. First, the harmonization requirement provides justification for both States and international institutions to eliminate or reduce non-trade barriers (NTBs) caused by environmental standards in international trade relations. Trade measures to combat perceived unfairness are no longer just traditional countervailing duties and anti-dumping duties, but rather are expanding to address domestic social matters including environmental or labor standards.[18] Thus, while a State uses the harmonization requirement for its benefit in the global market, the WTO uses the harmonization requirement to secure the multilateral trade system. Both harmonization requirements affect States' environmental policy objective. Accordingly, it is necessary to understand how both the State and the WTO harmonization requirements justify their desires to reduce NTBs caused by environmental regulations and how they affect States' environmental policy objectives and choices.

Second, a harmonization requirement can address comprehensive and precise legal issues regarding environmental protection between States and an international trade

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[18] Jagdish Bhagwati, *The Demands to Reduce Domesitic Diversity among Trading Nations*, *in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? ECONOMIC ANALYSIS, *supra* note 8, at 9, 19 [hereinafter Bhagwati 1996b]; Bhagwati & Srinivasan, *supra* note 8, at 162.

institution like the WTO because these two different actors have explicitly different purposes related to the harmonization requirement in international relations. The WTO prefers harmonization toward international regulations using the justification that international trade relations are more effective if the laws and policies of different jurisdictions are made similar. Meanwhile, States depend on harmonization toward their environmental policies arguing that internationally harmonized standards and regulations for environmental protection do not exist in the international trade system.[19] Accordingly, it is necessary to compare and understand how the two harmonization requirements of these two actors, States and the WTO, are different, and whether these different harmonization requirements can be reconciled.

1.4. Problem and Purpose of Research

When a State uses trade measures to force other States to agree to its environmental policies, it may lead to a conflict between States in international trade. To compensate for the higher price of products, a country with stringent standards may provide susbsidies for its domestic producers, increase tariffs for foreign producers, or impose trade restrictions for foreign producers.[20] Trade measures will make a State's domestic harmonization requirement be internationalized when the State's harmonization requirement affects international relations. This internationalization of a State's harmonization requirement can create conflict with the WTO harmonization requirement by restricting trade.

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[19] Interview with David Hunter, Professor, American University Washington College of Law, in Washington D.C. (Aug. 30, 2011) [hereinafter Hunter interview].

[20] *See* GATT Report 1992, *supra* note 2, at 17; GATT, *Industrial Pollution Control and International Trade* 13-15, L/3538 (Jun. 9, 1971) [hereinafter GATT Report 1971].

This dissertation aims at examining both the State and WTO harmonization approaches as they relate to the following issues: whether a State and the WTO have different positions on the harmonization requirement for environmental protection; whether the State harmonization requirement can be reconciled with the WTO harmonization requirment; and, whether either the State or WTO harmonization requirment is acceptable in international trading relations. To examine these issues, this dissertation chooses protectionism, unilateralism, and state sovereignty as analysis tools.

First, when environmental measures requiring harmonization are designed to protect domestic industries, those measures are protectionist and not allowed in the WTO. A State's trade measures for environmental protection are protectionist when their goals are to protect domestic industries from competition with foreign industries. The WTO does not allow its Member States to abuse environmental protection measures to impose trade restrictions on other Member States. Thus, a State's protectionist measures for environmental protection can conflict with the non-protectionism of the WTO. Second, a State's unilateral measures are not allowed in the WTO when those measures are designed to compel other States to adopt the same environmental policies. WTO covered agreements[21] are not subject to regulations of environmental protection, but rather to regulations of international trade.[22] The absence of harmonized environmental regulations in the WTO drives its Member States to apply their domestic environmental policies or

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[21] The WTO covered agreements include the Agreement Establishing the World Trade Organization, Multilateral Trade Agreements in Annexes 1 and 2, and Plurilateral Trade Agrement in Annex 4. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Appendix 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[22] Hunter Interview, *supra* note 19.

laws unilaterally in international trade. A State's unilateral actions potentially threaten multilateral trading mechanism of the WTO. Third, a State's right to take measures must be balanced with other States' rights to choose their own policies in the WTO. A State has the sovereign right to determine and enforce its domestic environmental policies within its jurisdiction under international law. Meanwhile, a State's excessive exercise of its rights can harm another State's right to determine its own environmental policies in international relations. Further, a State's trade measures in exercise of its rights can overwhelm its concessions and obligations under the WTO. These States' measures can conflict with the WTO requirements through which a Member State balances its right to make policy choices with another Member State's right to do the same, and a Member State balances its right to make policy choices with its obligations to comply with WTO rules.

Accordingly, while the State harmonization requirement represents protectionism, unilateralism, and state sovereignty, the WTO harmonization requirement represents non-protectionism, multilateralism, and State's obligations under the WTO. This dissertation deploys two different harmonization requirements in regards to protectionism versus non-protectionism, unilateralism versus multilateralism, and State sovereignty versus State obligations under international law.

1.5. Methodology of Research

This dissertation employs both practical and theoretical approaches. Practically, the dissertation analyzes WTO rules and cases to understand and compare the State harmonization and the WTO harmonization requirements as they relate to protectionism,

unilateralism, and state sovereignty for environmental protection. From a theoretical perspective, this dissertation examines theories and principles under international law and the WTO regarding unilateralism, protectionism, and state sovereignty.

1.6. Organization of the Dissertation

In the background section, the dissertation lays out the nature of environmental problems related to trade issues and examines the impact of trade liberalization on the environment. Chapter 3 discusses the concept of harmonization in international relations and two different types of harmonization regarding environmental protection policies in international trade: harmonization toward a State's law and harmonization toward international law. Chapter 4 examines the fundamental principles and general exceptions for environmental protection in the WTO. Chapter 5 analyzes and compares protectionism of the State harmonization requirement and non-protectionism of the WTO harmonization requirement. Chapter 6 analyzes and compares the unilateralism of the State harmonization requirement and the multilateralism of the WTO harmonization requirement. Chapter 7 analyzes the State and WTO harmonization requirements effect on States' sovereign rights regarding how to implement and enforce environmental policies. The conclusion summarizes the results of the research in this dissertation regarding how the State and the WTO have different approaches about harmonization requirements for environmental protection; whether the State harmonization requirement can be reconciled with the WTO harmonization requirement; and whether both harmonization requirements are optimal policy choices in international trade relations.

2. BACKGROUND: INTRODUCTION TO THE ENVIRONMENT, INTERNATIONAL TRADE, AND TRADE LIBERALIZATION

2.1. The Nature of Environmental Problems and International Trade

Environmental problems that affect international trade are classified into three categories.[23] First, there are domestic environmental problems such as those related to land, air, and water pollution in local areas which do not involve spillover effects on to neighboring States.[24] Second, there are transboundary environmental problems such as movement of hazardous material crossing borders between two countries or pollution that is emitted in one country but affects another.[25] Third, there are global environmental problems such as endangered species, degradation of natural resources, climate change, and ozone depletion that are a common concern of all countries.

First, trade measures face incompatibilty with the international trading system when those measures are taken to solve environmental problems within the territory of a State. A country considers environmental problems related to its land, air, and water as domestic affairs that can, and should, be resolved by purely domestic policies,[26] and with which other countries or international instruments should not interfere. Each country has the sovereign

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[23] PATRICIA BIRNIE, ALAN BOYLE, & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT (3rd ed. 2009); Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM.J.INT'L L. 700, 703-704 (1992) (The author classifies four different types of trade restrictions on the ground of environmental protection).

[24] Bhagwati 1993, *supra* note 7, at 164.

[25] *Id.*

[26] GATT Report 1992, *supra* note 2, at 16.

right to determine the optimal environmental policies to solve environmental problems within its territory. When a country takes trade measures to protect its domestic environment, those measures are potentially unilateral and protectionist.[27]

Second, trade measures may raise conflicts between States when those measures are taken in the absence of agreement for environmental problems causing transboundary spillover effects. When dangerous materials or pollutants move across borders, affected countries can work together to determine how to resolve those transboundary environmental problems. Neighboring countries may try to solve problems at issue through bilateral or regional negotiations. When a country takes unilateral trade measures to implement environmental protect policies, those unilateral trade measures become protectionist when they are intended to protect domestic industries. Measures taken by one country outside of its jurisdiction without agreement of the other countries involved potentially intervenes with the sovereign rights of other countries.[28]

Third, a State's unilateral trade measures may be imcompatible with international trade rules even when those trade measures are imposed to meet obligations under multilateral environmental agreements (MEAs). Countries draft, sign, and ratify MEAs to address environmental impacts on a global scale such as acid rain, ozone delpletion, and climate change. If a State uses trade sanction to implement or enforce obligations under MEAs, then those trade measures can confront violation of international trade rule. Further, if a State takes measures outside its jurisdiction for common concern of environmental protection, that would not be allowed because a State's unilateral action outside jurisdiction

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[27] *Id.* at 3.

[28] *See infra*, Chapter 7.3.2.

threatens the sovereign rights of other countries.

The types of environmental problems may be less important than a State's implementation of its environmental policy, which can raise conflict in international trade. Conflicts in international trade between countries regarding the issues of unilateralism, protectionism, and state sovereignty are not driven solely by environmental problems. Rather conflicts among countries are determined by how the government implements and enforces its domestic environmental policies in international trade. When a State uses trade measures to implement its envirommental policies, those measures can be controversial in the international trade system regardless of whether a State's policies are meant to address local, transboundary, or global environmental problems. Thus, this dissertation addresses trade related measures for States' environmental policies within the international trade system, particularly in the WTO.

2.2. Trade Liberalization and Environmental Protection

This section addresses different perspectives on whether trade liberalization impacts the environment either negatively or positively. Trade, or "international trade," must be distinguished from "trade liberalization." While "international trade" means the exchange of goods between countries, "trade liberalization"[29] refers to the removal of barriers in international trade. [30] Professor Irwin defines trade liberalization as the national economic

[29] The author of this dissertation chooses to use "trade liberalization" instead of "free trade" because the author recongnizes that trade liberalization includes free trade and instances where a nation is moving toward free trade.

[30] DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 36, 47-48 (1996). In the seventeenth and the eighteenth centuries, free trade means "freedom of trade," the liberty

policy "in which trade barriers are absent, implying no restrictions on the import of goods from other countries or restraints on the export of domestic goods to other markets."[31] Trade liberalization means international trade without import barriers or export subsidies, or without protectionist trade policy discriminating against foreign goods.[32] By removing trade barriers, trade liberalization results in expansion of trade through increased movement of goods. The expansion of trade can face different evaluations from the international trade perspective and from the environmental protection perspective.

2.2.1. The Negative Impact of Trade Liberalization on the Environment

2.2.1.1. Unsustainable Development through Trade Liberalization

From the environmental protection perspective, trade liberalization potentially causes unsustainable development with limited natural resources.[33] Removal of international trade barriers likely would increase trade that promotes production and consumption, which, in turn, likely would result in more pollution and waste, and therefore the degradation of the environment.[34] The two main reasons that trade liberalization leads to unsustainable development are degradation of the envrionment and depletion of natural resources due to

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of the merchant to participate in trade. *Id.* at 45-46.

[31] *Id.* at 5.

[32] *Id.* at 47-48.

[33] James Cameron, *Trade and Environment in the Context of Sustainable Development: Preface, in* SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 27, 27 (Markus W. Gehring & Marie-Claire Cordonier Segger eds., 2005).

[34] TIM LANG & COLIN HINES, THE NEW PROTECTIONISM: PROTECTING THE FUTURE AGAINST FREE TRADE 97, 103 (1993).

increased production and consumption.

First, trade liberalization and the economic growth promoted by trade liberalization exacerbate environmental pollution.[35] Trade liberalization expands trade among countries and potentially promotes the movement of goods including hazardous materials and endangered species.[36] Trade liberalization and increased movement of goods lead to new economic activity and that leads to increases in production, consumption, and transportation, which are the main causes of environmental degradation.[37] On the one hand, increases in production and consumption have made people's lives more prosperous and contributed to global development. However, the increases in production and consumption have also negatively affected the environment and people's lives by creating more waste and pollution.[38] Trade liberalization policies in one country often causes environmental pollution even outside of that State's territory because when it imports more and consumes more products from other countries that do not establish environmentally sound standards then pollution and other environmental degradation can be expanded in a way to increase.[39] Increased trade also results in more demands on transportation, which generates more

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[35] *Id.* at 61-62; *see also* RAVI BATRA, THE MYTH OF FREE TRADE 220-24, 226 (1993); RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 620 (2005).

[36] OECD 1994, *supra* note 3, at 12-13, 15.

[37] Programme for the Further Implementation of Agenda 21, G.A.Res.S-19/2, U.N. Doc. A/RES/S-19/2, ¶ 9 (Sep. 19, 1997); DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1235, 1238 (3rd ed. 2007) (1998). Environmentalists contend that international trade is the main factor for environmental pollution with more production, more consumption, and more transportation. *See* Lang & Hines, *supra* note 34, at 61-63 (arguing that "trade increase is highly environmentally destructive."); Batra, *supra* note 35, 220-24 (arguing that "trade is a bigger polluter than even industrialization."); Esty, *supra* note 5, at 43.

[38] Esty, *supra* note 5, at 42; Lang & Hines, *supra* note 34, at 61-63.

[39] Hunter interview, *supra* note 19.

pollution to the land, air, and seas.[40] A further distance between producers and consumers causes more pollution and resource use.[41] Accidental pollution, namely hazardous waste spills and oil spills, can occur during transportation as well.[42] For all these reasons, trade liberalization can degrade the environment by globally increased production, consumption, and transportation.

Further, some have expressed concern that human society and the environment will be threatened by pollution because the Earth may exceed its ability to "absorb" the waste.[43] The earth may not be able to assimilate to certain level of pollution and waste.[44] Thus, we may reach a point at which Earth will not be able to absorb the amount of pollution and waste generated by the global economy. This, then, should be considered when looking at the costs and benefits of trade liberalization.

Second, trade liberalization also drives over-exploitation or depletion of limited natural resources.[45] Expansion of international trade causes more consumption and production, which motivates manufacturers to produce more by exploiting renewable and nonrenewable resources.[46] Human society may be threatened when limited resources are

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[40] Batra, *supra* note 35, at 222.

[41] Hunter interview, *supra* note 19.

[42] Batra, *supra* note 35, at 220-23.

[43] *Id.* at 216-17.

[44] Esty, *supra* note 5, at 11, 12; Robert Goodland, *The Case that the World has Reached Limits: More Precisely that Current Throughput Growth in the Global Economy cannot be Sustained, in* ENVIRONMENTALLY SUSTAINABLE ECONOMIC DEVELOPMENT: BUILDING ON BRUNDTLAND 16, 16 (The United Nations Educational, Scientific and Cultural Organization 1993).

[45] Esty, *supra* note 5, at 42.

[46] OECD 1994, *supra* note 3, at 12-13, 15.

depleted by overuse.[47] In summary, trade liberalization can negatively impact the environment by promoting economic growth that results in the unsustainable production and consumption, and therefore depletion, of limited resources.[48]

2.2.1.2. Competitiveness in the Global Market and Race to the Bottom

Another concern from the environmental protection perspective is that trade liberalization motivates countries to compete more successfully in the global market by lowering environmental standards, externalizing environmental costs, and relocating industries to areas with lax standards.[49] Products made in countries with lax environmental standards frequently are more competitive when compared with products manufactured in countries with stringent standards because products produced in areas with lower standards generally cost less to manufacture and thus are cheaper.[50] These products tend to have a competitive advantage and could result in countries with more stringent standards to change their course, and "race to the bottom"[51] by choosing to enact more lax environmental standards and regulations.[52] Therefore, trade liberalization generates a competitive advantage for countries with lower standards and threatens environmental protection by

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[47] Esty, *supra* note 5, at 11, 12; Goodland, *supra* note 44, at 16.

[48] Hunter et al., *supra* note 37, at 1239-46; Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. L.A. INT'L & COMP. L. REV. 33, 35-36 (1992).

[49] Lang & Hines, *supra* note 34, at 71-72.

[50] OECD 1994, *supra* note 3, at 8-9.

[51] Bhagwati & Srinivasan, *supra* note 8, at 161, 171 (explaining the term "race to the bottom" implies that countries compete toward lower environmental standards to pursue more benefits in the international market).

[52] Lang & Hines, *supra* note 34, at 71.

driving all countries to "race to the bottom."[53]

Preferring lax standards might lead a State to choose an externalization policy, and thus would be more willing to externalize environmental costs rather than internalize them so as to be more competitive in the market. When a country internalizes environmental costs in product prices, the products will be more expensive and likely less competitive than ones from countries that do not internalize those costs in the global market.[54] To counteract the competitive disadvantage of having internalized environmental costs and higher cost products, a country either imposes trade restrictions to protect domestic industries or abandons the cost-internalization principle in its environmental policies.[55]

Further, competition promoted by trade liberalization can lead industries to relocate from countries with stringent standards to countries with lax standards.[56] A company would be willing to move its production to a country with lower environmental standards in order to minimize how much it needs to spend to meet regulations designed for environmental protection.[57] An industry's movement to a country with lower standards increases environmental pollution in that country. At the same time, as investment moves to these countries with lower standards, the country with more stringent standards loses its jobs and investment and, thus, political pressure builds to lower its environmental standards.[58] In summary, trade liberalization leads States to engage in greater competition in international

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[53] *Id.* at 97.

[54] OECD 1994, *supra* note 3, at 8-9; Daly, *supra* note 48, at 36.

[55] Daly, *supra* note 48, at 36.

[56] Lang & Hines, *supra* note 34, at 71-72.

[57] Lang & Hines, *supra* note 34, at 72; Matsushita et al., *supra* note 3, at 815.

[58] Lang & Hines, *supra* note 34, at 71-72; Esty, *supra* note 5, at 157.

trade to dominate the global market. This increased competitiveness in the global market will force countries to compete in a "race to the bottom" by enacting regulations that lower environmental standards and externalize environmental costs, and will force industries to relocate to countries with lower standards.

2.2.2. The Positive Impact of Trade Liberalization on the Environment

2.2.2.1. Economic Growth for Sustainable Development

From the international trade perspective, trade liberalization contributes to sustainable development by increasing global welfare, developing innovative technology, and allocating resources efficiently. Trade liberalization does not necessarily cause environmental degradation even though it increases production and consumption.[59] Instead, trade liberalization helps expand global production and consumption by facilitating the international movement of goods.[60] Unfortunately, if appropriate environmental policies are not in place, then increased trade will likely have adverse environmental impacts, including increased pollution and depletion of scarce natural resources.[61] Meanwhile, trade liberalization contributes to global economic growth, which increases financial support to build capacity for dealing with environmental problems and, to develop technical innovations for improving productivity and optimal use of resources.[62]

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[59] Kym Anderson, *Effects on the Environment and Welfare of Liberalizing World Trade: The Cases of Coal and Food, in* THE GREENING OF WORLD TRADE ISSUES 145, 145 (Kym Anderson & Richard Blackhurst ed., 1992).

[60] OECD 1994, *supra* note 3, at 12-13, 15-16.

[61] *Id.*

[62] GATT Report 1992, *supra* note 2, at 2, 18.

International trade contributes to protecting the environment by providing incentives and funds to do so.[63] It is important for environmental protection to help achieve "economic growth" and alleviate global poverty through trade liberalization.[64] The importance of international trade to achieve environmental protection has been recognized at the international level. For example, the 1972 United Nations Conference on the Human Environment, which was held in Stockholm, grew out of increased international concern about economic growth's impact on social development and the environment.[65] In the 1987 "Our Common Future," the World Commission on Environment and Development (WCED) argued that economic growth, along with increased international trade, could help alleviate poverty, and therefore decrease pollution since poverty was one of the leading causes of environmental degradation.[66] Further, twenty years after the Stockholm Conference, in 1992, countries came together for the Rio "Earth Summit, or United Nations Conference on Environment and Development (UNCED)," to again address economic growth's impact on the environment, and also paid increased attention to how international trade could help alleviate poverty and, therefore, combat environmental degradation.[67] Economic growth

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[63] OECD 1994, *supra* note 3, at 8.

[64] *See* Bhagwati 1993, *supra* note 7, at 162; Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices, in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS, *supra* note 1, at 95, 108 [hereinafter Hudec 1996b]; *see also* Matsushita et al., *surpa* note 3, at 786; Weiss & Jackson, *supra* note 4, at 2.

[65] United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Stockholm Declaration of the United Nations Conference on the Human Environment*, Principle 8, U.N. Doc. A/CONF.48/14/Rev.1 (1973).

[66] The World Commission on Environment and Development, *Our Common Future* 49-65 (1987) [hereinafter WCED].

[67] United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principles 5, 12, U.N.Doc.A/CONF.151/26/Rev.1 (Vol.1), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration].

promoted by trade liberalization satisfies people's basic economic needs and helps them achieve a high standard of living.[68] Thus, a nation is more likely to pay attention to how to solve its environmental problems by implementing optimal environmental policies after it has been able to meet its people's basic economic needs.[69]

Further, economic development through trade liberalization encourages technological innovation and efficiency to handle environmental problems and improve productivity using fewer resources.[70] Economic growth is essential to the development of technologies to solve specific environmental problems.[71] It is through international trade that countries are able to distribute environmental technologies and services that help address specific environmental problems, for example technologies for improved water treatment, waste management, air quality control, land remediation, and noise abatement, in countries where they might not otherwise be able to.[72] Innovative technology also will improve productivity by using fewer natural resources and thus, will contribute to environmental conservation.

International trade also promotes the efficient use of resources, which contributes to

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[68] World Bank, *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* 38-47 (2003), http://siteresources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf (last visited Jul. 30, 2012); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1227, 1228-29 (1992) [hereinafter Jackson 1992].

[69] DAVID PALMER, THE WTO AS A LEGAL SYSTEM: ESSAYS ON INTERNATIONAL TRADE LAW AND POLICY 295 (2003).

[70] OECD 1994, *supra* note 3, at 8; Esty, *supra* note 5, at 66; Rober Goodland, Herman Daly, Salah El Serafy & Vernd von Droste, *Introduction* to Environmentally Sustainable Economic Development: Building on Brundtland 9 (The United Nations Educational, Scientific and Cultural Organization 1993).

[71] *See* Bhagwati 1993, *supra* note 7, at 163; Matsushita et al., *surpa* note 3, at 793; GARY SAMPSON, THE WTO AND SUSTAINABLE DEVELOPMENT 54-55 (2005); WTO, Environmnet: Issues: Sustainable Development, http://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm (last visited on May 6, 2001); *cf.* Goodland et al., *supra* note 70, at 10.

[72] OECD 1994, *supra* note 3, at 12; Hakan Nordstrom & Scott Vaughan, *Trade and the Environment* 7 (Special Studies No. 4) (1999), http://wto.org/english/res_e/booksp_e/special_study_4_e.pdf (last visited Jul. 30, 2012).

environmental conservation.[73] Trade liberalization and environmental protection have the common goals of optimal use of limited resources to achieve sustainable development.[74] Increased trade allows countries to overcome their limited capabilities and limited resources, by allowing countries that have different resources and different advantages and capabilities to share.[75] Trade liberalization promotes growth by focusing on comparative advantages because countries can use their distinct natural advantages to produce specialized products and can trade those for products in another country that has different resources.[76] As a result, trade liberalization contributes the efficicient allocation of resources by allowing a State to use its advantageous resources and trade them with others.

In summary, trade liberalization can be a significant factor to help achieve sustainable development through the sharing and development of innovative technology, the efficient allocation of resources, and therefore, increased global welfare.

2.2.2.2. Environmentally-friendly International Trade System

Environmental protection policies would be more efficient if they were integrated with economic mechanisms.[77] Trade liberalization and environmental protection are supportive of each other. Trade liberalization promotes economic growth and prosperity,

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[73] OECD 1994, *supra* note 3, at 8; Konrad von Molke, *Must Environmental Policy be Protectionist?* 25 N. Y. U. J. INT'L L. & POL. 323, 323 (1992-1993).

[74] Marrakesh Agreement Establishing the World Trade Organization preamble, ¶ 1, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

[75] OECD 1994, *supra* note 3, at 13.

[76] Irwin, *supra* note 30, at 85.

[77] OECD 1994, *supra* note 3, at 10-12; Bhagwati 1993, *supra* note 7, at 163-64.

which increases the chance that one could garner continuous support for environmental protection; and, as seen through the concept of sustainable development, environmental protection also supports long-term economic growth.[78]

First, trade liberalization contributes to environmentally friendly production practices through international trade rules that require reduction of environmentally damaging subsidies and trade barriers.[79] Environmental policy is often undermined by subsidies and trade barriers because they can distort the value of the resources involved in production, the production costs, and the market price for goods and services.[80] When importing countries place trade barriers such as tariffs and quotas on imported products, this provides protection for domestic industries and can help uphold unsustainable practices in place there.[81] Trade liberalization can be achieved by removing subsidies, tariffs, and other barriers, which in turn can help correct problematic government policies, for example policies that allow for the excess use of chemicals, over-exploitation, or deforestation.[82] One of the prime examples of how subsidies lead to environmental degradation are agricultural subsidies, which have led to detrimental land use caused by overgrazing and animal production practices that are

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[78] WCED, *supra* note 66.

[79] GATT Report 1992, *supra* note 2, at 32-33; OECD, *Economic Policy Reforms 2011: Going for Growth* (2011), http://www.oecd.org/social/labourmarketshumancapitalandinequality/economicpolicyreformsgoingforgrowth2011.htm (last visited Jul. 31, 2012). The OECD recommended that its members reduce agricultural subsidies particularly in Japan, Iceland, Korea, Norway, Switzerland, the United States, and the EU. It also recommended the United States and the EU reduce biofuel subsidies and remove tariffs on imported ethanol.

[80] OECD 1994, *supra* note 3, at 10-12.

[81] *Id.* at 12.

[82] *Id.* at 10-12, 15-16.

harmful.[83] Moreover, agricultural subsidies have led to increased agrochemical use, natural resource depletion, wildlife loss, habitat loss, biodiversity loss, and less agricultural diversity.[84] By eliminating agricultural subsidies, countries decrease the incentive for companies or people to farm in ways that rely on using an excessive amount of chemicals and that are environmentally detrimental.[85] Likewise, reducing the number of environmentally detrimental fisheries' subsidies, or eliminating them altogether, would contribute to the conservation and sustainable use of fish stocks and, would instead promote sustainable development.[86] This would also reduce over exploitation of limited fishery resources.[87] Thus, by removing environmentally unfriendly subsidies, trade liberalization can reduce environmental damage.

Second, when a free trade system is working properly, it can provide diverse choices for consumers, who then have the possibility of choosing more environmentally friendly products with good information. For example, consumers can choose between agricultural products harvested by traditional method with low prices and products grown by using chemical fertilizers with high prices.[88] Consumers may also choose small, energy-efficient vehicles rather than large, high-energy consuming ones.[89] Trade liberalization will provide consumers and users with the opportunit to choose between more environmentally friendly

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[83] Sampson, *supra* note 71, at 61.

[84] *Id.*

[85] OECD 1994, *supra* note 3, at 10-11.

[86] *Id.* at 11; Sampson, *supra* note 71, at 65-67.

[87] OECD 1994, *supra* note 3, at 11; Sampson, *supra* note 71, at 65-67.

[88] Bhagwati 1993, *supra* note 7, at 163-64.

[89] *Id.*

and less environmentally friendly products.

Third, there is no direct evidence that environmental standards and regulations affect capital and investment movement, and company location.[90] Environmental standards may be one of several factors leading to the movement of capital and location of industry, however there are other factors including labor cost and standards, tax systems, infrastructure, and proximity to markets that also affect this movement.[91] Industry movement has often turned out to have nothing to do with the level of environmental standards. Thus, argument that trade liberalization leads to an "race to the bottom" of environmental standards is not substantiated by empirical data.

From the pro-free trade perspective, trade liberalization does not necessarily have negative impacts on the environment.[92] For the most part, the potential conflict areas are limited and largely manageable.[93] The 1992 Rio Declaration on Environment and Development (hereinafter Rio Declaration) indicats that having an open, equitable, and non-discriminatory trade system is important for sustainable development and for both national and international efforts to protect and conserve environmental resources.[94] Accordingly,

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[90] JAGDISH BHAGWATI, FREE TRADE TODAY 59-60 (2002); Bhagwati & Srinivasan, *supra* note 8, at 171-73.

[91] Bhagwati & Srinivasan, *supra* note 8, at 173.

[92] GATT Report 1992, *supra* note 2, at 2; Matsushita et al., *surpa* note 3, at 791; Bhagwati 1993, *supra* note 7, at 159, 162-63; OECD 1994, *supra* note 3, at 7. The OECD study explains that the main reasons for environmental problems are "market and invention failures" rather than trade liberalization itself. It characterizes those two failure as (1) when the market fails to "value and allocate environmental resources and to internalize environmental costs in the prices of goods and services"; and (2) when there is a failure of the government to intervene through government policies for environmental pollution and trade. OECD 1994, *supra* note 3, at 8-10.

[93] Palmer, *supra* note 69, at 295.

[94] Rio Declaration, *supra* note 67, Principles 12.

trade liberalization can have a positive impact on the environment by achieving economic growth for sustainable development and providing environmentally friendly free trading system.

Two different perspectives discussed above suggest that trade liberalization has both negative and positive aspects in terms of environmental protection.[95] On the positive side, by expanding economic activity and promoting market growth, trade can help provide additional resources for environmental protection, and it can help improve innovative technology to highlight particular environmental problems that are occurring due to the lack of proper environmental policies and regulations.[96] Further, the negative impact that economic growth has on the environment is not directly related to trade liberalization.[97] The impact of economic activities should be differentiated from trade liberalization.[98] The increase of global population and subsequent increase in production and consumption would contribute to environmental degradation regardless of trade policies. Human societies have pursued more convenient and prosperous lives through new technology and a greater number of products, both of which may have unsustainably impacted the environment.[99] Every human activity has both positive and negative aspects. The impact on the environment driven by development of human society has been an inevitable phenomenon. It would be difficult to establish where the free trade system has a "net

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[95] *See generally* OECD 1994, *supra* note 3 (including studies of environmental effects of trade in the agriculture, forestry, fisheries, and transport, which show "the direct impacts of trade on the evnrionment are small compared to other factors.").

[96] *Id.* at 7-8, 10-12.

[97] Esty, *supra* note 5, at 62.

[98] Goodland et al., *supra* note 70, at 11.

[99] Esty, *supra* note 5, at 41.

positive effect" or a "net negative effect" on the environment.[100] Global societies cannot stop trade in order to contribute to environmental protection, but can continue to trade while keeping in mind their common concern for the environment and the obligations therewith. The critical environmental question is how to shape trade policy to reduce the negative environmental impacts of trade liberalization and enhance the positive impacts of trade liberalization.[101]

[100] Esty, *supra* note 5, at 3.

[101] Hunter Interview, *supra* note 19.

3. HARMONIZING NATIONAL POLICIES IN THE INTERNATIONAL TRADING SYSTEM

This chapter discusses harmonization of environmental policies in international trade. Section 3.1 examines the concept of harmonization in international relations. Section 3.2 discusses necessities and limitations of harmonizing trade policies or environmental policies in international relations. Lastly, it addresses two different harmonizations in international relations: harmonization toward domestic laws and harmonization toward international laws.

3.1. The Concept of Harmonization in International Relations

In international relations, harmonization is when the laws and policies of multiple nations are made identical or similar.[102] National legal systems and policies are widely different; harmonization helps reduce these differences.[103] After laws and policies are harmonized internationally, they are incorporated into various aspects of domestic law and policy, including regulations, principles, institutional structures, and administrative procedures.[104]

This dissertation focuses on harmonization of laws and policies at the international and domestic level regarding environmental protection not harmonization of technical standards. Harmonization of technical standards must be differentiated from harmonization

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[102] *See* Leebron, *supra* note 8, at 41-43; *cf.* Steve Charnovitz, *Environmental Harmonization and Trade Policy*, *in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 267, 267 (Durwood Zaelke, Paul Orbuch & Robert F. Housman eds., 1993) [hereinafter Charnovitz 1993].

[103] Leebron, *supra* note 8, at 41.

[104] *Id.* at 43-46.

of policies. Harmonization of technical standards is established for the efficiency of manufactured goods or services such as electronic goods, railroad track gauges, telecommunications protocols, and navigation systems.[105] Industries prefer common standards for manufactured products because it provides for cost-efficiency and convenience when buying and selling in the global market place.[106] The private sector, rather than public or governmental sectors, is the driving force behind this type of harmonization, and, therefore, they may decide to harmonize standards for financial or investment reasons rather than political reasons. Countries, then, do not have to adopt similar or identical domestic legal systems or policies, but rather accept uniform standards.[107]

This dissertation rather deals with policy harmonization such as incorporating WTO obligations into Member States' national legal systems or making States' laws or policies more uniform with one another. However, the distinction between harmonizing standards and harmonizing legal systems is vague when it relates to harmonizing environmental policies. To harmonize environmental protection policies internationally, countries have to move toward creating equivalent standards and regulations.[108] Environmental policies may also be based on environmental standards, thus harmonizing environmental standards helps to harmonize environmental policies.[109]

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[105] *Id.* at 50, 52-53.

[106] *Id.* at 52-53.

[107] *Id.*

[108] Charnovitz 1993, *supra* note 102, at 267.

[109] OECD, *Environmental Standards: Definitions and the Need for International Harmonization* 3 (1974) [hereinafter OECD 1974].

3.2. Harmonizing National Economic or Environmental Policies in the International Trading System

3.2.1. Harmonizing National Economic Policies in the International Trading System

Harmonization of national trade laws has been regarded as a pre-requisite for the international trading system.[110] The international trade system requires internationally harmonized economic policies that consider globalization, remedy the defect of diversity, and efficiency.

First, the demands of expanded globalization have lead to a preference for uniformity in the international trading system.[111] As the world has become more interdependent, individual State's economic and social policies increasingly are affected by policies in other States.[112] Additionally, globalization has increased state interaction and created a more integrated world economy. This integration of the world economy has lead to countries and industries facing increased competition in the global market.[113] Increased competition at the global market has formed the basis for a harmonized economic system to

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[110] Bhagwati & Srinivasan, *supra* note 8, at 160.

[111] Adil Najam, David Runnalls & Mark Halle, *Environment and Globalization Five Propositions* 4-5, http://www.iisd.org/pdf/2007/trade_environment_globalization.pdf (last visited Jun. 1, 2012) (IISD, 2007) (describing globalization as "the growth in international exchange and interdependence, removing government imposed restrictions on movements between countries, and process of spreading ideas and experiences to people at all corners of the earth so that aspirations and experiences around the world become harmonized"); Jagdish Bhagwati, *Globalization, Sovereignty, and Democracy, in* THE WIND OF THE HUNDRED DAYS 323, 328 (2000) [hereinafter Bhawati 2000] (explaining that "[t]he process of globalization of the world economy has occurred through trade, capital flows, and human migrations").

[112] Rober E. Hudec, *Introduction* to 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS, *supra* note 1, at 1, 1 [hereinafter Hudec 1996a].

[113] Bhagwati 1996b, *supra* note 18, at 9, 22.

prevent unnecessary trade barriers between countries.[114] Global economic integration intended to eliminate trade barriers among nations reduces diversity among different nations.[115] To create fair competition in the global market, countries strive to harmonize national policies.[116]

Second, harmonized trading rules remedy the defect of diversity between States in international trade.[117] Different nations have different economic policy goals due to each society's different value preferences.[118] When they significantly impact international trade, differences between countries raise conflicts.[119] Countries have tried reducing or eliminating unfair competitive advantages resulting from "divergent domestic policies" in custom tariffs, export and import control, quality standards, internal taxes, and mixing or purchasing requirements in the international trading system.[120] When countries have different domestic institutions and policies, they can nullify the obligations of concessions

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[114] Hundec 1996a, *supra* note 112, at 1; *Bhagwati* 1996b, *supra* note 18, at 22.

[115] Jagdish Bhagwati, *Introduction* to 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?: ECONOMIC ANALYSIS, *supra* note 8, at 1, 1 [hereinafter Bhagwati 1996a]

[116] Robertson, *supra* note 15, at. 309.

[117] An OECD report recommended its members "seek harmonization of environmental policies on the timing and general scope of regulations to avoid the unjustified disruption of international trade patterns and of the international allocation of resources which may arise from diversity of national environmental standards." OECD, *Recommendation of the Council on Guiding Principle Concerning International Economic Aspects of Environmental Policies* ¶ 8, C(72)128 (May 26 1972) [hereinafter OECD 1972].

[118] *See* Jagdish Bhagwati, *Fair Trade, Reciprocity and Harmonization: The New Challenge to the Theory and Policy of Free Trade, in* ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 547, 581 (Alan V. Deardorff & Robert M. Stern ed., 1994) (explaining the details of the international trading system since the 18th century) [hereinafter Bhagwati 1994]; *see also* Jackson 1994, *supra* note 16, at 600.

[119] Hudec 1996a, *supra* note 112, at 1.

[120] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 8 (1969) [hereinafter Jackson 1969]; *see also* Bhagwati 1996b, *supra* note 18, at 22.

made under the international trade agreement.[121] Harmonization in international trade is justified because international trade relations are more effective when countries make their laws and policies more similar.[122] Nations have increasingly recognized that unification of economic laws is necessary to reduce differences in the international trading system.[123]

Third, the more harmonization that exists between countries' laws and policies, the more efficient the global market will be because there will be fewer differences that have the potential to distort international economic relations.[124] Harmonization, through unified standards, would decrease the burdens that having numerous and varied national standards places on international trade.[125] Manufacturers benefit from a more harmonized regulatory regime because harmonized regulatory regimes provide for greater market access with greater efficiency, less border enforcement costs, and fewer jurisdictional conflicts.[126] Both domestic industries and multinational corporations encourage national governments to adjust their domestic regulatory regimes to conform with international standards so that their products can compete more easily in the global market and they can avoid the expenses incurred when multiple regulation systems are used.[127] For large

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[121] Bhagwati 1996b, *supra* note 18, at 23-24, 29; *see also* Mitsuo Matsushita, *Harmonization of National Economic Institutions: Harmonization by Bilateral Agreements and the GATT*, *in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 457 (Meinhard Hilf & Ernst-Ulrich Petermann eds., 1993) [hereinafter Matsushita 1993].

[122] Leebron, *supra* note 8, at 43; Matsushita 1993, *supra* note 121, at 458.

[123] *See* Jackson 1969, *supra* note 120, at 7; *see also* Leebron, *supra* note 8, at 41, 47; Bhagwati 1996b, *supra* note 18, at 22; *cf.* Charnovitz 1993, *supra* note 102, at 279.

[124] OECD 1972, *supra* note 117, ¶ 8; Robertson, *supra* note 15, at 310.

[125] Robert Housman & Durwood Zaelke, *Trade, Environment and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535, 567 (1992).

[126] Leebron, *supra* note 8, at 56-58, 62-63.

[127] *Id.* at 79-80.

multinational corporations, operating in many jurisdictions, costs of environmental management of compliance is reduced to the extent harmonized policies applying across jurisdictions.

Meanwhile, some limitations exist on States adopting highly harmonized international trading policies in their economic policies. It is difficult to determine the extent of harmonization necessary among nations in an international trading system. Most countries have different legal and policy structures, social welfare preferences, and economic development goals, all of which make harmonization difficult.[128] Further, harmonization of national economic policies needs to consider diversities between different countries and must be limited to instances when differentiations distort international trade significantly and are not otherwise justified.[129] Diversity between countries should not be dismissed, but rather must be respected because it does not necessarily impede international trade and because it reflects other social values.[130]

Harmonization of national policies can threaten the international trading system by removing differences because it is based on States having comparative advantages in certain specializations, which arise from diversity.[131] The basic spirit of free trade is based on idea that different countries have different natural advantages based on their specific resources and systems, and, therefore, specialize in the export of different goods.[132] Even in instances

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[128] Robertson, *supra* note 15, at 311.

[129] OECD 1974, *supra* note 109, ¶¶ 41, 42; OECD 1972, *supra* note 117, ¶¶ 8, 10; Robertson, *supra* note 15, at 313.

[130] OECD 1974, *supra* note 109, at 3; Robertson, *supra* note 15, at 310-11.

[131] Bhagwati 1993, *supra* note 7, at 167; Daly, *supra* note 48, at 33, 33-34.

[132] Irwin, *supra* note 30, at 85. This is the principle of absolute advantage from trade, which was established by Adam Smith in the eighteenth century. *See id.* at Chapter Five; *see generally* ADAM

where one country does not have superiority in the production of any good, trading with one another still contributes to mutual gains because the country may specialize in the production of a good in which it has a low opportunity cost.[133] Under these international trade law principles, every trading country gains economic advantages from having different product prices or product types.[134] Harmonization leads to the creation of indistinguishable products, which can, in turn, increase competition between traders at the global market,[135] and further undermine the principle of comparative advantage in the international trading system.[136]

Taking into account these limitations related to adopting highly harmonized international trade policies, harmonization in international trade may occur through the development of baseline standards that all Member States are required to recognize and

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SMITH, *Book IV: Of System of Political Economy*, *in* AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 397 (Edwin Cannan & Max Lerner ed., The Modern Library 1937) (1776).

[133] Irwin, *supra* note 30, at 90. This is the principle of comparative advantage that was established by classical economics in the nineteenth century. The principle of comparative advantage means that "certain goods could be advantageously imported from abroad even if the home country had an absolute cost advantage in producing the good." *Id. See generally* DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817); JAMES MILL, ELEMENTS OF POLITICAL ECONOMY (1821); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (1848). Although comparative advantage is the basic theory of international trade, modern international trade theory is modifying traditional views. The traditional theory of comparative advantage assumes perfect competition and a simplified model that presumes trading two products between two countries. However, the reality of international trade is more complicated than the hypotheses of the traditional theory. While the traditional theory relies on labor value in production, factors such as labor skill, land and natural resources, capital, technology development, and governmental intervention are different in each country and these variations can affect productivity and comparative advantage. Further, the mobility of capital, labor, and technology, and expansion of multinational enterprises internationally are factors that may "shift" comparative advantage from the original country to other countries. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 3-6 (3rd ed. 2005) (1995); GRAHAM DUNKLEY, FREE TRADE: MYTH, REALITY AND ALTERNATIVES 18-47 (2004); CHARLES P. KINDLERBERGER, INTERNATIONAL ECONOMICS 17-21, 27, 33 (5th ed. 1973); *see also* Paul R. Krugman, *In Free Trade Passé?*, 1 J. ECON. PERSP. 131 (1987); PAUL R. KRUGMAN, RETHINKING INTERNATIONAL TRADE (1990); *see generally* THE ECONOMICS OF FREE TRADE (GARY HUFBAUER & KATI SUOMINEN eds., 2012).

[134] Leebron, *supra* note 8, at 41, 43, and 60.

[135] Bhagwati 1993, *supra* note 7, at 167.

[136] Robertson, *supra* note 15, at 311; Bhagwati 1994, *supra* note 118, at 584.

implement through their domestic policies.[137] Harmonization of international economic policies "involves a broader meaning of adjustment between domestic policies" by which States do not apply identical polices to others, but adjust those policies to reflect their needs.[138] Thus, harmonization in the international trading system can, in fact, be done by reducing differences through coordination efforts that focus on creating shared policies and instruments that will help international competition.[139]

3.2.2. Harmonizing National Environmental Policies in International Trade

Harmonization of environmental policies is justified to prevent unfair competition that arises from different environmental standards in international trade.[140] Different nations have different environmental regulations and policies based on their domestic necessity and priorities.[141] These different environmental regulations and policies can be seen as generating unfair competitiveness in international trading relations.[142] Substantial differences distort competition because countries with high environmental standards likely will be at a competitive disadvantage because products may cost more to produce.[143] Countries with lower standards typically receive more economic benefits than countries with high standards because the former are more competitive in the global market due to

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[137] Jackson 1994, *supra* note 16, at 600.

[138] Robertson, *supra* note 15, at 311.

[139] *Id.* at 310.

[140] Esty & Geradin, *supra* note 5, at 269, 287-94; Esty, *supra* note 5, at 155-79.

[141] Farber & Hudec, *supra* note 1, at 59.

[142] Bhagwati 1993, *supra* note 7, at 166.

[143] OECD 1994, *supra* note 3, at 8-9; Esty & Geradin, *supra* note 5, at 269.

their lower production cost.[144] Countries that impose higher standards will argue that cost advantages obtained by having lower pollution control expenditures result in an unfair competitive advantage that should be corrected by appropriate policy intervention.[145] This competitive advantage is regarded as a "different form of subsidy" in international trading system, which should be countervailed by trade measures.[146] For example, lax environmental standards can be considered as "implicit subsidies (brown subsidies)" when they are based on governmental funding.[147] Meanwhile, pollution control expenditures for the private sector can be classified as "explicit subsidies (green subsidies)."[148] Thus, harmonization of environmental regulations or policies can be suggested to counteract unfair competition resulting from different policies.

The need for uniform environmental regulations and policies is also supported by arguments related to cost efficiency and industry locations. Variations are not cost efficient because producers have to meet a variety of requirements depending on the importing country and what its policies and regulations are, and without harmonization these policies may be quite different.[149] Further, having harmonized standards among nations will help remove the incentive for industries to move their production from nations with higher environmental standards to nations with lower environmental standards.[150] Therefore,

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[144] OECD 1994, *supra* note 3, at 8-9; Matsushita et al., *surpa* note 3, at 790.

[145] Bhagwati & Srinivasan, *supra* note 8, at 162; Leebron, *supra* note 8, at 60-61; *cf.* Esty & Geradin, *supra* note 5, at 271.

[146] Bhagwati & Srinivasan, *supra* note 8 at 162; Leebron, *supra* note 8, at 60-61.

[147] Esty, *supra* note 5, at 169.

[148] *Id.*

[149] *See* OECD 1974, *supra* note 109, ¶ 36; *see also* Robertson, *supra* note 15, at 314.

[150] Housman & Zaelke, *supra* note 125, at 567.

harmonizing environmental regulations internationally could help to address the problems of unfair competition, cost inefficiency, and the movement of industry across borders for the purpose of avoiding higher environmental standards.[151]

However, some difficulties exist to harmonize environmental regulations in international relations. Governments create environmental policies that reflect their national value preferences, which include the assimilative capacities of the country to address environmental problems, the level of industrialization, population density, and other social or religious preferences in the country.[152] The amount of pollution in each country is different; therefore, countries will take different action and create different standards depending on how urgent the problem is in their specific country and the extent to which industrial activities cause the pollution there.[153] Every country also has different governmental capacities to solve domestic environmental problems.[154]

Differences come from the national value preferences and policy priorities each government sets related to environmental, social, and economic considerations.[155] To the extent that they reflect national value preferences, intergovernmental environmental standards and policies may not be uniform.[156] Each country creates its own tax rates or pollution rates, and therefore, they will all be different because each country places a different

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[151] *See* OECD 1974, *supra* note 109, ¶ 36; *see also* Robertson, *supra* note 15, at 309, 314.

[152] OECD 1974, *supra* note 109, ¶¶ 6, 9, 21-27; Robertson, *supra* note 15, at 311.

[153] GATT Report 1971, *supra* note 20, at 4.

[154] Bhagwati & Srinivasan, *supra* note 8, at 163.

[155] *Id.* at 168.

[156] *See* OECD 1974, *supra* note 109, ¶¶ 6, 9, 21-27; *see also* OECD 1972, *supra* note 117, ¶ 7; Robertson, *supra* note 15, at 311.

value on particular types of pollution.[157] These differences suggest that countries with lower standards need not follow higher standards in other countries.[158] The diversity of national regulations supports that domestic environmental problems are best solved at the national level.[159] Thus, diversity in environmental policies between different countries may not just be legitimate, but also expected.[160]

The international trading system does not require harmonization of environmental policies because disparities in environmental regulations do not necessarily distort international trade.[161] Comparative advantages, which form the basis of international trade, can be created by the production cost differences, and subsequent consumer cost differences, stemming from the disparities in standards in different countries.[162] Excessive emphasis on a set of harmonized environmental policies can threaten the principle of comparative advantage and deprive a State of its right to choose its own policies based on its social preferences.[163] In this way, social preferences can be seen as one of the many factors to explain comparative advantage in production.

However, international harmonization can be considered in certain situations when differentiation creates significant obstacles to international trade that are not otherwise

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[157] Jagdish Bhawati, *Trade and Environment: Exploring the Critical Linkages, in* AGRICULTURE, TRADE, AND THE ENVIRONMENT: DISCOVERING AND MEASURING THE CRITICAL LINKAGES 13, 16 (Maury E. Bredahl, Nicole Ballenger, John C.Dunmore &Terry L.Rose ed., 1996) [hereinafter Bhagwati 1996c].

[158] Bhagwati & Srinivasan, *supra* note 8, at 163.

[159] *Id.* at 167-68.

[160] Bhawati 1996c, *supra* note 157, at 16.

[161] *See* OECD 1974, *supra* note 109, ¶¶ 6, 9, 21-27; *see also* OECD 1972, *supra* note 117, ¶ 7; Robertson, *supra* note 15, at 310-11.

[162] OECD 1974, *supra* note 109, ¶ 33.

[163] Robertson, *supra* note 15, at 313, 316.

justifiable, then harmonization is desirable.[164] Recently, the WTO's 2012 World Trade Report suggests that harmonization of regulations or standards contributes to increased international trade and has a positive effect on trade.[165] As relationships among nations become more inter-dependent, different environmental regulations and standards have made a significant impact on trade.[166] When it distorts international trade significantly, this diversity of domestic policies may face compatibility problems with the international trading system.[167]

3.3. Harmonization in the WTO' Multilateral Trading System

Harmonization in the WTO means adjusting Member States' economic policies to meet the WTO's economic policies, and encouraging Member States to use internationally agreed standards that are achieved using multilateral approaches. The WTO requires its Member States to conform their national economic policies to harmonized international trading regulations. Article XXXVIII:2(e) of the General Agreement on Tariffs and Trade

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[164] OECD 1974, *supra* note 109, ¶¶ 41, 42; OECD 1972, *supra* note 117, ¶¶ 8, 10; Robertson, *supra* note 15, at 313.

[165] WTO, *World Trade Report 2012: Trade and Public Policies: A Close Look at Non-Tariff Measures in the 21st Century* 149-51 (2012), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf (last visited July 17, 2012). The Report, however, suggests and warns of negative effects of harmonization in regional trade agreements (RTAs) or bilateral trade agreements (BTAs) that can result in discriminatory treatment and have "trade-diverting effects" for non-parties of RTA or BTAs, and that may impede harmonization in multilateral trade agreements. The Report also points out that harmonization of RTAs or BTAs may result in the imbalance of trade between developed and developing countries particularly when RTAs contain rules of origin. *Id.* 151-52.

[166] Charnovitz 1993, *supra* note 102, at 269.

[167] Bhagwati 1996a, supra note 115, at 1.

1994 (GATT 1994)[168] requires Members to achieve economic growth through international harmonization, which, naturally, requires them to adjust national policies and regulations.[169] GATT Article III was drafted with the intention of harmonizing diverse "governmental practices, customs, and economic systems" among countries.[170]

WTO covered agreements also incorporate harmonization as part of the agreement.[171] For example, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provides for the use of harmonized sanitary and phytosanitary measures in Preamble paragraph 6,[172] Annex A paragraph 2,[173] and Articles 3.1 and 3.5.[174] It is

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[168] The General Agreement on Tariffs and Trade 1994 (GATT 1994) consists of the provisions in the General Agreement on Tariffs and Trade 1947. Thus, the GATT 1994 means same as the GATT 1947. *See* General Agreement on Tariffs and Trade 1994 ¶ 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 190.

[169] General Agreement on Tariffs and Trade 1947 art. XXXVIII:2(e), Oct. 30, 1947, 55 U.N.T.S. 194 (as Amended, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 190) [hereinafter GATT 1994]. Article XXXVIII:2(e) provides:

> The Contracting Parties shall collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research.

[170] Jackson 1969, *surpa* note 120, at 277.

[171] Leebron, *supra* note 8, at 41; Robertson, *supra* note 15, at 312.

[172] Agreement on the Application of Sanitary and Phytosanitary Measures preamble, ¶ 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. It provides:

> Members desire to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health.

[173] *Id.* Annex A, paragraph 2. It says that "[h]armonization is the establishment, recognition and application of common sanitary and phytosanitary measures by different Members."

[174] *Id.* art. 3.1. It states that "[t]o harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards,

preferable for the harmonized Sanitary and Phytosanitary Measures (SPS measures) to be based on international standards. Article 3.5 provides that the SPS Committee "shall develop a procedure to monitor the process of international harmonization."[175] The General Agreement on Trade in Services (GATS) provides that a Member can recognize harmonized authorization standards and financial services under Article VII:1[176] and Annex on Financial Services.[177] The Preamble of the Agreement on Technical Barriers to Trade (TBT Agreement) also stipulates that the reasons for the agreement included the recognition of the "important contribution that international standards and conformity assessment systems can make" and the desire to "encourage the development of such international standards and conformity assessment systems."[178] Accordingly, WTO Member States are encouraged to use accepted international standards as the basis for or guide in developing their national regulations because if all national regulations worldwide follow uniform international

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guidelines or recommendations ..."

[175] Meanwhile, in preamble, paragraph 6, and Articles 3.3 and 4.1, the SPS Agreement recognizes Member States' right to take appropriate domestic SPS measures. SPS Agreement, *supra* note 172.

[176] General Agreement on Trade in Services art. VII:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]. The GATS Article VII:1 provided:

> For the purposes of the fulfilment, in whole or in part, of its *standards or criteria* for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a *Member may recognize* the education or experience obtained, requirements met, or licenses or certifications *granted in a particular country. Such recognition, which may be achieved through harmonization* or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.(emphasis added).

[177] *Id.* Annex on Financial Services, Sec.3(a). It says:

> A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

[178] Agreement on Technical Barriers to Trade preamble, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

standards then there is a lesser likelihood of trade distortion.[179] The WTO prefers international standards to national standards not because international standards are technically better, but because they are less susceptible to unilateral and protectionist measures.[180]

Harmonization in the WTO, though, does not imply that a State's domestic policies or laws are identical to other States' policies or laws. In *United States-Measures Affecting Alcoholic and Malt Beverages* (hereinafter *US-Malt Beverages*), the Panel noted that "[t]he purpose of Article III is not to harmonize the internal taxes and regulations of [Member States]."[181] The Panel, in *United States-Taxes on Automobiles* (hereinafter *US-Automobiles*), noted that that "a primary purpose of the GATT was to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them."[182] The WTO, thus, provides the primary opportunities for international harmonization, which allows countries to adjust national policies and regulations.

In sum, WTO harmonization encourages Member States to adjust national economic policies and regulations to conform to the international economic system, and, when internationally accepted standards exist, to use those international standards. However, WTO harmonization does not require its Member States to implement the exact same economic policies or regulations because the WTO must respect diversity in each country and

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[179] Farber & Hudec, *supra* note 1, at 62.

[180] Charnovitz 1993, *supra* note 102, at 274.

[181] Report of the Panel, *United States-Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.71, DS23/R (Jun. 19, 1992), GATT B.I.S.D. (39th Supp.) at 206 [hereinafter US-Malt Beverages].

[182] Report of the Panel, *United States-Taxes on Automobiles*, ¶ 5.8, DS31/R (Oct. 11, 1994) (unadopted) [hereinafter US-Automobiles].

countries making policy choices based on their own value preferences.

3.4. Dual Facets of Harmonizing Environmental Policies in the WTO

Harmonizing national economic or environmental policies can be considered as two different approaches in international relations: the State harmonization requirement is that a certain State requires other States to accept its environmental policies as their own; and, the WTO harmonization requirement is that the WTO requires its Member States to implement internationally agreed policies.[183] A State and the WTO share common ground in wanting to adopt harmonization requirements that aim at eliminating unfair competition resulting from different environmental policies in international trade. However, these harmonization requirements are different because they achieve different goals. While a State uses the harmonization requirement to increase its national interest, the WTO uses the harmonization requirement to strengthen the international trading system. When a State imposes trade measures based on different environmental policies, it causes the two different harmonization requirements to conflict in international trade. The conflict between two harmonization requirements relates to protectionism, unilateralism, and state sovereignty with regard to environmental protection as following reasons.

First, when measures requiring harmonization are motivated by economic reasons to protect domestic industries rather than value-based reasons to protect the environment, those measures are protectionist and undermine international trading system. The State's harmonization requirement, a unilateral action compelling uniform environmental

[183] Leebron, *supra* note 8, at 78.

regulations, is a protectionist measure when it is designed to protect domestic industry for environmental reasons.[184] Trading nations can use environmental regulations as protectionist measures to favor domestic products, which distorts international trade.[185] Countries can use high environmental standards as trade measures by restricting trade or blocking market access for foreign products produced in countries with low environmental standards.[186] The WTO does not allow its Member State to take disguised protectionist measures by requiring application of uniform environmental policies. Thus, because the WTO's non-protectionist approach prevents differences in national environmental regulations from distorting international trade by blocking market access, a State's protectionist measures to compel uniform environmental policies can conflict with the WTO's approach.

Second, harmonization toward a State's domestic policies poses a potential conflict with the WTO's multilateral approach when a State imposes sanctions unilaterally on other countries that do not adopt its environmental policies.[187] Imposing a trade sanction to force the application of uniform environmental policies is considered a unilateral measure when a State takes action without negotiation with other States. States use unilateral actions to justify their refusal to trade for foreign products that do not satisfy particular domestic standards.[188] The WTO harmonization requirement prefers multilateral

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[184] JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 539 (5th ed. 2008).

[185] OECD 1974, *supra* note 109, ¶ 36; Robertson, *supra* note 15, at 314.

[186] Farber & Hudec, *supra* note 1, at 59; Housman & Zaelke, *supra* note 125, at 567.

[187] Leebron, *supra* note 8, at 80.

[188] *Id.* at 80.

approaches that States apply multilaterally agreed upon rules. Attempting to harmonize policies by threatening to issue unilateral trade sanctions undermines the multilateral trading system.[189] Requiring harmonization toward specific domestic environmental policies distorts the international trading system and fails to consider the necessities and differences in countries.[190] Further, a State's unilateral action is protectionist when the action is taken to protect its domestic industry.[191]

Third, the state sovereignty principle does not justify a State's measures when those measures are taken to coerce other States to adopt uniform environmental policies. A State may justify its unilateral trade measures by arguing that it has the sovereign right to adopt and implement its domestic policies to protect the environment and address environmental problems.[192] A State is not allowed to take unilateral action to compel other States to adopt uniform domestic policies under international law and the WTO. In particular, the extra-jurisdictionaly application of a State's unilateral measures is typically not allowed because those measures constrain the sovereign rights of other countries.[193]

The WTO harmonization requirement does not constrain a State's right to determine environmental policies,[194] but requires a State to implement its obligations under the WTO. The tendency to harmonize in the international trading system can deprive a nation from

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[189] *Id.* at 81.

[190] Bhagwati & Srinivasan, *supra* note 8, at 168.

[191] *Id.* at 184.

[192] *Id.* at 184.

[193] Peter L. Lallas, Daniel C. Esty & David J. van Hoogstraten, *Environmental Protection and International Trade: Toward Mutually Supportive Rules and Policies*, 16 HARV. ENVTL. L. REV. 271, 340 (1992).

[194] Bhagwati 1996a, *supra* note 115, at 1.

exercising its right to promote domestic policy goals for national health, welfare, the economy, and the environment.[195] The WTO harmonization requirement is legitimate when it respects variations in different nations.[196] The international trading system does not prevent States' from choosing what measures they need to achieve environmental goals. States' rights to differenciate environmental policies are constrained by international law only to the extent that States are accepting obligations to comply with international agreements.[197]

Accordingly, the State harmonization requirement related to environmental protection amounts to protectionism, unilateralism, and claiming the right to state sovereignty in the international trading system. Meanwhile, the WTO harmonization requirement represents as multilateralism, non-protectionism, and international obligations. Chapters 5, 6, and 7 further discuss the dual aspects of harmonization and how the creation of uniform environmental policies is treated in the WTO. Before analyzing these, chapter 4 examines the WTO rules and basic principles to understand its environment-related ones.

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[195] Jackson et al., *supra* note 184, at 538-39; JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 243-48 (2006).

[196] Bhagwati 1996a, *supra* note 115, at 1.

[197] Hudec 1996b, *supra* note 64, at 116-17.

4. WTO RULES AND ENVIRONMENTAL PROTECTION

4.1. Introduction

The WTO provides international rules on trade between nations to promote international trade by prohibiting discriminatory trade measures and by encouraging market-access. The WTO prohibits discriminatory treatment in duties, taxes, and regulations between the foreign products under Article I of the GATT 1994 and between the domestic and imported products under Article III of the GATT 1994. The WTO does not allow trade restrictions other than duties and taxes under Article XI of the GATT 1994. These obligations of non-discrimination and market-access are the fundamental principles of the WTO and are designed to encourage international trade and to limit trade barriers.[198] To be justified under WTO rules, any environmental measures must conform with these obligations of non-discrimination and market-access.[199]

Because WTO covered agreements do not include environmental agreements, the GATT rules, particularly Articles I, III, XI, and XX of the GATT 1994, have been used to justify Member States' environmental measures under the GATT and the WTO.[200] Most

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[198] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 157-58 (2nd ed. 1997) [hereinafter Jackson 1997].

[199] GATT Report 1971, *supra* note 20, at 12.

[200] Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 271 (1997) [hereinafter Schoenbaum 1997]. Obligations under the GATT will be applied for products because the GATT provided only products when it was drafted and established in 1947. Therefore, the GATS and Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS) provide their own non-discrimination obligations (most-favored-nation treatment and national treatement) because services and intellectual property were excluded from obligations of the GATT. Jackson 1997, *supra* note 198, at 157.

disputes in the GATT and the WTO involve whether a measure at issue violates general obligations under Articles I, III, and XI of the GATT 1994. Discriminatory measures and trade restrictions are permitted by exceptional provisions under Article XX of the GATT 1994 for environment protection. These exceptional provisions are allowed only "conditionally" and interpreted "narrowly" because they are exceptional clauses for general obligations under the WTO.[201] Lastly, the subject of the GATT 1994 and the WTO is "like products" and thus, the interpretation of what a like product is must be determined through WTO disputes.

This chapter focuses on understanding WTO rules including measures to protect the environment so as to analyze how the State and WTO harmonization requirements work regarding protectionism, unilateralism, and state sovereignty as discussed in chapters 5, 6, and 7. This chapter is organized as follows: section 4.2 identifies the fundamental principles of non-discrimination, and non-quantitative restrictions, and the concept of like products; section 4.3 examines environmental exceptions for these fundamental principles under Article XX of the GATT 1994.

4.2. The Fundamental Principles in the WTO

This part examines fundamental principles of the non-discrimination obligations

[201] GATT and WTO Panels have ruled that Article XX of the GATT 1994 should be read narrowly because it elaborates exceptions to other GATT/WTO obligation and rules. *See* US-Tuna (Mexico), *supra* note 12, ¶ 5.22; US-Tuna (EEC), *supra* note 12, ¶ 5.26; Report of the Panel, *Canada-Administration of the Foreign Investment Review Act*, ¶ 5.9, L/5504, (Feb. 7, 1984), GATT B.I.S.D. (30th Supp.) at 140; Report of the Panel, *United States-Section 337 of the Tariff Act of 1930*, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 [hereinafter US-Section 337]). However, environmentalists criticize the narrow interpretion of Article XX because, they argue, the drafters of the GATT considered the needs for environmental exceptions in GATT Article XX. *See* Steve Charnovitz, *The World Trade Organization and the Environment* 8 Y.B. INT'L. EVNT. L. 98, 105 (1997).

under Articles I and III of the GATT 1994 and the market access obligation under Article XI of the GATT 1994, and the criteria of like product.

4.2.1. GATT Article I: Most-Favored-Nation Treatment

Article I of the GATT 1994 (GATT Article I) provides for non-discriminatory treatment between like foreign products. GATT Article I:1 states:[202]

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT Article I provides for Most-Favored-Nation (MFN) treatment by which countries agree not to discriminate between the same goods from different foreign countries. MFN treatment is a fundamental principle of international trade agreements and a central policy of the GATT because MFN treatment promotes liberalizing trade by negotiating concessions based on reciprocity between countries.[203] MFN treatment under Article I covers border measures such as customs duties and import/export charges, methods of levying duties and charges, importation and exportation rules, and national taxes and

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[202] GATT 1994, *supra* note 169, art. I:1.

[203] Matsushita et.al, *surpa* note 3, at 202-205.

regulations under GATT Article III.[204]

GATT Article I requires that any advantage granted to a product from any country must be granted unconditionally to like products from all other countries. GATT Article I requires four elements to be met. First, "any advantage" should be granted between like product from all countries. Second, MFN treatment must be "unconditionally" granted for all countries. Unconditional treatment means that Member states have "equal treatment" in that market access cannot be conditioned on receiving reciprocal market concessions.[205] On the basis of equal treatment, the MFN treatment requires "no less favorable"[206] treatment than like products from other countries receive because not doing so would result in discrimination against products from a specific country. Third, MFN treatment granted to one country must be granted to "all other" countries. Fourth, MFN treatment is applied to "like products" from foreign countries. Like product means products that have the same physical characteristics.[207] Thus, between unlike products, WTO Members do not have any obligation of MFN treatment. "Like product" under the MFN obligation is interpreted narrowly. The GATT Panel in *Treatment by Germany of Imports of Sardines*, in which Norway complained about Germany's different duty for different kind of clupea,[208] made a

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[204] *Id.* at 206.

[205] Schoenbaum 1997, *supra* note 200, at 271; JOHN H. JACKSON, THE WORLD TRADING SYSTEM 136-38 (1989).

[206] The requirement of "no less favorable" is provide in Articles III:3 (national treatment), V:5 (transit of goods) and V:6, IX:1 (marks of origin) of the GATT 1994. *See* GATT 1994, *supra* note 169, arts. III:3, V:5, V:6, IX:1.

[207] The criteria to determine "like product" are discussed in section 4.2.4 of this chapter.

[208] The species of *Clupea* belongs to the larger family Clupeidae (herrings, shads, sardines, menhadens), which comprises some 200 species that share similar features. Wikipedia, http://en.wikipedia.org/wiki/Clupea (last visited Aug. 8, 2012).

distinction between "like product" and "directly competitive or substitutable products."[209] The Panel concluded that the MFN treatment is limited to "like products," and "like product" under GATT Article I means "product as the same product," not "competitive or substitutable" products.[210] Accordingly, when a WTO Member State imposes different customs duties, charges, taxes, or regulations on like products originating from a specific country, such measures explicitly constitute a violation of Article I regardless whether such differentiation provides advantage or disadvantage to that country.

The MFN treatment does not permit a country to discriminate between like products from foreign countries due to environmental reasons. When a country restricts the imports or exports from a specific country on environmental grounds such as conservation of fish stocks, protection of endangered species, or reduction of air pollution, this restriction is considered discriminatory. However, interestingly, the GATT and WTO Panels have not examined the violation of GATT Article I regarding environmental measures. In some cases, dispute parties complained that a State's discriminatory treatement violated GATT Article I. For example, in *United States-Prohibition of Imports of Tuna and Tuna Products from Canada* (hereinafter *US-Canadian Tuna*), in which the U.S. prohibited the import of tuna from Canada, Canada argued that the US import ban to conserve tuna stocks was discriminatory to Canadian products because the United States did not similarly restrict the

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[209] Report of the Panel, *Treatment by Germany of Imports of Sardines*, at 16-17, G/26 (Oct. 31, 1952), GATT B.I.S.D. (1st Supp.) at 53 [hereinafter Germany-Sardines]; *see also* Report of the Panel, *EEC-Measures on Animal Feed Proteins*, L/4599 (Mar. 14, 1978), GATT B.I.S.D. (25th Supp.) at 49 [hereinafter EEC-Animal Feed].

[210] Germany-Sardines, *supra* note 209, at 16-17.

importation from other countries.[211] The complainants in *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US-Shrimp*), in which the U.S. banned the import of shrimp harvested in a way that adversely affected sea turtles, argued that the import prohibition on shrimp is inconsistent with GATT Article I:1 because the US discriminated between the importation of "like" shrimp and shrimp products from certified (the Caribbean/Western Atlantic region) and non-certified (complainants) countries.[212] Similarly, in *Brazil-Measures Affecting Imports of Retreaded Tyres* (hereinafter *Brazil-Tyres*), in which Brazil prohibited the import of retreaded tyres from the European Community (EC), the EC argued that Brazil's exemption for MERCOSUR member countries from the import ban on retreaded tyres was inconsistent with Article I:1.[213] However, the Panels did not examine the violation of GATT Article I due to judicial economy when the measure at issue was found to be inconsistent with other provisional obligations such as Article XI or Article XX of the GATT 1994.[214] Rather discriminatory treatment against a specific country or a group of countries for environmental protection has been examined under the Chapeau of Article XX of the GATT 1994 as discussed later in this chapter.

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[211] *See* Report of the Panel, *United States-Prohibition of Imports of Tuna and Tuna Products from Canada*, ¶ 3.1, L/5198 (Feb. 22, 1982), GATT B.I.S.D. (29th Supp.) at 91 [hereinafter US-Canadian Tuna].

[212] Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 3.135, WT/DS58/R (May 15, 1998) [hereinafter US-Shrimp Panel Report].

[213] Panel Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, ¶ 3.1, WT/DS332/R (Jun. 12, 2007) [hereinafter Brazil-Tyres Panel Report].

[214] *Id.* ¶¶ 7.455-7.456; *see also* US-Shrimp Panel Report, *supra* note 212, ¶¶ 7.22-7.23.

4.2.2. GATT Article III: National Treatment

Article III of the GATT 1994 (GATT Article III) articulates the obligation of national treatment, which requires equal treatment for like products of domestic and foreign origin. Under the national treatment obligation, WTO Member States cannot enact national taxes and regulations that favor domestic products over "like" imported products.

GATT Article III:1 provides the overarching general principle:[215]

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements ... should not be applied to imported or domestic products so as to afford protection to domestic production.

National treatment under Article III requires three elements: non-discrimination, non-protectionism, and like product. First, non-discrimination requires that national taxation and regulations should not discriminate between domestic and imported products. Second, the non-protectionist clause requires that national taxes and laws should not be applied in a way that protects domestic goods.[216] The clause, "so as to afford protection to domestic production," means that domestic measures should not be used to protect domestic products over foreign ones. Third, GATT Article III covers only domestic and imported "like products." GATT Articles III:2 and III:4 provide that domestic taxes and regulations should be applied equally to imported and domestic "like products." In short, national taxes and

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[215] Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, at 96, 111, WT/DS8/AB/R, WT/DS 10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter Japan-Alcoholic Beverages II Appellate Body Report].

[216] Report of the Panel, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 11, L/833 (Oct. 23, 1958), GATT B.I.S.D. (7th Supp.) at 60 [hereinafter Italy-Agricultral Machinery]; US-Section 337 Panel Report, *supra* note 201, ¶ 5.10.

regulations should be applied equally to domestic and imported like products in a way that is neither discriminatory nor protectionist.[217]

A Member State cannot arbitrarily use environmental policy such as fuel conservation, progressive taxation, or waste reduction as a reason to impose national taxes or regulations on imported products in a way that discriminates against imported products or protects domestic products. In certain circumstances, a State can justify its discriminatory treatment of imported products when the treatment is for a legitimate environmental policy purpose as long as national discrimination is not based on the intent to protect domestic production. For example, the Panel in *US-Automobiles*, in which the U.S. imposed taxes on automobiles with low fuel efficiency, recognized that Article III does not prohibit the government from implementing policies to conserve natural resources or improve fuel economy when those policies were not intended to protect domestic producers.[218]

In sum, discriminatory or protectionist treatment of imported products is basically inconsistent with GATT Article I because GATT Article I prohibits discrimination between domestic and imported products, and emphasizes, in particular, the importance of national measures not having protectionist intentions.

4.2.2.1. Domestic Tax under Article III:2

The GATT Article III:2 provides a national treatment obligation for domestic taxation.

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[217] US-Automobiles, *supra* note 182, ¶ 5.9; Report of the Panel, *Japan-Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, ¶¶ 5.5, L/6216 (Nove. 10, 1987), GATT B.I.S.D. (34th Supp.) at 83 [hereinafter Japan-Alcoholic Beverages I].

[218] US-Automobiles, *supra* note 182, ¶ 5.8.

The GATT Article III:2 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject ... to internal taxes or other internal charges of any kind *in excess of those applied ... to like domestic products*. Moreover, *no* contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products *in a manner contrary to the principles set forth in paragraph 1*. (emphasis added)

Domestic taxes must satisfy the requirements of both the first and second sentences under GATT Article III:2.[219] The first sentence of Article III:2 stipulates that taxes on imported products shall not be "in excess of" taxes imposed on "like domestic products." This provision requires the non-discrimination obligation when imposing a tax provided the products at issue are "like" products.[220] When a State imposes different tax rates on imported and domestic products based on fuel efficiency, resource conservation, or health concerns, its differentiation is inconsistent with the GATT Article III:2.

The second sentence of Article III:2 provides two requirements for Member States to meet, including that the policy not be protectionist and that the product be a competitive product. The first requirement is non-protectionist, which means that domestic taxes shall not be imposed to protect domestic products. The second sentence of Article III:2 states that domestic taxes shall not be imposed "in a manner contrary to the principles set forth in GATT Article III:1," which establishes that Member States cannot put in place taxes and regulations

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[219] Jackson 1969, *supra* note 120, at 279-86; GATT 1994, *supra* note 169, Annex I: Notes and Supplementary Provisions, ad art III, pargraph 2.

[220] Jackson 1969, *supra* note 120, at 281.

that are designed to protect domestic production.[221] This provision requires dispute parties to demonstrate whether the intention of imposing taxes was based on environmental policy objectives or domestic economic goals. In *US-Automobiles*, because the US luxury tax and the gas guzzler tax distinguished automobiles by price and fuel efficiency, the parties and the Panel examined whether the intention of tax-distinction was designed to implement the US environmental policy objectives or to protect the US automobile industry.[222] The Panel found that imposing different taxes was consistent with Article III:2 because the difference was based on fuel efficiency and did not have a protectionist intention.[223]

The second requirement of the second sentence of Article III:2 is that a competitive product is involved. To interpret the second sentence of GATT Article III:2, it should be read together with GATT Ad Article III:2 of Supplementary Note (Note Ad Article III:2). The Note Ad Article III:2 provides the requirement needed to satisfy the second sentence of GATT Article III:2:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be *inconsistent* with the provisions of the second sentence only in cases *where competition was involved* between, on the one hand, the taxed product and, on the other hand, *a directly competitive or substitutable product which was not similarly taxed.* (emphasis added)

This clause introduced a broader concept than "like product" by referring to "competitive products" or "substitutable products."[224] Under Note Ad Article III:2, even if a

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[221] *Id.*

[222] US-Automobiles, *supra* note 182, ¶¶ 3.13, 3.26, 5.3-5.5, 5.11, 5.20, 5.23-5.24,

[223] *Id.* ¶ 5.12-5.15, 5.25-5.27, 5.31-5.32, 5.35-5.36

[224] US-Automobiles, *supra* note 182, ¶ 5.16; Japan-Alcoholic Beverages I, *supra* note 217, ¶ 5.5.

domestic tax satisfies the requirements of like product and non-discrimination under the first sentence of GATT Article III:2, the tax would be inconsistent with the second sentence when a non-taxed product is competing with the taxed product.[225] A nation should not discriminate between the taxed imported and domestic "like or directly competitive" products to protect domestic products.[226] Expanding "like product" to "competitive product" can lead to a situation in which a State imposes the same taxes on different products and that basically is not allowed under Article III. Thus, competitive products must be applied only when no like products exist and where there are other products that could compete with the domestic product, and thus placing a tax on an imported product would result in protecting a different domestic product."[227]

In short, Article III:2 requires a State to impose domestic taxes on both domestic and foreign like products without discrimination and without the intent to protect domestic industries.

4.2.2.2. Domestic Regulation under Article III:4

GATT Article III:4 articulates the national treatment obligation for domestic regulations and laws. GATT Article III:4 states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment *no less favourable* than that accorded to like products of national origin *in respect of*

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[225] Jackson 1969, *supra* note 120, at 281-83.

[226] Japan-Alcoholic Beverages I, *supra* note 217, ¶ 5.5.

[227] Jackson 1969, *supra* note 120, at 281-83.

all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. (emphasis added)

Domestic laws and regulations under Article III:4 must meet three requirements: they must regulate the product as such; afford no less favorable treatment; and apply to like products. First, the subject of domestic regulations under GATT Article III:4 is products or the sale of products. Laws and regulations regardless of product as such are not covered under Article III:4. For example, in *United States-Restrictions on Imports of Tuna* (hereinafter *US-Tuna (Mexico)*), in which the U.S. prohibited from Mexico the import of tuna harvested in a way that adversely affected dolphin, the Panel ruled that the US Marine Mammal Protection Act of 1972 (MMPA) did not constitute national regulations under GATT Article III:4 because the US MMPA did not address tuna products, but rather the way in which the tuna is harvested.[228] The *US-Automobiles* Panel also concluded that less favorable treatment for imported automobiles under the Corporate Average Fuel Economy (CAFE) was not permitted by Article III:4 because the CAFE measure was not applied to cars as such, but regulated the producers.[229] Similarly, the Panels in *US-Malt Beverages* and *United States-Standards for Reformulated and Conventional Gasoline* (hereinafter *US-Gasoline*) noted that Article III:4 does not permit a State to implement a regulation that creates less favorable treatment for a product based on the characteristics of the producer rather than the characteristics of the product itself.[230] These decisions demonstrate that the subject of domestic laws and regulations related to environmental protection must be

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[228] US-Tuna (Mexico), *supra* note 12, ¶ 5.10-5.14, 5.35.

[229] US-Automobiles, *supra* note 182, ¶ 5.45, 5.52, 5.54.

[230] US-Malt Beverages, *supra* note 181, ¶ 5.19; Panel Report, United *States-Standards for Reformulated and Conventional Gasoline*, ¶ 6.11, WT/DS2/R (Jan. 29, 1996) [hereinafter US Gasoline Panel Report].

"product as such" to meet the Article III:4 obligation.

Second, domestic regulations or laws cannot apply less favorable treatment to imported products. "No less favorable treatment" implies "effective equality of opportunities" for imported and domestic products under domestic regulations and laws.[231] "The treatment is less favorable when it has a less favorable economic impact and when it accords less favorable competitive opportunities."[232] When a State's regulations favor domestic products for reasons related to fuel efficiency of vehicles, conservation of specific species, or reduction of emission, such discriminatory treatment would violate GATT Article III:4. The *US-Tuna* Panels found that the United States must treat imported tuna in a manner that is no less favorable than domestic tuna to satisfy GATT Article III:4 no matter how the tuna was caught, even if catching it resulted in the incidental taking of dolphins.[233] The WTO Panel of *US-Gasoline* and Appellate Body of *EC-Measures Affecting Asbestos and Asbestos-Containing Products* (hereinafter *EC-Asbestos*) also noted that a measure violates GATT Article III:4 when the measure treats the like imported products less favorably than it treats the like domestic products.[234] The *US-Gasoline* Panel held that the Gasoline Rule to reduce air pollution was inconsistent with GATT Article III because its baseline establishment method provided imported gasoline with less favorable sale conditions than domestic

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[231] US-Section 337, *supra* note 201, ¶ 5.11.

[232] Frieder Roessler, *Diverging Domesitc Policies and Multilateral Trade Integration*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS, *supra* note 1, at 21, 26.

[233] US-Tuna (Mexico), *supra* note 12, ¶ 5.15; US-Tuna (EEC), *supra* note 12, ¶ 5.9.

[234] US-Gasoline Panel Report, *supra* note 230, ¶ 6.10; Appellate Body Report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 100, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC-Asbestos Appellate Body Report].

gasoline.[235] Thus, GATT Article III:4 ensures that imported products are given no less favourable treatment than like domestic products.

In short, GATT Article III:4 permits a State to impose domestic laws and regulations on foreign products provided that they do not afford protection to domestic production in accordance with GATT Article III:1, and that they treat imported products no less favorably than like domestic products, consistent with GATT Article III:4.[236] Article III:4, thus, generally requires that a State treat imported and domestic like products equally in its application of domestic environmental regulations and laws.

4.2.2.3. The Relationship between National Treatment and MFN

Domestic regulations or taxes must meet both the requirments of national treatment under GATT Article III and the MFN obligation under GATT Article I. The MFN requirement of Article I:1 applies to internal taxes and regulations by providing that the MFN obligation applies "with respect to all matters referred to Articles III:2 and III:4."[237] The *US-Tuna* Panel noted that members invoking GATT Article III should meet the requirements of MFN. The Panel ruled that domestic regulations imposed on imported products under GATT Article III could be justified only when such regulations do not discriminate between imported products consistent with Article I.[238] Accordingly a State cannot discriminate in the way it applies its domestic taxes and regulations to foreign

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[235] US-Gasoline Panel Report, *supra* note 230, ¶ 6.16.

[236] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.9, 6.2.

[237] Matsushita et al., *surpa* note 3, at 245, Footnote 65.

[238] US-Tuna (Mexico), *supra* note 12, ¶ 5.9.

products from different countries so as to comply with Article I. Thus, all imported products must be treated equally to comply with the MFN obligation, and so, if imported products were being forced to meet domestic regulations then all like imported products would have to be forced to meet those regulations regardless of their country of origin.

4.2.3. GATT Article XI: Non-Quantitative Restriction on Trade

GATT Article XI does not allow prohibitions or restrictions on import or export other than tariffs to promote market-access in international trade. GATT Article XI:1 provides:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT Article XI:1 bans any type of restraint on trade other than custom duties, taxes or other charges when goods are imported and exported. Article XI does not allow quotas, import or export licenses, or other measures to prohibit or restrict trade. A quota, or quantitative restriction, is a country's cap on imports at a certain level where all imports above the cap are not allowed.[239] The Panel in *Brazil-Tyres* recognized that requiring an import license for retreated and used tyres created an import ban, and thus was inconsistent with Article XI:1.[240] Because Article XI uses the phrase "other measures" as well, it seems

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[239] Jackson et al., *supra* note 184, at 372.

[240] Brazil-Tyres Panel Report, *supra* note 213, ¶¶ 7.13-7.15, 7.25, 7.28-7.29, 7.34.

that any limitation, or regulation creating a limitation such as import licensing requirements, anti-dumping measures, and health and safety regulations, imposed on trade that is not a monetary tax is a restriction on trade within the meaning of Article XI:1.[241]

The GATT and WTO decisions have ruled that a State's environmental policies that restrict or prohibit trade violate GATT Article XI. The GATT Panels of *US-Tuna (Mexico)* and *US-Tuna (EEC)* held that a United States embargo on tuna caught by fishing methods causing high dolphin mortality was inconsistent with GATT Article XI:1.[242] The Panels in *US-Shrimp* and *United States-Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia* (hereinafter US-Shrimp (21.5)) also found that the United States import ban of shrimp from non-certified countries violated GATT Article XI:1 because the measures were restrictions on the importation of shrimp product within the meaning of GATT Article XI:1.[243] Thus, any trade restriction or prohibition based on environmental policies objective would be inconsistent with Article GATT XI.

GATT Article XI:2 provides exceptions to Article XI:1 by allowing restrictions to be placed on trade to relieve food shortages, to apply domestic standards or regulations, or to enforce domestic measures on agricultural or fisheries products.[244] First, Article XI:2(a) permits an export ban or restriction to "prevent or relieve" critical food shortages, which

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[241] Panel Report, *India-Measures Affecting Trade and Investment in the Motor Sector*, ¶¶ 7.254-7.263, 7.265, WT/DS146/R, WT/DS175/R (Dec. 21, 2001); Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.369. *See also* Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L.779, 784 (2008).

[242] US-Tuna (Mexico), *supra* note 12, ¶ 5.17, 5.18; US-Tuna (EEC), *supra* note 12, ¶ 5.10.

[243] US-Shrimp Panel Report, *supra* note 212, ¶¶ 7.16-7.17; Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products -Recourse to Article 21.5 by Malaysia*, ¶¶ 5.22-5.23,WT/DS58/RW (Jun. 15, 2001) [hereinafter US-Shrimp (21.5) Panel Report].

[244] The use of quotas is also permitted for the balance of payment problems under Articles XII and XVIII. GATT 1994, *supra* note 169.

should be temporary.[245] Second, GATT Article XI:2(b) allows an import and export ban or restriction when such measure is "necessary to the appliction of standards or regulations."[246] For example, the Panel of *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon* (hereinafter *Canada-Herring and Salmon*), in which the United States complained about a Canadian export restriction on unprocessed herring and salmon, found that Canada's export prohibition was not justified under Article XI:2(b) because Canada banned export of certain unprocessed salmon and unprocessed herring even when those products met its quality standards.[247] Third, GATT Article XI:2(c) permits import restrictions on agricultural or fisheries products.[248] Under Article XI:2(c), import restrictions on agricultural products

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[245] GATT 1994, *supra* note 169, art. XI:2(a). Article XI:2(a) allows "[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."

[246] *Id.* art. XI:2(b). Article XI:2(b) permits "import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade."

[247] Report of the Panel, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.2, L/6268 (Mar. 22, 1988), GATT B.I.S.D. (35th Supp.) at 98 [hereinafter Canada-Herring and Salmon].

[248] While Articles XI:2(a) and XI:2(b) provide both trade restrictions and prohibitions, Article XI:2(c) stipulates only import restrictions. *See* US-Canadian Tuna, *supra* note 211, ¶ 4.6. The products eligible for import restrictions under Article XI:2(c) are limited to those earlier stages of processing, i.e. the fresh products. *See* Report of the Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 68-70, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 [hereinafter Thailand-Cigarettes Panel Report]. The *Thailand-cigarette* Panel found that Thailand's import restriction on cigarettes was inconsistent with GATT Article XI:1 because "agricultural products" under Article XI:2(c) should be limited to a fresh product in accordance to the GATT Note ad Article XI:2(c). *Id.* ¶¶ 67-68. The Panel rules that only leaf tobacco was an "agricultural product" within the meaning of Article XI:2(c) and "cigarettes were processed products from leaf tobacco and were not like leaf tobacco" according to GATT Note ad Article XI:2(c). *Id.* ¶ 70. Article XI:2(c) permits:

> [I]mport restrictions on any agricultural or fisheries product, imported in any form necessary to the enforcement of governmental measures which operate. (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market

must also be applied to domestic production in order to remove surplus of domestic product.[249] The *US-Canadian Tuna* Panel confirmed it by ruling that the United States import ban on tuna products from Canada was not justified by GATT Article XI:2(c) because the measure had not been applied to domestic production in the United States.[250] GATT Article XI:2 allows a State to prohibit or restrict import or export on the basis of food shortages, domestic standards, or surplus agricultural products, but the application of these exceptions must be narrowly interpreted and accepted in the WTO.

4.2.4. The Concept and Criteria of Like Product

The WTO prohibits discriminatory treatment between like products in international trade. Trade-related environmental measures can only be consistent with WTO rules if they do not discriminate between like products. Because discrimination between different products is not inconsistent with WTO rules, the criteria to determine likeness of product are significant in the dispute settlement of the WTO. The GATT Panels and the WTO Dispute Settlement Bodies (DSBs) have considered three factors to determine the likeness of products: the physical characteristics of product; the aim and effect of governmental policy; and other relevant factors such as risk to human health or the environment.

First, the general criteria to determine whether products are like products is to look at the physical characteristics criteria, which includes the product's end-uses, consumers' tastes

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level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible. (underline added)

[249] Jackson 1969, *supra* note 120, at 317-21.

[250] US-Canadian Tuna, *supra* note 211, ¶¶ 4.4-4.6.

and habits, and the product's properties, nature, and quality.[251] The GATT Working Party Report suggested the physical characteristics criteria and they have been the traditional criteria used by the GATT and the WTO ever since.[252] "Tariff classification" in the Harmonized System (HS) also has been considered one of the criteria in determining likeness in multiple decisions including *EEC-Measures on Animal Feed Proteins* (EEC-Animal Feed), *Japan-Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (Japan-Alcoholic Beverages I), and *Japan-Taxes on Alcoholic Beverages* (Japan-Alcoholic Beverages II).[253]

Second, when determining whether there are like products, the aims and effects of the measure can be considered to examine whether they have the intention of protecting domestic products.[254] The *US-Malt Beverages* Panel concluded that in determining whether two products subject to different treatment are like products under Article III, it is necessary to consider whether such product differentiation is being made so as to afford protection to domestic production.[255] The *US-Automobiles* Panel also found that the U.S. taxes on automobiles to conserve fuel resources and improve energy efficiency were consistent with GATT Article III:1 and III:2 because the aim and effect of the taxes was not to protect

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[251] GATT, *Working Party Report on Border Tax Adjustment*, ¶ 18, L/3464 (Dec. 2, 1970), GATT B.I.S.D. (18th Supp.) at 97 [hereinafter GATT BTA Report].

[252] EC-Asbestos Appellate Body, *supra* note 234, ¶ 101; US-Gasoline Panel Report, *supra* note 230, ¶ 6.8; Japan-Alcoholic Beverage II Appellate Body Report, *supra* note 215, at 19-23; Panel Report, *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 7.329, 7.336, WT/DS302/R (Nov. 26, 2004).

[253] EEC-Animal Feed, *supra* note 209, ¶ 4.2; Japan-Alcoholic Beverages I, *supra* note 217, ¶ 5.6; Japan-Alcoholic Beverages II Appellate Body Report, *supra* note 215, at 19-23; US-Gasoline Panel Report, *supra* note 230, ¶ 6.8, 6.9.

[254] US-Automobiles, *supra* note 182, ¶¶ 5.9-5.10.

[255] US-Malt Beverages, *supra* note 181, ¶¶ 5.25-5.26, 5.71-5.75.

domestic automobile production.[256] The "aim and effect" test, however, has the potential to make a Member State treat even like products differently when a State's policy objective is argued non-protectionist. These decisions left room for a State to defend its trade restriction even like products determined by objective criteria of characteristics and argue that governmental policy does not have protectionist intention. This potential would not comply with the principles of non-discrimination and market-access in the GATT/WTO. This may help to explain the *Japan-Alcoholic Beverage II* Appellate Body's rejecting of the "aim and effect" test in its decision.[257]

Third, relevant factors other than physical characteristics can be considered in determining likeness. The *EC-Asbestos* Appellate Body reviewed not only the physical characteristics, but also risk factors of products to determine the physical properties of chrysotile asbestos.[258] Likeness does not need to be based on physical characteristics alone, but can be based on all the relevant factors including marketplace, competition in the relevant market, elasticity of substitution, and cross-price elasticity of demand.[259]

However, even though these three factors have been reviewed to determine the

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[256] US-Automobiles, *supra* note 182, ¶¶ 5.12-5.15, 5.25-5.26.

[257] Japan-Alcoholic Beverage II Appellate Body Report, *supra* note 215, at 19-23. *See also* Matsushita et al, *surpa* note 3, at 253-55.

[258] EC-Asbestos Appellate Body Report, *surpa* note 234, ¶¶ 113-114, 116. Regarding evaluating the risk element of like products, the Panel noted that "the risk of a product for human or animal health had never been used as a factor of comparison by panels entrusted with applying the concept of 'likeness' within the meaning of Article III." Panel Report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.129, WT/DS135/R (Sep. 18, 2000) [hereinafter EC-Asbestos Panel Report]. The Appellate Body, however, overruled the Panel's decision by ruling that "health risks should be associated in examining the "likeness" of the cement-based products containing the different fibres between chrysotile asbestos fibres and PCG fibres." EC-Asbestos Appellate Body Report, *supra* note 234, ¶¶ 127-128.

[259] Matsushita et al., *surpa* note 3, at 237-38; Japan-Alcoholic Beverage II Appellate Body Report, *surpa* note 215, at 19-23.

likeness, the meaning of "like product" can be examined on a case-by-case basis.[260] "Like product" should be defined in light of other factors including the context, and the object and purpose of both the provision and the agreement.[261] The Appellate Body of *EC-Asbestos* noted that "like product" in Article III:4 should not be interpreted identically to that in other provisions under the WTO agreements.[262]

Furthere, national regulations can form the basis of regulatory distinction between like and different products. For example, the US MMPA differentiated between tunas and tunas harvested in a way that endangered dolphins, the U.S. luxury tax and gas guzzler tax distinguished cars by fuel efficiency, and the US Gasoline Rule applied the different baseline regulations to imported gasoline that was to be marketed in the United States. Whether a product is like or different can be determined by governmental regulatory distinction that is based on governmental policy objectives. The *US-Automobiles* Panel recognized governmental regulatory distinctions as part of the criteria used to determine likeness of

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[260] GATT BTA Report, *supra* note 251, ¶ 18; US Gasoline Panel Report, *supra* note 230, ¶ 6.8; EC-Asbestos Panel Report, *supra* note 258, ¶¶ 8.112-8.116. The GATT 1994 provides for "like product" in Articles I:1, II:2(a), III:2, III:4, VI:1(a) and (b), IX:1, XI:2(c), XIII:1, and XVI:4. Like product should be interpreted narrowly for exceptional provisions. For example, exceptional provisions such as the agricultural-fishery exception to the quotas prohibition under Article XI:2(c) must be interpreted "more narrowly." Jackson 1969, *supra* note 120, at 261. Member States are permitted to impose antidumping or countervailing duties only to the same product as well. *Id.* Meanwhile, some provisions provide broader meaning of like product. The GATT 1994 provides "like commodity" in Article VI:7, "like merchandise" in Article VII:2, and "like or competitive products" in Article XIX:1. Articles II, V:6, and III:1 of the GATT 1994 provide only product. For national treatment, while Article III:2 covers like product, Ad Article III:2 provides "directly competitive or substitutable product" to "impose the broader obligation to avoid protection to domestic production in applying internal taxes." *Id.* at 262. The escape clause of Article XIX allows members to restrict imports when the imports seriously injure a domestic industry producing like or competitive products. Product is also interpreted broadly for the test for nullification and impairment under Art XXIII. Thus, the meaning of like product can be considered differently in different provisions of the GATT 1994. *Id.* at 260, 263.

[261] EC-Asbestos Appellate Body Report, *supra* note 234, ¶ 88; *see also* Japan-Alcoholic Beverage II Appellate Body Report, *supra* note 215, at 19-23.

[262] EC-Asbestos Appellate Body Report, *supra* note 234, ¶ 89.

products.[263] The *US-Gasoline* Panel, however, denied the U.S. the ability to apply its national regulation to discriminate against imported products even though the Gasoline Rule was found to be designed to reduce air pollution because the application of the U.S. regulations constituted unjustifiable discrimination and a disguised restriction on trade inconsistent with Article XX Chapeau.[264] Therefore, whether governmental regulatory distinction is legitimate depends on whether that distinction meets requirements and obligations under GATT and WTO rules.

4.3. Environmental Exceptions to International Trade in the WTO

Article XX of the GATT 1994 (GATT Article XX) provides exceptions to general obligations of the GATT and the WTO so that a State can take measures related to the protection of the environment and natural resources. The general exceptions provided by GATT Article XX have been the most controversial with regard to the relationship between trade rules and environmental measures.[265] Articles XX(b), XX(d), and XX(g) have been most frequently invoked in the WTO dispute settlement involving environmental disputes.[266] GATT Articles XX(b), (d) and (g) provide:[267]

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

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[263] US-Automobiles, *supra* note 182, ¶ 5.6.

[264] Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, at 28, WT/DS2/AB/R 19 (Apr. 29, 1996) [hereinafter US-Gasoline Appellate Body Report].

[265] Jackson at al., *supra* note 184, at 591.

[266] *Id.*

[267] GATT 1994, *supra* note 169, art. XX, paragraphs (b), (d) and (g).

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; ...
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...;
(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 Member State can justify its violation of obligations under the GATT and the WTO by demonstrating that the measure falls under an Article XX exception. WTO members have invoked GATT Article XX to justify their violation of obligations under the GATT 1994, particularly Articles I, III, and XI.[268] For example, the *EC-Asbestos* Panel ruled that the violation of Article III:4 was justified under Article XX(b) because the trade measure regulating chrysotile asbestos was necessary to protect human life and health.[269] To justify measures that would otherwise violate its WTO obligations, a Member State should satisfy the "two-tiered" requirements provided by Article XX: first, a measure must satisfy each relevant provisional requirement under Article XX; and second, a measure must meet the requirements under the introductory paragraph of Article XX (the Article XX Chapeau).[270] WTO Panels have used this sequence of steps because it is consistent with

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[268] Weiss & Jackson, *supra* note 4, at 6.

[269] EC-Asbestos Panel Report, *supra* note 258, ¶ 8.194.

[270] With regard to measures satisfying the requirement of any clauses under Article XX, the GATT/WTO DSBs have consistently determined that measures must meet the Chapeau of Article XX. US-Tuna (Mexico), *supra* note 12, ¶¶ 5.27, 5.32; US-Tuna (EEC), *supra* note 12, ¶¶ 5.12, 5.29; US-Automobiles, *supra* note 182, ¶ 5.56; US-Gasoline Panel Report, *supra* note 230, ¶¶ 6.20, 6.31, 6.35; US-Gasoline Appellate Body Report, *supra* note 264, at 22; US-Shrimp Appellate Body Report, *supra*

Article XX's structure and logic.[271] This section reviews each relevant provisional requirement under Article XX and then the requirements of the Article XX Chapeau.

4.3.1. GATT Article XX(b): Measures Necessary to Protect the Environment

A WTO Member can take measures necessary to protect the environment under GATT Article XX(b). Article XX(b) provides:

> Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of *measures:... necessary to protect human, animal or plant life or health.* (emphasis added)

Article XX(b) requires three elements to be met to justify measures that would otherwise violate the WTO: first, the State's policy must be designed to protect the environment; second, the inconsistent measure must be necessary to fulfill the State's policy objectives; and third, the measure must satisfy the requirements of the Article XX Chapeau.[272]

First, in order to be considered legitimately designed and compliant with Article XX(b), the State's policy objectives for implementing trade measures must be to protect the environment. Many GATT and WTO decisions have recognized that Member States' measures fell within the range of policies considered under Article XX(b) as designed "to

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note 12, ¶ 118; US-Shrimp (21.5) Panel Report, *supra* note 243, ¶ 5.28; Brazil-Tyres Panel Report, *supra* note 213, ¶¶ 7.37-7.38.

[271] *See* US-Shrimp Appellate Body Report, *supra* note 12, ¶ 119; Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.37.

[272] US-Tuna (EEC), *supra* note 12, ¶ 5.29; US Gasoline Panel Report, *supra* note 230, ¶ 6.20; EC-Asbestos Panel Report, *supra* note 258, ¶ 8.169; Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.40.

protect human, animal or plant life or health". In *Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes* (hereinafter *Thailand-Cigarettes*), in which the U.S. complained about Thailand's import ban on cigarettes, the Panel acknowledged that smoking cigarettes posed a serious risk to human health, and therefore, measures designed to reduce cigarette consumption fell within the scope of Article XX(b). [273] Additionally, the *US-Gasoline* Panel agreed with the United States that a policy designed to reduce air pollution by regulating gasoline was within the meaning of Article XX(b).[274] Panels in *EC-Asbestos* and *Brazil-Tyres* considered the existence of risk to determine whether the trade measures were legitimately designed to meet the requirements of Article XX(b).[275] The *EC-Asbestos* Panel and Appellate Body noted that the measure was taken for the purpose of protecting human life or health within the meaning of Article XX(b) because chrysotile-cement products "pose a risk to human life or health".[276] Further, the *Brazil-Tyres* Panel found that Brazil's import ban fell under an Article XX(b) exception because "Brazil's policy objective was the protection of human life and health and the environment and was designed to prevent the generation of additional waste tyres in Brazil and to reduce the incidence of risks associated with waste tyres under Article XX(b)." [277] These decisions suggest that a State's policy designed to protect the environment falls within the

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[273] Thailand-Cigarettes, *supra* note 248, ¶¶ 73, 76. The Panel referred to the *US-Section 337* Panel's decision of "reasonably available alternative" as "necessary requirement" under Article XX(d). *See* US-Section 337, *supra* note 201, ¶ 5.26.

[274] US-Gasoline Panel Report, *supra* note 230, ¶ 6.21.

[275] EC-Asbestos Panel Report, *supra* note 258, ¶ 8.170; Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.43.

[276] EC-Asbestos Panel Report, *supra* note 258, ¶¶ 8.170, 8.188, 8.194-8.195; EC-Asbestos Appellate Body Report, *supra* note 234, ¶¶ 162, 163, 172.

[277] Brazil-Tyres Panel Report, *supra* note 213, ¶¶ 7.99, 7.102.

policy under Article XX(b).

Second, the inconsistent measure must be "necessary to" fulfill the State's policy objectives of protecting the environment. To determine if a policy meets the "necessary to" requirement, there must be a two-tiered review. First, the measure must be analyzed by considering the following three factors together: the importance of the objective pursued by the measure, the trade-restrictiveness of the measure, and the contribution of the measure to the objective.[278] Secondly, after analyzing those factors, then the challenged measures should be compared with possible alternatives.[279] As the first requirement, the *Brazil-Tyres* Appellate body analyzed a measure's necessity under Article XX(b) as the measure that contributes to achieving the measure's objective and such contribution is recognized when "a genuine relationship of ends and means between the objective pursued and the measure at issue" exists.[280]

As second requirment, the measure can satisfy the "necessary to" requirement when there are no "reasonably available alternatives" that are "at least or not inconsistent" with the obligations under the WTO.[281] The GATT and WTO decisions have ruled against

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[278] Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter Korea-Beef Appellate Body Report]; *EC-Asbestos* Appellate Body Report, *supra* note 234, ¶ 172; Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 306, WT/DS285/AB/R (Apr. 7, 2005); Appellate Body Report, *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 70, WT/DS302/AB/R (Apr. 25, 2005) [hereinafter Dominica-Cigarettes Appellate Body Report]; Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.104; Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, ¶¶ 141-143, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Brazil-Tyres Appellate Body Report].

[279] Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.104; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 156.

[280] Brazil-Tyres Appellate Body Report, *supra* note 278, ¶¶ 146-147, 210.

[281] US-Section 337, *supra* note 201, ¶¶ 5.10, 5.26; Thailand-Cigarettes, *supra* note 248, ¶¶ 73-75; US-Gasoline Panel Report, *supra* note 230, ¶ 6.24; EC-Asbestos Panel Reoprt, *supra* note 258, ¶ 8.199;

Member States' environmental policies found to be designed to protect the environment because they failed to meet the "necessary to" requirement when reasonable alternatives existed. The *Thailand-Cigarette* Panel ruled that Thailand's import ban on cigarettes was not necessary under Article XX(b) because the Thai government could have achieved the same objectives by enacting a reasonably available alternative measure such as requiring "non-discriminatory labeling and ingredient disclosure" or by creating a "governmental monopoly on the importation and domestic sale of product."[282] The *US-Tuna (Mexico)* and *US-Tuna (EEC)* Panels concluded that US measures could not be considered necessary within the meaning of Article XX(b) because the United States failed to prove that there were no "options reasonably available" to it that could be used to protect dolphins in a manner that was consistent with the GATT.[283] Similarly, the *US-Gasoline* Panel held that the measures that violated Article III:4 were not "necessary" to achieve the policy objectives of the US and were not justified by Article XX(b) because the United States had other "reasonably available" alternatives that were "consistent or less inconsistent measures."[284]

Contrary to these decisions, *EC-Asbestos* and *Brazil-Tyres* recognized that inconsistent measures were justified by Article XX(b) because there were no reasonably available alternatives to achieve governmental policy objectives. The Panel and the Appellate Body in *EC-Asbestos* found that the import ban on asbestos fibers was

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Korea-Beef Appellate Body Report, *supra* note 278, ¶¶ 165-166; EC-Asbestos Appellate Body Report, *supra* note 234, ¶¶ 170-172; Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.149

[282] Thailand-Cigarettes, *supra* note 248, ¶¶ 76-81.

[283] US-Tuna (Mexico), *supra* note 12, ¶ 5.28 (noting that the Panel cited international negotiations to protect dolphins as an example of a reasonably available option); US-Tuna (EEC), *supra* note 12, ¶ 5.35.

[284] US-Gasoline Panel Report, *supra* note 230, ¶¶ 6.24, 6.28, 6.29.

"necessary to protect human life or health" within the terms of Article XX(b) because there was "no reasonably available alternative" to the import ban.[285] The *Brazil-Tyres* Panel and Appellate Body reviewed the availability of alternative measures that could be used to achieve Brazil's policy goal and found that Brazil's import ban was necessary because no alternative measures were reasonably available to achieve the goal of reducing risks from retreaded tyres. [286] However, there are times when it would be difficult to achieve identical environmental objectives through the use of alternative measures.[287] Thus, in analyzing a measure and making their decisions, the Panel and the Appellate Body need to consider the "tradeoffs" between what the trade disruption cost would be and what the cost associated with achieving the environmental objectives.[288]

In sum, Article XX(b) allows a State's environmental policy measures provided that governmental policy is intended to protect the environment. This environmental policy objective is recognized as meeting the "necessary to" requirement when the genuine link between policy objective and a measure exists, and there are no available alternatives to achieve the policy goals. These provisional requirements and interpretations of the WTO DSBs emphasize the importance of having a genuine environmental protection goal when trying to invoke an exception under Article XX(b). These strict provisional devices are to prevent WTO Member States from misusing Article XX(b) as disguised protectionist

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[285] EC-Asbestos Panel Report, *supra* note 258, ¶¶ 8.209-8.217; EC-Asbestos Appellate Body Report, *supra* note 234, ¶ 175.

[286] Brazil-Tyres Panel Report, *supra* note 213, ¶¶ 7.157, 7.215; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶¶ 170, 172, 174-175, 210, 212. (referring to the US-Gambling decision. *See* US-Gambling Appellate Body Report, *supra* note 278, ¶ 308).

[287] Bhagwati 1993, *supra* note 7, at 180.

[288] *Id.*

measures.

4.3.2. GATT Article XX(d): Measures Necessary to Comply with Domestic Laws

The GATT Article XX(d) allows members to adopt measures necessary to secure compliance with domestic laws or regulations without violating the GATT. Article XX(d) provides:

> Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of *measures*:...
> *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*.... (emphasis added)

Article XX(d) requires three elements to be met to justify measures that would otherwise violate the WTO: first, the measure to "secure compliance" with domestic laws or regulations must be consistent with the GATT 1994; second, the measure must be "necessary to secure" such compliance; and third, the measure should comply with the Article XX Chapeau.[289]

First, to invoke Article XX(d), the measures that complies with domestic laws or regulations must be consistent with the GATT 1994.[290] The *US-Tuna (Mexico)* Panel found that the US MMPA could not justify the ban on Mexican tuna as a measure designed to "secure compliance with laws and regulations" consistent with the GATT if that ban was inconsistent with GATT Articles XI and III.[291] The *US-Gasoline* Panel also ruled that the

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[289] Korea-Beef Appellate Body, *supra* note 278, ¶ 157.

[290] US-Tuna (Mexico), *supra* note 12, ¶ 5.40.

[291] *Id.*

US baseline establishment methods under the Gasoline Rule did not meet Article XX(d) requirements because they discriminated against imported gasoline in violation of Article III:4.[292] Accordingly, measures violating any obligation of the GATT and the WTO cannot be justified as measures under Article XX(d).

Second, the measures satisfy the "necessary to" requirement when there are no "reasonably available alternatives" that are consistent or less inconsistent with the GATT and the WTO.[293] The party claiming that the measure is necessary, as required under Article XX(d), has the burden of proof to demonstrate that no alternative measure consistent with the WTO Agreement is reasonably available.[294] Both paragraphs (b) and (d) of GATT Article XX and the General Agreement on Trade in Services (GATS) Article XIV(a) include the "necessary to" requirement. The interpretation of "necessary to" in these provisions has been consistent throughout the GATT and WTO decisions.[295]

In sum, Article XX(d) permits measures to implement States' domestic environmental laws or regulations when those measures are consistent with the GATT 1994, and when they are necessary because there is no reasonably available alternative to achieve the policy objectives. Thus, Article XX(d) requires States' application of domestic environmental laws and regulations to comply with obligations under the GATT 1994.

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[292] US-Gasoline Panel Report, *supra* note 230, ¶. 6.33.

[293] Korea-Beef Appellate Body Report, *supra* note 278, ¶ 167.

[294] Panel Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 665, WT/DS161/R (Jul. 31, 2000).

[295] For the "necessary to" test under GATT Article XX(d), *see* US-Section 337, *supra* note 201; Korea-Beef Appellate Body Report, *supra* note 278. For the "necessary to" test under GATT Article XX(b), *see* Brazil-Tyres Appellate Body Report, *supra* note 278; EC-Asbestos Appellate Body Report, *supra* note 234. Lastly, for the "necessary to" test under GATS Article XIV(a), *see* Dominica-Cigarettes Appellate Body Report, *supra* note 278; US-Gambling Appellate Body Report, *supra* note 278.

4.3.3. GATT Article XX(g): Measures Relating to Environmental Conservation

A WTO Member State can take action to conserve exhaustible natural resources under the GATT Article XX(g). Article XX(g) provides:

> Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of *measures: ...*
> *relating to the conservation of exhaustible natural resources* if such measures are *made effective in conjunction with restrictions on domestic production or consumption.* (emphasis added)

Article XX(g) requires four elements to justify a Member State's measures to implement its environmental policy: first, the policy must be designed to conserve exhaustible natural resources; second, measures must be related to the conservation of exhaustible natural resources; third, measures must be made effective in conjunction with restrictions on domestic production or consumption; and fourth, measures must meet the requirements of the Article XX Chapeau.[296]

First, the State's policy must be designed to conserve exhaustible natural resources. Many GATT and WTO decisions have ruled that States' environmental policies fall under Article XX(g). The *US-Automobiles* Panel found that the US CAFE standards, which are designed to improve fuel efficiency, and therefore to conserve gasoline, were within the range of policies Article XX(g) is designed to cover because gasoline is a petroleum product and petroleum is an exhaustible natural resource.[297] The *US-Gasoline* Panel also

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[296] US-Tuna (EEC), *supra* note 12, ¶ 5.12; US-Automobiles, *supra* note 182, ¶ 5.56; US- Gasoline Panel Report, *supra* note 230, ¶ 6.35;

[297] US-Automobiles, *supra* note 182, ¶ 5.57.

ruled that the Gasoline Rule, which was a policy designed to prevent the depletion of clean air, fell under Article XX(g) because clean air was a natural resource within the term of Article XX(g).[298] Similarly, in *US-Shrimp* and *US-Shrimp (21.5)*, the US's policy goal to protect turtle under Section 609 of Public Law 101-162 (Section 609),[299] which banned the import of shrimp that was harvested in a way that adversely affected sea turtles, was found to be a valid policy under Article XX(g).[300] Thus, a State's policy falls under the Article XX(g) exception when its policy goals are conservation of natural resources.

Second, the measure must be related to conserving a natural resource. The measures "relating to" conservation are interpreted as the measures "primarily aimed at" conservation and are examined by looking for whether a substantial link between the measures and a conservation objective exists.[301] The *Canada-Herring and Salmon* Panel ruled that for measures to be considered as "relating to" conservation within the meaning of Article XX(g) they should be "primarily aimed at the conservation of an exhaustible natural resource."[302] The *US-Tuna* Panel found that trade restrictions based on the U.S. standards and on unpredictable conditions, here a maximum dolphin taking rate as determined by the U.S. take in the same time period, could not be regarded as being "primarily aimed at" conserving dolphins in accordance with Article XX(g).[303] These GATT decisions suggest

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[298] US-Gasoline Panel Report, *supra* note 230, ¶ 6.37.

[299] Sea Turtle Conservation Amendments to the Endangered Species Act, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037 (Nov. 21, 1989) (codified at 16 U.S.C. § 1537 note (1984)) [hereinafter Section 609].

[300] US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶¶ 5.40-5.42.

[301] Canada-Herring and Salmon, *supra* note 247, ¶ 4.6; US-Tuna (Mexico), *supra* note 12, ¶¶ 5.33, 5.27; US-Tuna (EEC), *supra* note 12, ¶ 5.22; US-Automobiles, *supra* note 182, ¶ 5.58; US-Gasoline Panel Report, *supra* note 230, ¶ 6.37.

[302] Canada-Herring and Salmon, *supra* note 247, ¶ 4.6.

[303] US-Tuna (Mexico), *supra* note 12, ¶ 5.33; US-Tuna (EEC), *supra* note 12, ¶ 5.27.

that the term "relating to" does not have to be "necessary or essential" but merely "primarily aimed at" conservation.[304] The WTO Appellate Body in both *US-Gasoline* and *US-Shrimp* further developed this "primarily aimed at" test to require a "substantial relationship" between trade measures and environmental conservation goals.[305] The Appellate Body of *US-Shrimp* concluded that Section 609 was a measure "relating to" the conservation of an exhaustible natural resource (an endangered species) because it had a "substantial or genuine relationship" with "the legitimate policy of conserving an exhaustible endangered species."[306] Thus, when a measure has a substantial link to environmental conservation policy, it is "relating to" and, further, "primarily aimed at" environmental conservation.

Third, to satisfy the requirement of "measures made effective in conjunction with restriction on domestic production or consumption," measures to conserve exhaustible resources must be applied not only to foreign products but also to domestic production and consumption. Numerous Panels have looked into this question. For example, the Panel in *US-Canadian Tuna* found that the U.S. import ban was not a measure within the meaning of Article XX because U.S. restrictions applied to Canadian tuna had not applied to domestic production and consumption of tuna.[307] The term "in conjunction with" is interpreted as "primarily aimed at".[308] The *Canada-Herring and Salmon* Panel ruled that

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[304] Canada-Herring and Salmon, *supra* note 247, ¶ 4.6.

[305] US-Gasoline Appellate Body Report, *supra* note 264, at 18-19; US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 135-137.

[306] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶141-142.

[307] US-Canadian Tuna, *supra* note 211, ¶¶ 4.10-4.12.

[308] US-Tuna (EEC), *supra* note 12, ¶ 5.22; US-Automobiles, *supra* note 182, ¶ 5.59.

the trade measure could not be seen as having conservation of salmon and herring stocks as its primary aim and so could not be justified by Article XX(g) because Canada only enforced prohibitions on unprocessed fish from foreign producers and consumers, but not domestic ones.[309] The *US-Gasoline* Appellate Body ruled that because Gasoline Rule affected both domestic and imported gasoline, it satisfied the requirement that a restrictive measure on imports be made "in conjunction with" a similar requirement on the domestic product and therefore could be justified under Article XX(g).[310] Likewise, the *US-Shrimp* Appellate Body found that Section 609 met the requirement under Article XX(g) that measures should apply to both foreign and domestic production and consumption because Section 609 regulated the use of approved turtle excluder devices (TEDs) by U.S. shrimp trawlers and sanctioned them for violations.[311] Thus, the "in conjunction with" test requires a States to apply its environmental measures to both foreign and domestic products without discrimination.

These requirements under Article XX(g) apply to "exhaustible natural resources" and thus, it is important to determine what "exhaustible natural resources" means under Article XX(g). GATT and WTO decisions have recognized that exhaustible natural resources under Article XX(g) include not only non-living resources but also living species.[312] The Panels and involved parties in both *US-Canadian Tuna* and *Canada Herring and Salmon* recognized tuna stocks, and salmon and herring stocks, respectively, as exhaustible natural

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[309] Canada-Herring and Salmon, *supra* note 247, ¶ 4.7.

[310] US-Gasoline Appellate Body Report, *supra* note 264, at 20-21.

[311] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 144-145.

[312] *Id.* ¶ 128.

resources within the meaning of Article XX(g).[313] Similarly, the *US-Shrimp* Appellate Body concluded that the sea turtles were also "exhaustible natural resources" within the terms of Article XX(g).[314]

In sum, like Article XX(b), Article XX(g) emphasizes the importance of having a policy objective aimed at conserving the environment. When a substantial link exists between measures and a policy goal to conserve natural resources, then measures can be recognized as related to environmental conservation. These provisional requirements also provide the WTO with a device to prevent States' abuse of Article XX(g) exceptions. The WTO DSBs have expanded the scope of measures that are seen as being aimed at conservation under Article XX(g).[315] The *US-Gasoline* Panel recognized that clean air could be an exhaustible natural resource because it could be depleted by pollution and was, in fact, both natural and a resource, therefore the policy to reduce the depletion of clean air satisfied that requirement of Article XX(g).[316] Further, the WTO DBSs have recognized that the parties' inconsistent measures could be justified by Article XX(g). The *US-Gasoline* Appellate Body ruled that the U.S. Gasoline rule's violation of Article III:4 by treating foreign gasoline less favorably than domestic gasoline would be justified to implement an environmental policy objective under Article XX(g).[317] The *US-Shrimp* Appellate Body also ruled that the import ban on shrimp products by U.S. Section 609 was substantially legitimate policy to conserve an exhaustiable endangered species under Article

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[313] *See* US-Canadian Tuna, *supra* note 211, ¶ 4.9; Canada-Herring and Salmon, *supra* note 247, ¶ 4.4.

[314] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 134.

[315] Jackson et al., *supra* note 184, at 611.

[316] US-Gasoline Panel Report, *supra* note 230, ¶ 6.37.

[317] US-Gasoline Appellate Body Report, *supra* note 264, at 20-21.

XX(g).[318] The expanded application of Article XX clauses has been arguably one reason for the WTO DSBs' narrower approache to the Article XX Chapeau. The Chapeau of Article XX is discussed in next section.

4.3.4. The Chapeau of GATT Article XX

Any exceptional measure satisfying provisional requirements under Article XX should comply with requirements under the Chapeau of Article XX of the GATT 1994 (GATT Article XX Chapeau). The Article XX Chapeau provides:

> 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. (emphasis added)

The Article XX Chapeau is to "prevent abuse" of the general exceptions contained therein.[319] In examining the measures that fall under Article XX exceptions, both the legal duties of the party claiming the exception and the legal rights of the other parties concerned should be applied reasonably.[320] In order to prevent abuse of the exceptions under Article XX, a Member's rights to invoke Article XX exceptions must be balanced with the

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[318] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 134, 141-142, 144-145.

[319] US-Gasoline Appellate Body Report, *supra* note 264, at 21; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 150; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 224.

[320] US-Gasoline Appellate Body Report, *supra* note 264, at 22; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 224.

Member's obligation to respect "substantive rights" of other Members under the GATT.[321]

Inconsistent trade measures justified by provisional requirements of Article XX must meet the requirements under the Article XX Chapeau in order to be consistent with provisional obligations under Article XX. The Article XX Chapeau has two requirements:[322] first, a measure provisionally justified under Article XX clauses must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail"; second, this measure must not be applied in a way that is "a disguised restriction on international trade."

First, to meet the requirement of non-arbitrary or non-unjustifiable discrimination, the measure must be applied to countries without discrimination. Three steps can be considered to meet this requirement: whether the measure is applied in a way that results in discrimination; whether the discrimination is arbitrary or unjustifiable in character; and lastly, whether this discrimination occurs between countries in which the same conditions prevail.[323] The provision that the measure not be used as "a means of arbitrary or unjustifiable discrimination between countries" requires a non-discrimination obligation between nations, which reflects the MFN treatment under Article I.[324] However, the standards in the Article XX Chapeau are distinguished from standards in other provisions

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[321] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 156-159; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 224.

[322] US-Gasoline Appellate Body Report, *supra* note 264, at 21-22; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 150; US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶ 118; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 215.

[323] US-Shrimp Apellate Body Report, *supra* note 12, ¶150; EC-Asbestos Panel, *supra* note 258, ¶ 8.226; Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.226.

[324] Jackson 1969, *supra* note 120, at 743.

of the GATT 1994. The Panels of *EC-Asbestos* and *Brazil-Tyres* confirmed this. The *EC-Asbestos* Panel noted that the existence of discrimination violating Article III:4 does not mean the existence of discrimination violating Article XX.[325] The *Brazil-Tyres* Panel also noted that the discrimination referred to in the Article XX Chapeau is different in nature and quality from the discrimination in the treatment of products under the GATT Articles I and III.[326] While the Article XX Chapeau reflects the non-discrimination obligation of Articles I and III, it is not the same because under the Article XX Chapeau, a measure could discriminate between countries provided that the discrimination was neither arbitrary nor unjustifiable, nor done in a way that was a disguised restriction on international trade.[327]

Regarding what is "arbitrary or unjustifiable" discrimination under the Article XX Chapeau, the WTO DBSs have examined whether discriminatory treatment exists between countries with the same conditions and whether a legitimate link exists between a measure and an environmental policy objective. The Panels in *US-Canadian Tuna* and *US-Shrimp* judged whether there was arbitrary or unjustifiable discrimination on the basis of the existence of discrimination between countries. The *US-Canadian Tuna* Panel found that the U.S. import ban on Canadian tuna was not arbitrary or unjustifiable discrimination because the United States took the same action against other countries.[328] In contrast, the *US-Shrimp* Panel and Appellate Body ruled that the U.S. measure, which conditioned access to the U.S. market based on whether the exporting Member adopted certain

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[325] EC-Asbestos Panel Report, *supra* note 258, ¶ 8.227.

[326] Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.226.

[327] Schoenbaum 1997, *supra* note 200, at. 274.

[328] US-Canadian Tuna, *supra* note 211, ¶ 4.8.

conservation polices, was unjustifiable discrimination between countries because not all countries could implement the specific conservation policies.[329] Meanwhile, the *Brazil-Tyres* Appellate Body emphasized the importance of having a legitimate link between the measure and policy objective when determining the existence of non-arbitrary or justifiable discrimination.[330] The Appellate Body ruled that the Brazil's import ban on used tyres from the European Community was arbitrary or unjustifiable discrimination because the import ban "[bore] no relationship to the objective of the import ban to reduce exposure to the risks arising from the accumulation of waste tyres."[331]

Second, to comply with the Article XX Chapeau's requirement of "non-disguised restriction on international trade," the exceptions cannot be purposefully used to protect domestic industry.[332] A measure is considered a disguised restriction on international trade when the measure is designed to protect domestic industry. This reflects the national treatment obligation under Article III that prohibits discrimination between imported and domestic like products.[333] The *EC-Asbestos* Panel ruled that a measure without protectionist aims to benefit domestic industry could be consistent with the Article XX Chapeau.[334] Thus, a Member State implementing the measures must demonstrate their legitimacy as to protect the environment.[335]

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[329] US-Shrimp Panel Report, *supra* note 212, ¶¶ 7.44-7.51, 7.55; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 177.

[330] Brazil-Tyres Appellate Body Report, *supra* note 278, ¶¶ 225-227.

[331] *Id.* ¶¶ 228, 233, 246.

[332] Jackson 1969, *supra* note 120, at 743.

[333] *Id.*

[334] EC-Asbestos Panel Report, *supra* note 258, ¶¶ 8.231-8.240.

[335] Brazil-Tyre Panel Report, *supra* note 213, ¶ 7.329.

The provision of "arbitrary or unjustifiable discrimination" is related to the provision of "a disguised restriction." The *US-Gasoline* Appellate Body noted that "a disguised restriction on international trade" may in fact be "arbitrary or unjustifiable discrimination", and the determination that a measure is "arbitrary or unjustifiable discrimination" may be based on the fact that it is "a disguised restriction on international trade".[336] The Appellate Body held that the application of the U.S. regulation resulted in unjustifiable discrimination and a disguised restriction on trade inconsistent with the Article XX Chapeau because the U.S. could have avoided discrimination by imposing less discriminatory alternative measures.[337]

WTO decisions have emphasized the importance of conformity with the Article XX Chapeau more than GATT decisions in interpreting requirements to meet provisional obligations under Article XX. In contrast to GATT decisions, WTO decisions have looked more closely at the requirements of the Article XX Chapeau. For example, the *US-Gasoline* Appellate Body found that the U.S.'s Gasoline Rule was inconsistent with Article XX(g) because measures under the Gasoline Rule did not comply with the requirements under the Article XX Chapeau even though they met provisional requirements under Article XX(g).[338] The *US-Shrimp* Appellate Body also ruled that the U.S. import ban on shrimp products under Section 609 could have a provisional justification under Article XX(g), but failed to satisfy the requirements of the Article XX Chapeau.[339] Similarly, the *Brazil-*

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[336] US-Gasoline Appellate Body Report, *supra* note 264, at 24.

[337] *Id.* at 24, 28.

[338] *Id.* at 29.

[339] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 134, 136, 144-145, 160, 173-177.

Tyres Panel found that Brazil's import ban on retreaded tyres could not be justified by Article XX(b) because it constituted a breach of obligations under the Article XX Chapeau even though it met the requirements of Article XX(b).[340] These decisions suggest that, even though the WTO DSBs have referred to the principles of international law and international environmental law in interpreting each provisional requirement under Article XX, they strictly abide by the principles of the Article XX Chapeau. Since the Article XX Chapeau represents the non-discrimination and non-protectionist principles, the WTO DSBs do not seem to step back from these principles in their rulings.

4.4. Summary

In principle, a WTO Member State is not allowed to impose different custom duties, taxes, laws, or regulations for foreign products under Articles I and III nor impose trade restrictions on other Member States under Article XI. However, these fundamental principles do not deprive Members the ability to implement their legitimate governmental policy choices. In the WTO, environmental measures can be considered legitimate environmental policy objectives when those measures meet requirements under Article XX.

The GATT and WTO DSBs have acknowledged that many of the dispute parties' environmental policies fall under Article XX. This is because the DSBs do not have any capacity or right to judge the national policy objectives. Thus, if national policies are legislated to protect the environment, the DSBs should recognize them as such. This also shows the difficulty in judging whether the genuine goal of environmental policies is an

[340] Brazil-Tyres Panel Report, *supra* note 213, ¶¶ 7.99, 7.102, 7.215, 7.356-7.357.

environmental or economic purpose.

For these reasons, the DSBs have focused primarily on examining whether a WTO Member State applies its environmental policies to foreign products in compliance with WTO obligations and rules. The DSBs have used the "necessary to" and "relating to" tests under GATT Article XX to determine whether a measure is legitimate to achieve environmental policy objectives. If the measure is "necessary to" or "relating to" the achievement of an environmental policy objective, then it is considered a legitimate measure. This is because the DSBs have examined the genuine link between trade measures and environmental policy objectives, and determined that one exists.

Further, the Article XX Chapeau provides non-discrimination and non-protectionist obligations. Even though these obligations under the Article XX Chapeau are distinguished from those under Articles I and III, these provisional obligations can be a burden on Member States because discriminatory or protectionist environmental measures would violate the Article XX Chapeau. These strict requirements of each exception under Article XX and the Article XX Chapeau are important provisional devices for the WTO to prevent its Member States from abusing Article XX to justify their environmental policies. Moreover, for judicial economy, the WTO Panel can replace making traditional rulings on obligations of non-discrimination and market access under GATT Articles I, III, and XI with examining those obligations under GATT Article XX or relevant WTO covered agreements such as the SPS Agreement and the TBT Agreement.

Now with an understanding of the main principles and obligations under the WTO, the following chapters will examine protectionism, unilateralism, and the state sovereignty

principle under the State and WTO harmonization requirements as they relate to environmental protection policies.

5. A STATE'S PROTECTIONISM AND THE WTO'S NON-PROTECTIONISM TO HARMONIZE ENVIRONMENTAL POLICY

5.1. Introduction

Protectionism means that a State's trade policies or laws are designed to protect domestic industries in international trade. Countries impose higher tariffs and duties on imported products to protect their domestic industries.[341] Governments also use subsidies as protectionist devices that give domestic producers an advantage because subsidies allow them to keep costs low.[342] Non-tariff barriers such as quotas, countervailing duties and anti-dumping duties, technical or safety standards, labor standards, or environmental standards often are considered protectionist measures as well. [343]

In particular, environmental regulations can effectively be protectionist measures[344] because the regulations place a burden on foreign producers and reflect domestic producers' practices.[345] A State's environmental regulations are less transparent protectionist measures than tariffs, quotas, or subsidies because, unlike the others, they cannot be quantified

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[341] OECD 1994, *supra* note 3, at 12. As for the affect of tariff, *see* MELVYN B. KRAUSS, THE NEW PROTECTIONISM: THE WELFARE STATE AND INTERNATIONL TRADE 6-13 (1978).

[342] Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 3 (1999) [hereinafter Sykes 1999].

[343] Mitsuo Matsushita, *Harmonization of National Economic Institutions: Harmonization by Bilateral Agreements and the GATT, in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 457, 461 (Meinhard Hilf & Ernst-Ulrich Petermann eds., 1993). As for the affect of quotas, *see* Krauss, *supra* note 341, at 13-17.

[344] Lang & Hines, *supra* note 34, at 97.

[345] Sykes 1999, *supra* note 342, at 1-4, 46.

exactly.[346] Because the WTO/GATT is rooted on the free trade principle, protectionism is contrary to its basic principle.[347] When environmental policies create trade restrictions, they may cause conflict with WTO rules as obstacles to international trade.[348] In particular, a State's legislation requiring foreign producers to apply the "same" standards has a "protective effect."[349]

Accordingly, this chapter analyzes the tension between a State's tendency toward protectionism and the WTO's non-protectionism goal in the context of environmental protection. Section 5.2 discusses protectionism in international trade. Section 5.3 discusses how a State harmonization requirement creates protectionism by implementing its environmental policies. Section 5.4 reviews the fundamental principles and devices of the WTO to achieve non-protectionism. Section 5.5 examines main environmental protectionist measures such as process and production methods (PPMs), labeling, environmental taxes, and Border Tax Adjustments (BTAs). Then, section 5.6 analyzes the legitimate requirements of a State's protectionist environmental policies in the WTO.

5.2. Protectionism in International Trade

Certain domestic economic situations make a State's protectionist action inevitable.[350] For example, a State may need to protect its domestic infant industries from foreign

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[346] *Id.* 6, 30-33.

[347] Krauss, *supra* note 341, at 18.

[348] GATT Report 1971, *supra* note 20, at 13-15.

[349] Robert E. Hudec, *"Circumventing" Democracy: the Politicla Morality of Trade Negotiations* 25 N.Y.U. J.INTL. L. & POL. 311, 317-18 (1992-1993) [hereinafter Hudec 1992].

[350] Batra, *supra* note 35, at 164-83; Lang & Hines, supra note 34, at 125-40.

competition so that the State can strengthen its industries initially to ensure their ability to compete with foreign industries in the market.[351] A State also needs to restrict trade to protect its domestic industries when the import threatens to seriously injury domestic industries and economy.[352] However, these governmental protectionist measures must be adopted only temporarily and to the extent necessary because trade protectionism can distort international trade and domestic market as well.

The international trading system discourages trade protectionism because protectionist measures often lead to trade distortions, unsustainable practices in the importing countries, and an inefficient allocation of resources.[353] Protectionism distorts international trade because protectionism in one State may cause other States to be protectionist as well. A restraint on foreign imports creates "reciprocity of retaliation" by which a State reacts to another State's trade restraints by imposing an equal or higher restriction on trade.[354] An example of this is the U.S.'s retaliatory tariff against products from the E.C. due to the E.C.'s ban on importation of hormone-treated beef.[355] Similarly, if, under the Article XX exceptions to the WTO, a WTO Member is allowed to adopt measures "conditioning access to its market" in accordance with environmental policies of other Members, then "other

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[351] Irwin, *supra* note 30, at 3; Bhagwati 1994, *supra* note 118, at 568, 573; Lang & Hines, *supra* note 34, at 135.

[352] Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations* 58 U. CHI. L. REV. 255 (1991) [hereinafter Sykes 1991].

[353] OECD 1994, *supra* note 3, at 11-12: *see also* Irwin, *supra* note 30.

[354] Irwin, *supra* note 30, at 81-82; Hudec 1992, *supra* note 349, at 315.

[355] Presidential Proclamation 5759, Increasing the Rate of Duty on Certain Products of the European Community, 3 C.F.R. 1987 Comp. 189 (Dec. 24, 1987); Office of the United States Trade Representative, Modification to the Determination To Impose Increased Duties on Certain Products of the European Community, 54 Fed. Reg. 31398 (Jul. 28, 1989).

Members would also have the right to adopt similar measures on the same subject but with differing requirements."[356] This would create a world in which trade barriers in one country lead to trade barriers in another country. Accordingly, trade protectionism will not be preferred in international trade system because it distorts international trade.

Trade bans or tariffs on foreign products effectively diminish competition, which leads to mismanagement and also allows domestic producers to monopolize the home market, which enables them to charge higher prices.[357] The trade bans can distort domestic prices from being in line with the world market.[358] For example, the price of final products will be higher because the price of components or unprocessed products will be higher due to raised tariffs or monopolies by domestic producers.[359] The trade restrictions or bans deprive other domestic producers and consumers of their rights to potentially choose products that are of good quality and a lower price.[360] Thus, unilateral measures against foreign products can distort the market system in a way that forces domestic users to pay higher prices even though producers benefit from the trade restriction.[361]

Trade protectionism also hinders efficient allocation of resources by restricting exchange of different goods between different States, which results in imbalance between domestic production and consumption. Trading goods in which each State has comparative

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[356] US-Shrimp Panel Report, *supra* note 212, ¶ 7.45.

[357] Irwin, *supra* note 30, at 76-77; Krauss, *supra* note 341, at 9-11.

[358] GATT Report 1971, *supra* note 20, at 8; Irwin, *supra* note 30, at 5; Krauss, *supra* note 341, at 9-11, 14-15.

[359] GATT Report 1971, *supra* note 20, at 8.

[360] Sykes 1999, *supra* note 342, at 5.

[361] Irwin, *supra* note 30, at 5; Sykes 1999, *supra* note 342, at 7-12. In this context, it is quite persuasive to say "free traders aruge from the standpoint of the overall economy; protectionists argue from the standpoint of particular interest groups." Krauss, *supra* note 341, at 6.

advantage contributes to the efficient allocation of global resources and economic prosperity of States as well.[362] Distorted domestic market prices caused by trade restrictions lead to an imbalance between production and consumption because domestic production is increased due to the import ban and consumption is decreased due to the higher price.[363] Thus, trade protectionism can distorts international trade by protecting domestic industries in a way that undermines the goal of efficiently allocating resources globally.[364] Accordingly, these factors of protectionism (trade distortion, unsustainable market practices, and inefficient resource-allocation) make trade protectionism contrary to a free trade system.

Nevertheless, a State inevitably prefers protectionism in its economic policies because its main function is to protect domestic industries from foreign competition. In a free trade system, domestic industries are exposed to excessive competition with foreign companies that may threaten the domestic market, which could lead to job loss.[365] One important role of government is to protect its domestic industries from excessive competition with foreign producers so as to ensure its economic prosperity.[366] However, a WTO Member cannot avoid complaints from other Member States when its protectionist measures to restrict or prohibit trade are explicitly inconsistent with WTO rules. From the international trading system perspective, prohibiting international trade to promote domestic economic activities

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[362] *See supra* 3.2.1 of this dissertation. As for the absolute advantage principle, *see* A. Smith, *supra* note 132. For the comparative advantage principle, *see* J. Mill, *supra* note 133.

[363] Krauss, *supra* note 341, at 7-8.

[364] OECD 1994, *supra* note 3, at 11.

[365] *See* Batra, *supra* note 35, at 164-83; Lang & Hines, *supra* note 34, at 3, 125-40.

[366] *See* Batra, *supra* note 35, at 164-83; Lang & Hines, *supra* note 35 , at 125-40 (suggesting that government encourages domestic, or local competition, but discourages foreign competition in order to allow its domestic economy to prosper).

are not appropriate resolutions to compensate for the negative impacts of trade liberalization on domestic industries or the environment. The next sections discuss the different perspective that a State and the WTO have on trade protectionism.

5.3. Protectionism as a Goal of a State's Environmental Policy

A State's trade measures to enforce its environmental policies can be protectionist when its environmental purposes are combined with its economic ones. Environmental policies and regulations are effective protectionist tools for a State to justify its trade measures. Prioritizing environmental protection provides a State with the moral justification to take trade measures that can disguise its protectionist intention. Further, the argument of unfair competition due to different environmental policies provides a State the economic justification to counteract such unfair competition through economic sanctions. This section discusses a State's protectionism, as demonstrated by how it implements environmental policies.

5.3.1. Hidden Protectionism of a State's Environmental Policy

It is often difficult to determine whether a country's environmental protection measures are for genuine environmental purposes rather than primarily motivated by protectionism.[367] A State regulates environmental policies due to concern over local or transboundary pollution or concern over competitive disadvantages from low-standard

[367] Weisee & Jackson, *supra* note 4, at 27.

products.[368] When a State's environmental policies entail trade measures to countervail competitive disadvantages from foreign products, those measures are protectionist.[369] The moral priority that society places on environmental conservation helps governments defend against political or economic criticism of unilateral measures and justify their protectionist intent behind building trade barriers.[370] A State may use unilateral environmental measures to achieve its economic purpose.[371]

GATT and WTO decisions have rejected State's environmental measures when they are taken to disguise State's economic purpose.[372] The *US-Canadian Tuna* Panel ruled that the US import ban on tuna from Canada was enacted for trade reasons rather than environmental reasons, namely the conservation of tuna.[373] In *Canada-Herring and Salmon*, Canada's export ban on salmon and herring stocks was not accepted by the GATT Panel who determined that its aim was not conservation.[374] In contrast, GATT and WTO decisions have upheld dispute parties' measures when they do not have protectionist intention. For example, the *US-Automobiles* Panel emphasized the protectionist intention of an environmental policy objective in its ruling. It ruled against the EC's argument that the US imposition of higher taxes on foreign automobiles was based on economic goals rather than environmental policy objectives because the Panel recognized that the US tax

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[368] Birnie et al, *supra* note 23, at 788; Bhagwati 1994, *supra* note 118, at 587-88.

[369] Bhagwati 1994, *supra* note 118, at 588.

[370] Esty, *supra* note 5, at 45.

[371] Hudec 1996b, *supra* note 64, at 149; Esty, *supra* note 5, at 31.

[372] Leebron, *supra* note 8, at 80.

[373] US-Canadian Tuna, *supra* note 211, ¶ 4.13 (noting that the US ban on tuna products from Canada responded to a Canadian arrest of US vessels fishing tuna).

[374] *Id.* ¶¶ 4.4-4.7.

policy did not have a protectionist intention.[375] Further, the *EC-Asbestos* Panel ruled that the import ban on asbestos fibers and products was consistent with GATT Article XX(g) and the the Article XX Chapeau because the measure "[had no] protectionist aims to benefit the French substitute fibers industry."[376]

These GATT and WTO decisions suggest that if an environmental policy does not have legitimate enough environmental objectives to overwhelm the policy's economic purpose, then it is regarded as protectionist. However, distinguishing real environmental concerns from economic goals is difficult even when the government applies legal constraints to both domestic and foreign products.[377] In other words, even if environmental policies do not discriminate between domestic and foreign products, they can be protectionist if they have protectionist intentions.[378] In such an instance, the WTO will review whether the trade measures must be necessarily taken to achieve environmental policy objectives.[379] Further, substantial trade restrictions with costs that outweigh the environmental regulatory benefits cannot be justified as having an environmental purpose, but rather will be seen as a restriction with a protectionist purpose.[380] However, it is not easy to demonstrate whether governmental policy is generated from a genuine environmental objective because environmental measures are a more implicit violation than an explicit

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[375] US-Automobiles Panel Report, *supra* note 182, ¶¶ 3.3-3.6, 3.106, 5.12-5.15, 5.25-5.27, 5.31-5.32, 5.35-5.36.

[376] EC-Asbestos Panel Report, supra note 258, ¶¶ 8.238-8.240.

[377] Hudec 1996b, *supra* note 64, at 149.

[378] Sykes 1999, *supra* note 342, at 17.

[379] Canada-Herring and Salmon, *supra* note 247, ¶¶ 3.9, 3.33.

[380] Farber & Hudec, *supra* note 1, at 71.

violation of WTO rules.[381] Thus, it is easier for a State to use its environmental regulations and policies for its economic goals in international trade. The next section examines how a State implements its protectionist policy through the harmonization requirment.

5.3.2. A State's Protectionism Implemented through the Harmonization Requirement

The State's argument of harmonization to counteract unfair competition due to differences in environmental policies provides an effective justification of protectionist measures. A State can implement trade restrictions on low-standard products because those products have a competitive advantage that leads to unfair competition in international trade.[382] Fairness of trade or competition effectively justifies a State's environmental measures.[383] Trade restrictions based on fair trade or fair competition have the potential to be protectionist.[384] This protectionist intention can be infused with national environmental objectives in the domestic policy-making process. For example, when a country issues regulations to impose higher environmental standards to meet national need or international obligation, relevant domestic industries will lobby to restrict foreign products from countries with low environmental standards on the basis that these cheap foreign products are more competitive than domestic ones.[385] Therefore, this process may

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[381] Sykes 1999, *supra* note 342, at 30-33.

[382] *See Infra.* Chapter 3.2.2 of this dissertation.

[383] Bhawati 1994, *supra* note 118, at 582.

[384] Krauss, *supra* note 341, at 9; JAGDISH BHAGWATI, PROTECTIONISM 48-53 (1988) [hereinafter Bhagwati 1988].

[385] Bhagwati 1994, *supra* note 118, at 587-88. In this context, domestic industries and environmental

lead to protectionist intent being reflected in national environmental policy. If this happens, then what started as a purely environmental regulation becomes, instead, a protectionist device.[386] The notion that products made in countries with low environmental standards are "unfair" and should be reduced or removed by countervailing trade measures is arguably protectionist.[387]

Further, when a State restricts trade if other countries do not agree to harmonize their standards to meet the initial State's preferred standard level, its forcing the application of uniform standards for fair trade is potentially protectionist.[388] This protectionism is warranted, proponents would say, because diversity in environmental regulations causes "unfair competition" and creates a "race to the bottom."[389] Competitive advantage resulting from regulatory differences can thus result in demands from countries for harmonized environmental standards to be implemented through trade restriction.[390] Because each country has different environmental policies that generate different pollution costs, a State can argue that these costs should be countervailed for like foreign products with competitive advantage.[391] A State potentially can misuse the need for uniform standards as protectionist measures by arguing that harmonization is a remedy to address

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groups can work together to achieve the same goal, restricting trade, even though it's done so with different underlying purposes. While environmental groups pressure their governments to restrict trade with countries with lower-standards for environmental protection, domestic industries do the same for their economic benefits.

[386] Lang & Hines, *supra* note 34, at 97.

[387] Bhagwati & Srinivasan, *supra* note 8, at 175; Bhagwati 1988, *supra* note 384, at 48-53; Krauss, *supra* note 341, at 9.

[388] Bhagwati 1994, *supra* note 118, at 588, 592; Leebron, *supra* note 8, at 80.

[389] Bhagwati 1996b, *supra* note 18, at 31; Bhagwati & Srinivasan, *supra* note 8, at 161, 171.

[390] Bhagwati 1994, *supra* note 118, at 581.

[391] *Id.* at 582.

unfair competition.[392] The following section examines the WTO's non-protectionist nature in contrast to a State's protectionism.

5.4. The Non-Protectionist Orientation of the WTO

One of the WTO's most important functions is to prevent Member States from abusing protectionist measures and unilaterally imposing trade restriction on other countries.[393] The WTO/GATT is promotes trade liberalization in order to prevent protectionism in international trade. The trade protectionism prevalent in the early 20th century led to World War II. In 1947, the GATT, which is the WTO's predecessor, was established under the auspice of the Bretton Woods System as an instrumental tool to promote free trade and avoid protectionist trade practices to help keep peace between nations.[394] Trade protectionism, thus, is contrary to the goals of the GATT/WTO.

The GATT/WTO achieves its goal of non-protectionism through tariff reduction and the principles of non-discrimination and market access. The GATT/WTO tariff negotiations have been designed to reduce protections for domestic products.[395] The principles of non-

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[392] *Id.* at 547.

[393] GATT Report 1992, *supra* note 2, at 13.

[394] In the 17th and 18th centuries, mercantilism was the prevalent theory about how a nation must expand export, but restrict import. Then in the 18th and 19th centuries, the free trade theory dominated and supported the principles of absolute advantage and comparative advantage in international trade. In the early 20th century, protectionism appeared again. *See* Iriwin, *supra* note 30, at Chapter 2.

[395] GATT Report 1971, *supra* note 20, at 14. The GATT/WTO reduced tariff rates significantly during tariff negotiations so called GATT Rounds that are Geneva Round in 1947, Annecy Round in 1949, Torquay Round in 1951, Geneva Round in 1956, Dillon Round in 1960-61, Kennedy Round in 1964-67, Tokyo Round in 1973-79, and Urugay Round in 1986-94. WTO, UNDERSTANDING THE WTO: BASICS: The GATT years: from Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Aug. 8, 2012). *See also* Jackson et al., *supra* note 184, at 234-39.

discrimination and market access are fundamental tools to achieve the GATT/WTO's goal of non-protectionism.[396] This section analyzes the GATT/WTO's institutional devices to prevent protectionism: the non-discrimination principle, market access (the non-quantitative restriction), and further the transparency requirement.

5.4.1. The Non-Discrimination Principle to Prevent Protectionism

Discriminatory measures inconsistent with the GATT Articles I or III can pose potential risks of protectionism.[397] Governmental policies discriminate against imported goods so as to shelter the domestic producers from foreign competition by imposing tariffs, quantitative restrictions, or other import barriers.[398]

Environmental policy objectives are legitimate measures under GATT Article I provided that they apply to like products from one country no less favorably than to like products from any other country. When different imposing customs duties, charges, taxes and regulations on products from a specific country or a group of countries can afford protection to domestic producers, a State is willing to choose discriminatory measures. Thus, this discriminatory treatment against a specific country or countries can protect domestic producers from competition from foreign producers, and would constitute a violation of the MFN obligation under GATT Article I.

National taxes and regulations imposed in a way that is more favorable to domestic

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[396] GATT Report 1971, *supra* note 20, at 12.

[397] GATT Report 1971, *supra* note 20, at 13-15; Farber & Hudec, *supra* note 1, at 69-70; Sykes 1999, *supra* note 342, at 17.

[398] Irwin, *supra* note 30, at 5.

products than foreign products can be seen as protectionist measures under the GATT Article III.[399] The *US-Tuna* and *US-Automobiles* Panels stated that domestic taxes and laws should not be applied to protect domestic industry within the meaning of Article III:1.[400] The *US-Automobiles* Panel introduced the "aim and effect" test to determine whether a policy that differentiates internal taxes or regulations against foreign products is protectionist under Article III.[401] The Appellate Body in both *Japan-Alcoholic Beverages II* and *EU-Asbestos* also reaffirmed these decisions by noting that Article III's fundamental purpose is to avoid protectionism created by national taxes or regulations.[402]

Accordingly, discriminatory treatment of foreign products designed to provide protection for domestic products is contrary to the non-protectionist principle of the GATT/WTO.

5.4.2. Non-Quantitative Restriction to Prevent Protectionism

Quantitative restrictions are controversial non-tariff barriers to international trade and are not allowed under the WTO because of their protective effect.[403] Internal quantitative restrictions or mixing requirements generally are seen as substantially protectionist.[404] Exceptions for trade restrictions under GATT Article XI:2 can be only applied when there are

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[399] Jackson 1969, *supra* note 120, at 273.

[400] US-Tuan (Mexico), *supra* note 12, ¶¶ 5.9, 5.11-5.13; US-Automobiles, *supra* note 182, ¶ 5.10.

[401] US-Automobiles, *supra* note 182, ¶¶ 5.9-5.10.

[402] Japan-Alcoholic Beverages II Appellate Body Report, *supra* note 215, at 109 Footnote 58, 110; EC-Asbestos Appellate Body Report, *supra* note 234, ¶¶ 97-98; *see also* Italy-Agricultral Machinery, *supra* note 216, ¶ 11; US-Section 337, *supra* note 201, ¶ 5.10.

[403] Jackson 1969, *supra* note 120, at 305-307.

[404] *Id.* at 315; GATT 1994, *supra* note 169, art. XI:1.

food shortages, when it involves application of standards, and when it involves any agricultural or fisheries product.

The GATT and the WTO have typically ruled against protectionist restrictions on international trade. The *Canada-Herring and Salmon* Panel held that the export restrictions were to protect a domestic industry and could not be justified under Article XI:2(b) because they were "not 'regulations for the marketing' of processed salmon and herring in international trade" within that Article's meaning.[405] The *Thailand-Cigarette* Panel interpreted the term of agricultural products of Article XI:2(c) as fresh product to limit national protectionist intention for domestic agricultural or fisheries industry in accordance to the Note Ad Article XI:2(c).[406] The Panel found that Article XI:2(c) purpose is to allow governments to protect their farmers and fishermen from excess supplies of fresh product and must not permit the use of quantitative restriction to protect domestic agricultural or fisheries products.[407]

Accordingly, a quantitative restriction for the purpose of affording protection to domestic products constitutes a violation of Article XI and exceptions to quantitative restriction cannot be misused for protectionist intentions.

5.4.3. The Transparency Requirement as Non-Protectionist Devise

The transparency requirement is another non-protectionist device in the

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[405] Canada-Herring and Salmon, *supra* note 247, ¶ 4.3.

[406] Thailand-Cigarettes, *supra* note 248, ¶¶ 68-70.

[407] *Id.* ¶ 69.

GATT/WTO system.[408] Domestic producers tend to be better informed about and are often more involved in their own legal and political systems than foreign producers are, therefore, unexpected or untimed notice of laws or regulations can afford them protection.[409] The GATT/WTO prevents this protectionist measure by requiring, under GATT Article X, its Member States to publish, administer, and review their trade policies. WTO Members should publish promptly "laws, regulations, judicial decisions and administrative rulings" and "agreements affecting international trade policy," administer them "in a uniform, impartial and reasonable manner," and maintain "[the] review . . . of administrative action relating to customs matters."[410]

Publication obligations under the GATT/WTO promote international trade, enhance compliance with WTO obligations, and prevent non-tariff barriers by providing traders with information on laws, regulations, and policies.[411] For these reasons, all WTO covered agreements contain a transparency provision requiring the notification and publication of regulations.[412] Governments must provide notice of all measures that agreements regulate

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[408] Transparency means "sharing information or acting in an open manner," or "a measure of the degree of which information about official activity is made available to an interested party." *See* Ala'i, *supra* note 241, at 780 Footnote 5.

[409] Sykes 1999, *supra* note 342, at 19-20.

[410] GATT 1994, *supra* note 169, art. X:1.

[411] Jackson et al., *supra* note 184, at 456-57.

[412] GATT 1994, *supra* note 169, art. XIII; GATS, *supra* note 176, art. III; Agreement of Trade Related Aspects of Intellectual Property Rights arts. 15.5, 63, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]; SPS Agreement, *supra* note 172, art. 7, Annex B, paragraph 5(d), 6; TBT Agreement, *supra* note 178, arts. 2.9-2.12, 10; Agreement on Trade-Related Investment Measures art. 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186; Agreement on Customs Valuation art. 12, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 279; Agreement on Preshipment Inspection arts. 2.5-2.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 368; Agreement on Import Licensing Agreement arts. 1.4, 3.3, Apr. 15, 1994, Marrakesh Agreement

so the measures can be distributed to other WTO Member States.[413] This notification requirement promotes transparency and allows countries and trading partners to understand the practical applications of certain measures, including how they comply with the WTO.[414] Knowing and understanding applicable regulations and policies in other countries allow traders to know the tariffs and internal taxes to expect, as well as any quota restrictions, technical or safety standards and environmental regulations their product will be subject to.[415] The publication requirement also efficiently prevents not only non-tariff barriers, but also prevents foreign producers from incurring unnecessary costs that may result from having to search for laws or from uncertainty.[416]

Several GATT/WTO decisions noted the transparency requirement regarding environmental measures. In its discussion of what "arbitrary discrimination" in the Article XX Chapeau means, the *US-Shrimp* Appellate Body noted that "Article X:3 . . . establishes . . . minimum standards for transparency and procedural fairness in the administration of trade regulations."[417] Accordingly, the Appellate Body found that the U.S. certification process under Section 609 was applied in a manner that was "contrary to

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Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 436; Agreement on Subsidies and Countervailing Measures art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14; Agreement on Safeguard Agreement art. 3.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154; Agreement on Antidumping art. 12, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

[413] Jackson et al., *supra* note 184, at 457.

[414] *Id.* at 457-58.

[415] *Id.* at 456; Ala'i, *supra* note 241, at 794-95. *See* also Panel Report, *Argentina-Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, ¶ 11.77, WT/DS155/R (Dec. 19, 2000).

[416] Sykes 1999, *supra* note 342, at 19-20; Jackson et al., *supra* note 184, at 457.

[417] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 183.

the spirit . . . of Article X:3" and constituted "arbitrary discrimination" because governmental procedures did not meet notification and publication requirements of other Member States.[418] Regarding "a disgugised restriction" under the Article XX Chapeau, the *US-Canadian Tuna* and *EC-Asbestos* decisions noted that making a public announcement is one way a country can show that it is not taking a measure that is a disguised restriction on international trade.[419] Thus, WTO Member States are required to publish and notify their environmental policies and regulations to avoid "arbitrary discrimination" or "a disguised restriction" under the Article XX.

The WTO's transparency requirement can be criticized as overwhelming a State's sovereign right to implement and enforce its own legal and administrative system because it leads to the WTO involving itself in domestic legal or administrative system.[420] Uniform application of domestic laws and regulations are required to promote transparency and expectation in international trade. However, the transparency and uniformity requirements under Article X are interpreted as being the uniform application of internal or border measures and not the application of the same measures by each government.[421] Further, uniform application implies that a State applies its domestic laws and regulations to domestic and foreign products uniformly rather than discriminately. The Panel, in *European Economic Community-Restricting on Imports of Dessert Apples*, ruled that because uniformity in administration of a policy under Article X:3(a) does not require EC

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[418] *Id.* ¶¶ 182-184.

[419] US-Canadian Tuna, *supra* note 211, ¶ 4.8; EC-Asbestos Panel Report, *supra* note 258, ¶ 8.233.

[420] Ala'i, *supra* note 241, at 801.

[421] *Id.* at 795.

Members to have identical procedures, the EC's administration of its quota system does not violate Article X:3(a).[422] The Panel in *US-Stainless Steel from Korea* also stressed that the uniformity requirement in Article X:3(a) "cannot be understood to require identical results where relevant facts differ."[423] Further, the WTO does not interfere with a State's right to administer its legal instruments. The Appellate Body in *European Communities-Selected Customs Matters* noted that administration requirement under Article X:3(a) requires Members to demonstrate not how the legal instrument is administered, but how it is applied and implemented by a government.[424] Thus, publication and notification requirements provide transparency in the WTO system, but do not allow the WTO to overwhelm a State's rights of implementing its national legal or administrative system.

In sum, the transparency requirement is an effective device of the WTO to prevent protectionist measures. This requirement would make environmental regulations and standards more transparent to foreign producers.

5.5. A State's Environmental Protectionist Measures in International Trade

Tariffs, taxes, subsidies, quotas, or regulations are the main protectionist measures that States can use. Environmental taxes including border tax adjustments (BTAs) are often controversial protectionist measures. Environmental regulations such as PPMs or labeling

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[422] Report of the Panel, *European Economic Community – Restrictions on Imports of Dessert Apples-Complaint by Chile*, ¶¶ 12.29, 12.30 L/6491 (Jun. 22, 1989), GATT B.I.S.D. (36th Supp.) at 93. *See also* Ala'i, *supra* note 241, at 786.

[423] Panel Report, *United States-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, ¶¶ 6.50-6.54, WT/DS179/R (Dec. 22, 2000).

[424] Appellate Body Report, *European Communities-Selected Customs Matters*, ¶ 199, WT/DS315/AB/R (Nov. 13, 2006).

also represent environmental protectionist measures. This section examines these environmental taxes and regulations as protectionist measures.

5.5.1. Environmental Taxes and Border Tax Ajustment as Protectionist Measures

Environmental taxes can be a useful tool to achieve environmental protection without compromising economic efficiency.[425] They can be used both to encourage producers to use environmentally sound methods, and therefore to create environmentally sound products, and to discourage consumers from buying goods that are more detrimental to the environment.[426] Under Articles III and II:2 of the GATT 1994, WTO Member State can charge environmental taxes on imported products at the same level of internal taxes on domestic products.[427] Further, a State may impose different environmental taxes against imports when the tax that does so has a legitimate environmental purpose.[428] The *US-Automobiles* Panel confirmed it by upholding the U.S.'s higher taxes on imported automobiles because they were designed for environmental conservation and were not based on protectionist intentions.[429] Nevertheless, such environmental taxes pose negative impacts on competitiveness in the

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[425] Matsushita et al., *supra* note 3, at 823.

[426] *Id.*

[427] Jackson 1969, *surpa* note 120, at 295-96; Jackson 1997, *surpa* note 198, at 218. GATT Article II:2(a) provides exception for schedules of concessions. Article II:2(a) stipulates:

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.

[428] Birnie et al., *supra* note 23, at 799.

[429] US-Automobiles, *supra* note 182, ¶¶ 5.12-5.15, 5.25-5.26.

global market as a non-tariff barrier and as hidden protectionist measures.[430]

Further, a State can impose an environmental tax, charge, law or regulation when foreign products are imported. Note Ad Article III of the GATT 1994 permits a State to implement border measures involving environmental taxes or regulations for imported products.[431] These border taxes or regulations are recognized as domestic taxes or regulations under Article III. However, importing countries can potentially misuse such border measures as non-tariff barriers because they allow the importing country to prevent a like product from entering the country rather than just waiting to regulate it once its placed in the market.[432]

In particular, the WTO permits BTAs of environmental taxes on products when implementing BTAs is consistent with Article III's national treatment obligation.[433] BTAs mean that a State can charge taxes on imported products and then give a rebate equivalent to the amount of internal taxes that were imposed at the point the products are exported. The remission of such taxes would not be considered a subsidy under Article VI:4[434] and Ad

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[430] Matsushita et al, *surpa* note 3, at 823.

[431] GATT 1994, *supra* note 169, art. III, Note Ad art. III. Note Ad Article III states:

> *Any internal tax or other internal charge, or any law, regulation or requirement* of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is *collected or enforced* in the case of the imported product *at the time or point of importation*, is nevertheless to be *regarded as an internal tax or other internal charge, or a law, regulation or requirement* of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III. (emphasis added)

[432] EC-Asbestos Panel Report, *supra* note 258, ¶ 8.96.

[433] Matsushita et al, *surpa* note 3, at 826-27.

[434] GATT 1994, *supra* note 169, art. VI:4. Article VI:4 of the GATT 1994 provides exceptions for subsidies related to anti-dumping and countervailing duties with regard to border tax adjustment. The GATT Article VI:4 states:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the

Article XVI.[435] The Panel in *US-Tuna (Mexico)* recognized that "[member states] may apply a border tax adjustment with regard to those taxes that are borne by products."[436]

Internal taxes relating to BTAs still can have protectionist effects even though they are not inconsistent with the GATT and are not discriminatory measures because different countries have different taxation systems.[437] For example, country A imposes product taxes, but country B generally does not.[438] From country B's perspective, BTAs are meaningless in its domestic tax system because it does not impose internal taxes on either the domestic or import products so it is not necessary to provide a rebate for the exported products. Thus, Country B would argue that a border taxe on import products in country A is a protectionist measure and the rebate for export products is an export subsidy.[439]

5.5.2. PPMs as Protectionist Environmental Measures

Many environmental and public health based trade restriction regulations focus on a

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exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

[435] Jackson 1969, *surpa* note 120, at 295; Jackson 1997, *surpa* note 198, at 218. The GATT Note Ad Article XVI permits internal taxes and the remission. It states that "[t]he exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy."

[436] US-Tuna (Mexico), *surpa* note 12, ¶ 5.13.

[437] Jackson 1969, *surpa* note 120, at 294-303; Jackson 1997, *surpa* note 198, at 218-20.

[438] BTA under the GATT is subject to indirect taxes imposed on products not direct taxes imposed on income. US-Tuna (Mexico), *surpa* note 12, ¶ 5.13. The GATT Working Party on Border Tax Adjustments 1970 provides that "taxes directly levied on products were eligible for tax adjustment and that certain taxes that were not directly levied on products were not eligible for adjustment." GATT BTA Report, *surpa* note 251, ¶ 14.

[439] Jackson 1969, *surpa* note 120, at 297-301.

product's manufacturing methods or the "process and production methods (PPMs)" used.[440] Regulations on PPMs stem from concern about whether the products are manufactured in a way that is dangerous to human health and safety or hazardous to the environment.[441] Different production processes result in different costs, and products that have to meet lower standards tend to benefit from having a competitive advantage due to their low costs.[442] Because every State does not regulate the same PPMs, conflicts will arise when a State restricts trade due to differing PPMs regulations.

The importance of PPMs in the WTO relates to whether PPMs should be considered as a way to distinguish between like products and unlike products, and whether different treatment based on PPMs can be justified under the WTO. The WTO addresses "the product as such," which does not consider the production processes and methods.[443] Treating imported products "with the same physical characteristics" differently based on different production processes could undermine the principles of non-discrimination of the WTO.[444] General exceptions of Article XX are applied only to a like product that is not distinguished by its manufacturing process and methods.[445] Accordingly, different treatment for like products due to "unlike production processes" is not covered by Articles I and III nor

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[440] Matsushita et al., *supra* note 3, at 461.

[441] Jackson 1997, *supra* note 198, at 235.

[442] *Id.* at 235-36.

[443] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.13, 5.14; US-Tuna (EEC), *supra* note 12, ¶ 5.8; US-Automobiles, *supra* note 182, ¶¶ 5.45, 5.52, 5.54; US-Malt Beverages, *supra* note 181, ¶ 5.19; US-Gasoline Panel Report, *supra* note 230, ¶ 6.11.

[444] Weiss & Jackson, *supra* note 4, at 33; Matsushita et al., *supra* note 3, at 809.

[445] Jackson 1997, *supra* note 198, at 236.

is it justified by an Article XX exception.[446] However, when a State demonstrates that the different treatment of like products based on PPMs is "necessary to" or "relating to" environmental protection, the different treatment will be justified under Article XX.

Differential treatment on the basis of PPMs, ones that do not affect the characteristics of "the products as such," is not permitted in the WTO. PPMs involving how goods are produced, constructed, gathered, grown, or caught do not always affect the characteristics of the product.[447] For example, the *US-Tuna* Panel found that the United States import ban on Mexican tuna was inconsistent with Article III of the GATT 1994 because tuna harvesting methods could not affect tuna's characteristics.[448] The same principle was applied to decisions in *US-Shrimp* and *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter US-Tuna Labeling). The *US-Shrimp* Panel and Appellate Body found that the US import ban on shrimp harvested in a way that adversely affects sea turtles violated Article XI:1 and was not justified by Article XX of the GATT 1994.[449] Similarly, the *US-Tuna Labeling* Panel ruled that Mexican tuna products caught by using purse seine nets, thus "setting on dolphins," in the Eastern Tropical Pacific Ocean (ETP) are like tuna products caught by using other methods outside the ETP.[450] Thus, neither of the Panels distinguished products based on harvesting methods. Thus, in the

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[446] *Id.*

[447] Birnie et al., *supra* note 23, at 788; Esty, *supra* note 5, at 51; Shinya Murase, *Unilateral Measures and the Concept of Opposability in International Law*, *in* MIGHT AND RIGHT IN INTERNATIONAL RELATIONS 397, 418 (Kalliopi Koufa ed., 1999) [hereinafter Murase 1999].

[448] US-Tuna (EEC), *supra* note 12, ¶ 5.9.

[449] US-Shrimp Panel Report, *supra* note 212, ¶¶ 7.16-7.17; US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 164, 172-177.

[450] Panel Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuan Products*, ¶ 7.251, WT/DS381/R (Sep. 15, 2011) [hereinafter US-Tuna Labeling Panel Report].

absence of an established international agreement, the "permissibility" of PPMs lies in whether PPMs affect the characteristics of the products.[451]

The WTO may permit PPMs when the PPMs affect the characteristics of the product. When the scientific evidence proves that PPMs affect the characteristics of the products, these PPMs are permissible in the WTO because the physical characteristics of products will be changed by PPMs. For example, PPMs affect the characteristics of the products in case of hormone-treated cattle, pesticide-used agricultural crops and genetically modified products.[452] To be allowed, these types of PPMs will require WTO Member States to demonstrate scientific evidence. The Appellate Body in *EC-Asbestos* upheld the European Community's import ban on asbestos products from Canada by ruling that products containing asbestos posed heath risks.[453] For these types of PPMs, WTO Member States can invoke the SPS Agreement and the TBT Agreement. In the SPS Agreement, PPMs are one of the factors used to assess risk and one of the factors that constitute SPS measures.[454] In the TBT Agreement, PPMs are one of the subjects for technical regulation, standards, and conformity assessment procedures.[455]

Forcing nations to adopt uniform PPMs can be inconsistent with the principles of the WTO and international law. When countries are allowed to impose trade restrictions on the basis of PPMs, they can abuse their environmental regulations that are actually disguised

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[451] Murase 1999, *supra* note 447, at 418; Birnie et al., *supra* note 23, at 788.

[452] Murase 1999, *supra* note 447, at 418; Birnie et al., *supra* note 23, at 788;

[453] EC-Asbestos Appellate Body Report, *supra* note 234, ¶¶ 113-116, 126, 134-141, 147, 162-163.

[454] SPS Agreement, *supra* note 172, art. 5.2, Annex A, ¶ 1.

[455] TBT Agreement, *supra* note 178, Annex 1, ¶¶ 1-2. Product and process and production method are all subjects of technical regulation, standard, and conformity assessment procedures.

protectionist measures.[456] It is important to allow a diversity of PPMs in the international trade regime because "objections to PPMs" could lead to trade distortion by removing any difference in PPMs.[457] Further, forcing a State to accept uniform PPMs can restrict its exercise of jurisdiction by depriving its rights to produce with its own PPMs, which undermines a fundamental principle of international law.[458] Thus, diversity of PPMs is consistent with the principles of the WTO and international law in that allowing diverse PPMs supports States to choose their own policies that balance trade and environmental protection.

5.5.3. Labeling as Protectionist Environmental Measures

Eco-labeling[459] is another environmental policy approach that relies on differentiating products by labeling how they are produced and what ingredients are used.[460] Eco-labeling gives consumers and users exact information about products so that they can choose environmentally friendly products.[461] Eco-labeling is effective because it allows products to differentiate themselves from others because they are environmentally sound, and it also creates an incentive for producers to consider their own environmental

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[456] Weiss & Jackson, *supra* note 4, at 34; Matsushita et al., *supra* note 3, at 809.

[457] Bhagwati 1996b, *supra* note 18, at 19.

[458] Matsushita et al, *supra* note 3, at 810; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306-308 (2003).

[459] Eco-label means "to label products according to environmental criteria." *See* WTO, Enviroment: Issues: Labelling, http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm (last visited May 7, 2011).

[460] Matsushita et al., *supra* note 3, at 818.

[461] *Id.*; Esty, *supra* note 5, at 171.

practices.[462] Eco-labeling can be permissible in the WTO provided that it is applied in a non-discriminatory way and in accordance with WTO principles and the requirements of relevant WTO covered agreements.[463] The *US-Tuna (Mexico)* Panel has accepted the United States' voluntary "dolphin safe" labeling scheme for tuna products.[464] As for the requirement of the "Dolphin Safe" label, the Panel stated that the labeling provisions do not restrict the sale of tuna products and give consumers the free choice according to preference.[465] The Panel also noted that, the labeling regulation was consistent with the requirements of GATT Article I:1 because it did not discriminate between countries, and therefore was permitted.[466]

The TBT Agreement also looks at how to manage mandatory and voluntary labeling programs. Annex I stipulates that a labeling requirement is either a technical regulation or standard, where labeling as a technical regulation is mandatory while labeling as a standard is voluntary.[467] Annex 3 of the TBT Agreement contains a "Code of Good Practice for the Preparation, Adoption and Application of Standards" (Standards Code), and when the standardizing body develops labeling requirements, they are encouraged to use this Standards Code.[468] Labeling under the Standards Code will be voluntary because this Code stipulates "standards" not "regulations," which means it is voluntary labeling that can

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[462] Esty, *supra* note 5, at 171.

[463] Matsushita et al., *supra* note 3, at 818-19.

[464] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.42-5.44.

[465] *Id.* ¶ 5.42.

[466] *Id.* ¶ 5.43.

[467] TBT Agreement , *supra* note 178, Annex 1, ¶¶ 1.1, 1.2.

[468] *Id.* Annex 3.

be freely adopted and applied by a State, regional body, or international body. Meanwhile, developing mandatory labeling can be limited under the TBT Agreement. Mandatory labeling can comply with the TBT Agreement's requirements provided that the eco-labeling scheme fulfills a legitimate objective, is not more-trade restrictive than necessary, and complies with notice and transparency requirements.[469] Thus, a controversial issue is whether a labeling requirement is voluntary or mandatory. The answer to this question will be determined by whether the labeling requirement falls within "technical regulation" or "standard" under the TBT Agreement.

Recently, this issue was addressed in *US-Tuna Labeling*, in which Mexico complained that the US "dolphin-safe" labeling requirements violated the TBT Agreement by prohibiting access to "dolphin-safe" labeling for Mexican tuna products consisting of tuna caught by "setting on dolphins" in the ETP.[470] Contrary to the United States' argument, the Panel and the Appellate Body recognized that the US dolphin-safe labeling provisions were mandatory by ruling that they were technical regulations within the meaning of Annex 1.1 of the TBT Agreement.[471] The US dolphin-safe labeling requirements were found not to be justified by the TBT Agreement because they "modified the condition of competition" in the U.S. market to the detriment of Mexican tuna.[472] This case suggests that environmental labeling regulations may not be allowed when they have adverse effects on

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[469] Matsushita et al., *supra* note 3, at 819.

[470] US-Tuna Labeling Panel Report, *supra* note 450; Appellate Body Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuan Products*, WT/DS381/AB/R (May 16, 2012) [hereinafter US-Tuna Labeling Appellate Body Report].

[471] US-Tuna Labeling Panel Report, *supra* note 450, ¶¶ 7.142-7.145; US-Tuna Labeling Appellate Body Report, *supra* note 470, ¶¶ 191, 193, 199.

[472] US-Tuna Labeling Appellate Body Report, *supra* note 470, ¶¶ 240, 299.

competition in the market even though they do not directly restrict trade given that the US "dolphin-safe" labeling provisions did not prohibit importation or marketing of tuna products that did not meet the provisional requirements of "dolphin-safe" labeling. Though, some people may criticize that the WTO Appellate Body decision does not consider the United States' specific value preference, the protection of dolphin. However, this criticism likely results from an incorrect understanding about WTO rules and DSBs' roles. As the Appellate Body noted, "it is well established that WTO rules protect competitive opportunities, not trade flows [itself nor environmental protection itself]" in international trade.[473]

In sum, eco-labeling is an effective tool to protect the environment. When they are mandatory and related to trade restrictions, labeling regulations must comply with WTO rules. Eco-labeling can be a protectionist measure when it leads to discrimination between countries, unnecessary barriers to trade, or creates a disguised restriction on international trade.[474]

5.6. Legitimacy of a State's Environmental Protection Policy in the WTO

As discussed above, non-protectionism is the most important principle of the WTO, so a State's protectionism is not allowed in the WTO. Thus, when a State's measures turn out to be protectionist, a State must prove the legitimacy of its measures in order to be justified under WTO rules.[475] The WTO allows its Member States to impose trade measures

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[473] *Id.* ¶ 239.

[474] WTO, Enviroment: Issues: Labelling, http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm (last visited May 7, 2011).

[475] Hudec 1992, *supra* note 349, at 318-19.

in certain circumstances, for example imposing safeguard measures, technical or safety standards, or environmental protection. The following sections discuss these three exceptional circumstances as legitimate environmental protectionist measures.

5.6.1. Safeguard Measures for a State's Economic Injury

When the increased imports cause "serious injury" to domestic producers, WTO Members can impose safeguard tariffs or quantitative restrictions to the extent necessary to remedy such injury.[476] For a State's safeguard measures to be legitimate, a Member State must demonstrate that its measures meet the requirements of the GATT 1994 and WTO rules. Safeguard actions must satisfy the requirements of "increased import quantities" and "serious injury" and demonstrate linkages between increased import and injury.[477] A Member State also must negotiate with any "affected States" before taking safeguard actions.[478] When such negotiations fail, the affected States can retaliate against the affecting State by imposing "substantially equivalent concessions or other obligations under the GATT/WTO."[479] While safeguard measures are allowed, the WTO prefers prior consultation between parties and, if implemented, the measures must be adopted provisionally to ensure that they will not become protectionist.[480]

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[476] GATT 1994, *supra* note 169, art. XIX(1); Safeguards Agreement, *supra* note 412, arts. 2, 5; Agreement on Agriculture art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

[477] GATT 1994, *supra* note 169, art. XIX:1.

[478] *Id.* art. XIX:2.

[479] *Id.* art. XIX:3(a).

[480] *Id.* art. XIX(2); Safeguards Agreement, *supra* note 412, arts. 6, 12.

These safeguard provisions allow WTO Member States to restrict imports in order to protect their domestic industries from serious injury by foreign products with low environmental standards. Even if protectionist measures resulting from a State' taking safeguard actions are allowed in the WTO, strict safeguard requirements help discourage States from resorting to implementing safeguards unless the State will receive a sizable political gains to prevent disguised protectionism in international trade.[481]

5.6.2. Regulations on Technical Standards and SPS Measures

A State can choose to implement domestic policies on technical regulations or SPS measures to afford protection to domestic products.[482] A WTO Member State can adopt regulations on technical barriers to trade measures (TBT measures), which involve measures requiring technical standards that both domestic and foreign products must meet. A State can also take SPS measures, which are measures requiring safety standards to be met. States can use these governmental regulations on technical or safety standards either explicitly or implicitly in order to favor domestic producers over foreign producers. When regulations on technical or safety standards meet requirements of the TBT Agreement and the SPS Agreement, they are legitimately allowed. The WTO can declare these governmental regulations on technical or safety standards as protectionist because these governmental regulations may afford protection to domestic producers. Thus, both the TBT and SPS Agreements provide constraints to prevent protectionist measures.[483]

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[481] Skyes 1991, *supra* note 352, at 286-87.

[482] Jackson 1997, *supra* note 198, at 221-24.

[483] Sykes 1999, *supra* note 342, at 15-23.

Four factors can be considered legitimacy requirements under the TBT and SPS Agreements. First, the TBT and SPS measures must meet non-discriminatory treatment requirement between domestic and foreign products in applying domestic technical regulations[484] and SPS measures.[485]

Second, technical regulations or SPS measures must not be applied in a way that is "more trade-restrictive than necessary" to achieve national policy objectives. The TBT Agreement requires that technical regulations must not create "unnecessary obstacles to international trade" nor be applied to be "more trade-restrictive than necessary to fulfill a legitimate objective."[486] Technical regulations must be designed to fulfill a legitimate objective and be applied to the extent necessary to fulfill that objective in order to not be seen as having protectionist intentions. Similarly, the SPS Agreement requires that SPS measures must not be applied in a way that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade."[487] To avoid discrimination or being a disguised restriction, SPS measures must be taken "to the extent necessary to protect human, animal or plant life or health."[488] SPS measures should "not be more trade-restrictive than required" to achieve the appropriate level of protection.[489]

Third, risk assessment is specific and the most significant legitimacy requirement

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[484] TBT Agreement, *supra* note 178, art. 2.1.

[485] SPS Agreement, *supra* note 172, art. 2.3.

[486] TBT Agreement, *supra* note 178, art. 2.2.

[487] SPS Agreement, *supra* note 172, art. 2.3.

[488] *Id.* art. 2.2.

[489] *Id.* art. 5.6. Article 5.6 states that "... Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility." *See also id.* Footnote 3.

under the TBT and SPS Agreements given that it requires scientific evidence for a State's measures.[490] The SPS Agreement requires that SPS measures must be "based on a risk assessment" taking into account scientific evidence and relevant economic factors.[491] The TBT Agreement also requires that risk assessment to determine legitimate objectives is based on scientific and technical information, which includes not only the product but the production process as well.[492] If a country fails to provide legitimate scientific evidence, then it could be violating the TBT and SPS Agreements when those measures impose different burdens on foreign products.[493]

Fourth, the TBT and SPS Agreements require WTO Member States base their domestic measures on harmonized international standards.[494] Meanwhile, WTO Members are granted the right to adopt national standards for environmental protection when international standards are not inappropriate or ineffective.[495] Members are permitted to implement standards higher than international standards on the condition that there is scientific justification that the international standards are not sufficient to achieve

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[490] TBT Agreement, *supra* note 178, art. 2.2; SPS Agreement, *supra* note 172, arts. 2.2, 5.

[491] SPS Agreement, *supra* note 172, arts. 2.2 and 5.1. Risk assessment requirement has been confirmed by most disputes related to SPS measures. *See* Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, ¶¶178-179, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter EC-Hormone Appellate Body Report]; Appellate Body Report, *Japan-Measures Affecting the Importations of Apples*, ¶¶ 243(b), (d), WT/DS245/AB/R (Nov. 26, 2003); Appellate Body Report, *Australian-Measures Affecting Importation of Salmon*, ¶ 279(d), WT/DS18/AB/R (Oct. 20, 1998); Panel Report, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 8.22-8.30, 8.42-8.46, 8.57-8.62, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sep. 29, 2006) [hereinafter EC-Biotech Panel Report].

[492] TBT Agreement, *supra* note 178, art. 2.2.

[493] Farber & Hudec, *supra* note 1, at 62.

[494] TBT Agreement, *supra* note 178, art. 2.4; SPS Agreement, *supra* note 172, arts. 3.1, 3.3.

[495] TBT Agreement , *supra* note 178, art. 2.4; SPS Agreement, *supra* note 172, art. 4.1, preamble ¶ 6.

appropriate protection.[496]

In summary, national policy objectives related to technical or safety measures will be legitimate when the policy objective is supported through requirements of non-discrimination, scientific evidence, the least trade restrictiveness, or application of international standards.[497] However, these legitimacy requirements also represent the non-protectionism principle of the WTO. Non-discrimination is not only a legitimacy requirement under the TBT and SPS Agreements, but it is also a non-protectionist device under the GATT/WTO as discussed above. The "necessary to" requirement is both a non-protectionist device and a legitimacy requirement because a protectionist objective is not considered a "legitimate objective" for technical or safety policies. The international standard requirement is also a non-protectionist device because widely accepted international standards prevent States from unilaterally using protectionist national standards for the evaluation of imported products.[498] Thus, the TBT and SPS Agreements provide WTO Members with non-protectionist devices as well as legitimacy requirements.

5.6.3. Exceptional Measures for Environmental Protection

A State can invoke exceptional provisions under GATT Article XX to justify its

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[496] SPS Agreement, *supra* note 172, art. 3.3, Footnote 2. Article 3.3 says that

> Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate ...

[497] Sykes 1999, *supra* note 342, at 23.

[498] *Id.* at 18-19.

inconsistent environmental measures that constrain import or export from foreign countries. WTO Members can pursue domestic environmental regulations as long as they satisfy the non-discrimination or non-quantitative restriction requirements.[499] Even discriminatory measures or quantitative restrictions are permitted provided they have the legitimate objective of being necessary or relating to protection health, safety, or the environment in accordance with GATT Article XX.[500]

However, to justify inconsistent measures against foreign products, a State must demonstrate that its measures meet requirements under GATT Article XX as discussed in chapter 4.[501] A State must prove that its measures satisfy both relevant provisional requirements under Article XX and the requirements under the Article XX Chapeau. The first requirement that must be met to justify inconsistent measures under Article XX is that the policy objective must be designed to protect the environment. Article XX requires a State to invoke Article XX's exceptions to justify trade restrictions when those trade restrictions are genuinely based on environmental protection. The *Canada-Herring and Salmon* Panel noted that GATT Article XX(g) should not create a loophole for allowing countries to impose discriminatory or protectionist trade policy measures, but rather it is designed to ensure that the GATT does not prevent countries from having national conservation policies.[502] Meanwhile, the *EC-Asbestos* Panel found that the Decree of France was in response to health scares and its desire to protect the health of its people and

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[499] Esty, *supra* note 5, at 102.

[500] Farber & Hudec, *supra* note 1, at 67-68, 72; Weiss & Jackson, *supra* note 4, at 6.

[501] *See supra.* Chapter 4.3 of this dissertation.

[502] GATT Report 1992, *supra* note 2, at 13; *see* Canada-Herring and Salmon, *supra* note 247, ¶ 4.6.

is consistent with the Article XX Chapeau because its intention was not to protect the French substitute fibres industry.[503] Thus, the legitimate policy objective requirement is also a non-protectionist device of the WTO because States may use their trade restrictions to protect the environment and natural resources, but if these regulations pose the threat of being protectionist, then they are not justified by any Article XX exception. Many governmental policy objectives have been upheld by the GATT/WTO Panels. Thus, even though the policy objective requirement is a non-protectionist device, this requirement will be met when a governmental policy objective turns out to be aimed at environmental protection.

The second requirement is that measures must be "necessary to" or "relating to" environmental conservation. The "necessary to" test requires States to choose the least trade-restrictive measures, and the "relating to" test requires a substantial link between a measure and the policy objective of conserving natural resources. Because these tests are stricter than the policy objective requirement, measures justified by the policy objective requirement can be rejected when they do not meet the "necessary to" or the "relating to" requirement.

The third requirement, necessary to satisfy the requirements of the Article XX Chapeau, is that measures must not be "arbitrary or unjustifiable discrimination" nor "a disguised restriction on international trade." These non-discrimination and non-protectionist requirements have turned out to be the strictest for measures to meet. In *US-Gasoline*, *US-Shrimp*, and *Brazil-Tyres*, environmental measures meeting provisional requirements under Article XX were determined to be inconsistent with Article XX because they failed to satisfy

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[503] EC-Asbestos Panel Report, *supra* note 258, ¶¶ 8.238-8.240.

the requirements of the Article XX Chapeau.[504]

Accordingly, the GATT Article XX does not justify inconsistent environmental measures as having legitimate environmental objectives when the governmental environmental policies mask underlying protectionist intention. The strict provisional requirements of Article XX and the WTO's rejection of protectionist environmental measures make it difficult for a State's measures to fall under an Article XX exception. It will be difficult for a State to demonstrate that its measures are generated from genuine environmental purpose, and meet provisional requirements under Article XX exceptions. This is because it is still possible that measures that meet the requirements of a GATT Article XX exception are protectionist, and countries can use their ability to justify measures with Article XX so as to continue using protectionist measures.[505]

5.7. Summary

The State harmonization requirement to counteract unfair competition generated by different environmental policies can be potentially protectionist and therefore contrary to the WTO's fundamental principle of non-protectionism. From the State perspective, it is inevitable for a State to provide protection to its domestic industries and to implement policies to meet its needs for environmental protection. A State justifies its trade restrictions by arguing that it removes the unfair competitive advantage of low-standard

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[504] US-Gasoline Appellate Body Report, *supra* note 264, at 29; US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 134, 136, 144-45, 160, 173-77; Brazil-Tyres Panel Report, *supra* note 213, ¶¶ 7.99, 7.102, 7.215, 7.356-7.357.

[505] Jackson 1969, *supra* note 120, at 743.

products and removes the unfairness that results from different environmental policies. However, when an environmental protection goal is combined with an economic protectionist intention, the State harmonization requirement of environmental policy can conflict with the WTO's non-protectionism.

The GATT/WTO system provides strong equipment to prevent protectionist measures through the fundamental principles of non-discrimination, non-quantitative restriction, and transparency. When trade restrictions or discriminatory treatment of a specific foreign country exist to implement national environmental policies, those measures explicitly constitute a violation of Article XI, I, or III. Unexpected or untimed publication of laws or regulations is also inconsistent with Article X.

Further, the WTO allows legitimate measures that can be non-protectionist tools in certain circumstances. The WTO exceptionally allows its Member States to take measures for safeguards, safety or technical standards, or the environment. However, those measures still have some limitations on implementation. The WTO provides strict provisional requirements to exceptionally implement trade measures in order to prevent its Member State from misusing those measures as disguised protectionist measures. Strict provisional requirements make legitimacy requirements of measures non-protectionist devices under the WTO. The fact that legitimacy requirements for trade measures are also non-protectionist devices means that these requirements are difficult to demonstrate as allowable under the WTO.

The WTO's preventing protectionism is inevitable to secure the international trading system established by the GATT/WTO. Protectionism in one country would generate

protectionism in another country, and that would result in global protectionism in international trade, which potentially could threaten the international trading system and deteriorate the international relations between States. However, a State's national need to protect its domestic industries cannot be disregarded. Thus, when a WTO Member State enacts a governmental policy that permits trade restrictions to protect the environment, it must consider the balance between a State's needs to protect its domestic industries and the WTO's goal to promote international trade. Because effective solutions to address environmental problems do not necessarily involve discriminatory trade policies,[506] a State can choose less trade restrictive policies such as environmental taxes, labeling, advertisement, or education of the public.

If a State still needs to take trade restrictions to implement its environmental policies, it must consider two factors. First, a State must consider whether its measures meet the non-discrimination obligation under Articles I and III or the non-quantitative restriction obligation under Article XI; whether it publishes its environmental laws and regulations in a timely manner; or whether its measures meet requirements and obligations under the relevant WTO covered agreement. Second, if its measures constitute a violation of any of the above requirements, then a State must demonstrate that its trade measures are "necessary to" or "relating to" the achievement of its environmental policies.

A State's ability to take unilateral action or defend its actions by invoking the state sovereignty principle is one tool used in order to take protectionist measures. A State's

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[506] GATT Report 1992, *supra* note 2, at 4, 16, 25-26; Esty, *supra* note 5, at 69-70; Richard H. Snape, *The Environment, International Trade and Competitiveness, in* THE GREENING OF WORLD TRADE ISSUES 73, 84, 86 (Kym Anderson & Richard Blackhurst ed., 1992)

unilateral action can be protectionist when it suspends "other States' trading rights" by compelling them to accept the State's policies.[507] Further, because an important role of State government is to protect its domestic producers from excessive competition of foreign producers, the WTO's non-protectionism designed to prevent a State from protecting its domestic industries can be challenged by a State arguing that creating such policies is within its sovereign rights. Arguing the sovereign right to pass legislation to solve domestic environmental problems is a good moral reason to justify protectionism.[508] Chapters 6 and 7 further discuss unilateralism and the state sovereignty principle with regard to environmental protection policies in terms of the harmonization requirement.

[507] Bhagwati 1993, *supra* note 7, at 171, 172, 174.

[508] Hudec 1992, *supra* note 349, at 311.

6. A STATE'S UNILATERALISM AND THE WTO'S MULTILATERALISM TO HARMONIZE ENVIRONMENTAL POLICY

6.1. Introduction

Unilateral measures in international trade are trade measures taken without agreement from other countries and thus not preferred in the WTO's international trading system that requires its Member States to apply harmonized international regulations. A State's action is basically unilateral when it implements and enforces its national policies. A State's unilateral action will be an international action when it affects other States' policies. In particular, when a State unilaterally takes trade measures to force other States to adopt uniform environmental policies without an international agreement, its unilateral action can conflict with the WTO's multilateral approach. States are willing to use unilateral measures to implement their environmental policies because these unilateral measures may be the best option available as an effective countermeasure or enforcement tool in the absence of relevant international instruments. A State's unilateral action is an important tool to help it achieve its harmonization goals in international trade.

The State harmonization requirement is not always contrary to the WTO harmonization requirement. A State can take unilateral measures as a condition of access to its market because an exporting country must comply with the domestic regulations and standards of an importing country in international trade.[509] Unilateral measures that are not

[509] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 121; Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products -Recourse to Article 21.5 by Malaysia*, ¶ 138, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter US-Shrimp (21.5) Appellate Body Report].

allowed in the WTO are measures taken to force other States to adopt the same environmental policies. Whether a State's unilateral measures are allowed in the WTO depends on whether a State applies its policies in compliance with requirements and obligations under the WTO. Accordingly, this chapter focuses on what qualifies as a State's unilateral action to achieve harmonization with its policies; what the WTO does through multilateralism to achieve harmonization within the WTO; and, whether a State's unilateral approach is an efficient tool to achieve its environmental policies and can be reconciled with the WTO's multilateral approach related to harmonization and environmetal protection.

This chapter is organized as follows: section 6.2 discusses and compares a State's unilateral approach and the WTO's multilateral approach to achieve the harmonization requirement; section 6.3 analyzes a State's unilateral measures as countermeasures or an environmental policy enforcement tool; and section 6.4 discusses the WTO's legitimacy requirements for a State's unilateral measures.

6.2. A State's Unilteralism and the WTO's Multilateralism as the Harmonization Requirement

6.2.1. A State's Unilateralism as the Harmonization Requirement

A unilateral measure is a State's action under domestic law when there is no clearly established relevant rule of international law.[510] In instances where there are no relevant

[510] Murase 1999, *supra* note 447, at 405. A unilateral measure is distinguished from a unilateral act that is "a juridical act" recognized by established international law either customary law or treaty law. Examples of unilateral acts are unilateral declarations, the recognition of a new State by existing States, and the submission of a dispute to the international tribunals according to relevant provisions. *Id.* at 404; *see* also Brownlie, *supra* note 458, at 640-43. Meanwhile "a unilateral measure is an action of a State taken under its domestic law for which there is no clearly established rule of international law." *See* Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*,

rules of international law, a State can take unilateral measures based on domestic law.[511] As suggested by the name, when a government's action is "unilateral," it is an action without multilateral approval.[512] An example of a unilateral measure is Austria's legislation restricting the import of tropical woods from Malaysia because Malaysia was not practicing sustainable forestry policies.[513]

From the international trade perspective, unilateralism is when a country forces other countries to make "unilateral trade concessions" for its economic benefit and when a country takes unilateral retaliation unless others agree.[514] Countries can unilaterally retaliate using trade restrictions such as unilateral tariffs or trade bans.[515] Section 301 of the 1974 Trade Act which allows the United States to take any appropriate action against other countries when their trade practices are considered unfair is an example of a retaliatory measure.[516]

Unilateral environmental measures relate to a State's effort to adopt regulations in order to conserve the environment and to take reasonable actions necessary in order to enforce them.[517] A State enacts environmental measures to implement its domestic

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253 RECUEIL DES COURS 283, 356 Footnote 140 (1995) [hereinafter Murase 1995].

[511] Murase 1999, *supra* note 447, at 405, 453.

[512] Hudec 1996b, *supra* note 64, at 143.

[513] Murase 1999, *supra* note 447, at 405.

[514] JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK 48-57 (1991).

[515] *Id.* at 54.

[516] Professor Bhagwati criticized the United States' unilateral retaliation under the Section 301, which was not aimed at freeing trade through "open markets generally" but "increasing its own exports." *Id.* at 55-56. This opinion suggests that the characteristic of unilateralism is opposed to the spirit of free trade and is supported by two notions of mercantilism and protectionism.

[517] Murase 1999, *supra* note 447, at 414.

environmental protection policies. When these environmental measures are taken in the absence of or go beyond agreed international rules, then they are considered unilateral.[518]

A State may use unilateral environmental measures as trade restrictions to implement its domestic environmental policies effectively.[519] A governmental measure against a foreign environmental practice absent any authorization from either a WTO legal proceedings or any international environmental agreement is a unilateral measure.[520] The DBSs in *US-Shrimp* and *US-Shrimp (Article 21.5)* made the meaning of "unilateral measure" clear in by stating that it is a State's unilateral action on the issue without multilateral or bilateral negotiation or cooperation with its counterpart countries.[521] Thus, conflicts between a State's environmental protection policy and the WTO's trade promotion policy can arise from a country's unilateral action in the absent of the WTO's legal procedures or international agreements.[522]

The State's measures within its jurisdiction are, by their nature, unilateral for both domestic and foreign manufacturers. A country has the right to impose measures or restrict trade in order to protect the environment within its jurisdiction.[523] Also, a country does not have to get agreement from other countries to determine and implement its own environmental regulations and policies. Unilateral measures are prohibited in international relations when they are coercive. A State's unilateral use of trade measures

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[518] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 942, 946 (2nd ed. 2003).

[519] *Id.*

[520] Hudec 1996b, *supra* note 64, at 143.

[521] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 166-172; US-Shrimp Panel Report, *supra* note 212, ¶¶ 7.52-7.54, 7.56, 7.61; US-Shrimp (Article 21.5) Panel Report, *supra* note 243, footnote 155.

[522] Weiss & Jackson, *supra* note 4, at 27.

[523] *Id.* at 28.

creates conflict in international relations when it forces another State to adopt uniform environmental policies. This coerciveness of the State harmonization requirement is not acceptable in international law or in the WTO.[524]

Nevertheless, a State still will prefer the unilateral harmonization requirement because it is an effective tool to enforce environmental policies. In this context, a State can use the harmonization requirement as a pre-requisite to permit access to its market. A State will justify its unilateral trade measures when foreign producers do not comply with its specific law and policy requirements to engage in a trade relationship. Even though a State's unilateral action must be allowed within its jurisdiction, the unilateral harmonization requirement is still controversial in international trade.[525] Section 6.3 further discusses the main ways that a State uses this unilateral State harmonization requirement as a countermeasure or an enforcement tool.

The following section discusses the WTO's multilateralism as opposed to a State's unilateralism.

6.2.2. The WTO's Multilateralism as the Harmonization Requirement

The objective and purpose of both the GATT and the WTO are based on multilateralism in international trade.[526] The WTO's objectives are trade expansion and

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[524] *See infra*, Chapter 7.3 of this dissertation.

[525] As for further discussion, *see infra*, Chapter 7.3 of this dissertation.

[526] Professor Jackson defines the meaning of multilateralism as "an approach to international trade and other relations that recognizes and values the interaction of a number of nation states." Jackson 1997, *supra* note 198, at 158.

economic development through the promotion of international trade.[527] The WTO achieves these objectives through multilateral agreements designed to reduce tariffs and trade barriers and to eliminate discriminatory treatment.[528] The WTO's multilateral character makes harmonization, as used in the WTO, achievable through a multilateral approach in international trade. For this multilateral approach to trade measures to succeed, Member States must engage in advanced negotiations to be consistent with their rights and obligations under the WTO.[529]

The WTO incorporates the principle of multilateralism in the WTO Agreement and its covered agreements. Article III:2 of the WTO Agreement stipulates that it "shall provide the forum for negotiations among its Members concerning their multilateral trade relations." In 1994 when the WTO was established, the Member States' Ministers issued the Marrakesh Declaration in which they "express[ed] their determination to resist protectionist pressures of all kinds," and reiterated the importance of the WTO as an instrument for operating a multilateral trading system.[530] WTO covered agreements also support a multilateral approach. The GATS and TRIPS provide that it is necessary to establish a multilateral framework of principles and rules for trade in services and in counterfeit goods.[531] The Committee on Trade and Environment (CTE) endorsed "multilateral solutions based on international cooperation and consensus as the best and

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[527] GATT 1994, *supra* note 169, preamble ¶ 2; WTO Agreement, *supra* note 74, preamble, ¶ 1.

[528] GATT 1994, *supra* note 169, preamble ¶ 3; WTOAgreement, *supra* note 74, preamble, ¶¶ 3-5.

[529] GATT Report 1971, *supra* note 20, at 20.

[530] Marrakesh Declaration of 15 April 1994 ¶ 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 148.

[531] GATS, *supra* note 176, preamble ¶ 2; TRIPS, *supra* note 412, preamble ¶ 3.

most effective way for governments to tackle environmental problems of a transboundary or global nature."[532] These provisions and declaration emphasize multilateralism as the best way to achieve harmonization in the WTO.

GATT and WTO dispute settlement decisions have also emphasized the importance of the multilateral approach such as international negotiations, cooperation or agreements to resolve environmental disputes. The Panel in *US-Tuna (Mexico)* recognized that one of the reasonably available options would be to engage in international negotiations to try and reach an agreement to protect dolphins, and noted that this could be less inconsistent with Article XX(b).[533] The *US-Shrimp* Panel and the Appellate Body also noted that the United States should have engaged in international cooperation and undertaken agreements to conserve sea turtles effectively before imposing an import ban on Mexican shrimp products.[534] Further, the *US-Shrimp* Appellate Body determined that the United States' unilateral action under Section 609 leaded to a failure to negotiate bilateral or multilateral agreements with all relevant parties to protect sea turtles, and that such unilateral measures instead "heightened discriminatory and unjustifiable import prohibitions."[535]

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[532] Word Ttrade Organization, *Report of the Committee on Trade and Environment*, ¶ 171, WT/CTE/1 (1996).

[533] US-Tuna (Mexico), *supra* note 12, ¶ 5.28.

[534] US-Shrimp Panel Report, *supra* note 212, ¶¶ 7.52-7.53, 7.56; US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 166-171. The Panel, in its concluding remarks, stated that:

> We consider that the best way for the parties to this dispute to contribute effectively to the protection of sea turtles in a manner consistent with WTO objectives, including sustainable development, would be to reach cooperative agreements on integrated conservation strategies, covering, *inter alia*, the design, implementation and use of TEDs while taking into account the specific conditions in the different geographical areas concerned. US-Shrimp Panel Report, *supra* note 212, ¶ 9.1.

[535] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 172.

The main ground of WTO preference on multilateralism is that multilateral resolutions ensure the security and predictability of the WTO's multilateral trading system. The Panel in *US-Tuna (Mexico)* noted that the State's unilateral measures that they claimed fell into the category of the environmental exceptions under GATT Articles XX(b) and XX(g) could jeopardize the GATT as a multilateral trading system as well as threaten its basic objectives and principles.[536] The *US-Shrimp* Panel emphasized that WTO Member States implement their environmental policies without the intent of affecting the WTO's multilateral system.[537]

In sum, the WTO achieves international harmonization through multilateral approaches and encourages its Member States to engage in multilateral procedures such as international negotiations, cooperation, and developing agreements to resolve environmental protection disputes. Thus, unilateral measures unrelated to multilateral processes are discouraged in the WTO because such unilateral measures could potentially be disguised protectionism that threatens the WTO's multilateral trading system.

6.3. A State's Unilateral Measures to Implement Environment Policies in the WTO

The WTO does not allow its Member States to impose discriminatory and protectionist unilateral measures on environmental grounds. The WTO's preference for a multilateral approach limits its Member State's ability to use unilateral measures. However, every unilateral measure is not prohibited in the WTO. Unilateral measures are prohibited

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[536] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.27, 5.32; US-Tuna (EEC), *supra* note 12, ¶ 5.26.

[537] US-Shrimp Panel Report, *supra* note 212, ¶¶ 6.6, 7.45, 7.55, 9.1.

in the WTO when they are discriminatory and protectionist. The Panel in *US-Tuna (Mexico)* confirmed this by noting that States could regulate or prohibit the importation of a product to protect the environment as long as such measures meet the non-discrimination requirements.[538] A States' unilateral measures can be justified when they are not deemed discriminatory and protectionist under the WTO.

States are willing to choose trade measures for environmental protection because the trade measures can be justified as a countermeasure to redress environmental injuries and be considered effective methods to enforce environmental policies. Transboundary or global environmental problems need to be addressed and, so when there is no international forum to do so, unilateral trade sanctions can be justified as an indispensible measure.[539] Unilateral measures also can be considered a rule-making process, which, in international relations, help to address existing gaps in international law and creat "subsequent agreements" to govern the sustainable use and conservation of natural resources.[540] States justify trade measures as a countermeasure in the absence of "substantive" rules deal with environmental problems.[541]

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[538] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.9, 6.2.

[539] Birnie et al., *supra* note 23, at 777-78; Esty, *supra* note 5, at 237; Lang & Hines, *supra* note 34, at 65-66.

[540] Murase 1999, *supra* note 447, at 415, 424. After the *US-Tuna (Mexico)* dispute between the United States and Mexico, twelve states, including the two involved in the dispute, signed the International Agreement for the Reduction on Dolphin Mortality 1992. International Agreement for the Reduction on Dolphin Mortality in the Eastern Pacific Ocean, Apr. 21-23, 1992, 33 I.L.M. 936 (1994). *See also* Pub. L. No. 102-523, 106 Stat. 3425 (1992) (codified at 16 U.S.C. §§ 1411-1418 (1994)). This rule-making role of unilateral measures is called "creative unilateralism." *See* Murase 1999, *supra* note 447, at 415, 424; *see also* Esty, *supra* note 5, at 237; Schoenbaum 1997, *supra* note 200, at 300-301; Birnie et al., *supra* note 23, at 777; Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L EVNTL. L. REV. 1, 106 (1999).

[541] Murase 1999, *supra* note 447, at 430; Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 GA. J. INT'L & COMP. L. 433, 455-56 (1995); Schoenbaum 1997, *supra* note 200, at 299.

States also regard trade measures as effective "regulatory tools" to enforce domestic environmental rules or to enforce compliance with international environmental rules.[542]

This section examines these main motivations that States rely on unilateral measures in contrast to the WTO's multilateralism. It focuses on a State's unilateral measures as the State's method of achieving harmonization including analysis of whether these unilateral measures are an efficient method for addressing environmental problems and are allowed in the WTO harmonization requirement. This section discusses two aspects of a State's unilateral measures: first, unilateral environmental measures as a countermeasure; and second, unilateral measures as a tool to enforce domestic or international environmental rules.

6.3.1. Unilateral Measures as a Countermeasure

A State can take unilateral environmental measures as a countermeasure for its injuries provided there are no international rules or enforcement instruments available to provide redress for the injury.[543] Multilateral decision-making is intrinsically difficult, especially when it relates to environmental policy enforcement.[544] Thus, unilateral actions are sometimes necessary for States to effectively enforce environmental policies.[545] States willingly use, and justify, unilateral environmental measures when there are no international

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[542] Birnie et al., *supra* note 23, at 777-78; Esty, *supra* note 5, at 16, 19, 20, 38, 51, 150, 236; Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A commentary*, 86 AM. J. INT'L L. 728, 728, 730 (1992) [hereinafter Weiss 1992].

[543] Murase 1999, *supra* note 447, at 430.

[544] Esty, *supra* note 5, at 144, 150.

[545] *Id.*

rules and enforcement instruments to address specific environmental problems.[546] Unilateral environmental measures are justified as a countermeasure under the principle of international law.[547]

In the WTO, a State's use of a countermeasure can be problematic when a State chooses a trade restriction as a countermeasure to seek redress for an environmental injury or for an economic injury arising from different environmental policies between States. In this context, the redress of environmental problems is not subject to WTO judicial processes. A countermeasure that is reviewed in the WTO can be in a case where a measure is implemented by a State to sanction other States for its environmental injuries, and other States can complain about the initial State's taking unilateral countermeasures on the environmental grounds. Or, a countermeasure is an issue in the WTO when a measure is taken to compensate for its economic injuries arising from different environmental policies.

A State cannot justify its unilateral measures as countermeasure when it takes actions on the basis of its domestic environmental policies in international law. Aggrieved States can only seek remedies unilaterally when certain conditions are met.[548] Countermeasures

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[546] Weiss & Jackson, *supra* note 4, at 28-29; Murase 1999, *supra* note 447, at 424, 430; Cheyne, *supra* note 541, at 461; Esty, *supra* note 5, at 144.

[547] Murase 1999, *supra* note 447, at 430; Cheyne, *supra* note 541, at 455-56; Schoenbaum 1997, *supra* note 200, at 299.

[548] Murase 1999, *supra* note 447, at 428-30. There are several requirements for countermeasures, including that: it must be in response to a prior act contrary to international law; there must be a prior request for redness; the measure taken by the grieved country must be proportional to the original wrongful act; and political or economic forces threatening a state's territorial integrity or political dependence must be avoided. *Report of the International Law Commission to the General Assembly on the Work of its Fifty-third Sesion, IV. State Responsibility, E. Draft Articles on Responsibility of States for Internationally Wrongful Acts*, arts. 49-52, U.N.Doc. A/56/10 (Apr. 23 - Jun.1 & Jul. 2 - Aug. 10, 2001), reprinted in [2001] v.II pt.2 U.N.Y.B. Int'l L. Comm'n 26, U. N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC 2001].

are applied when a State is injured by another State's violation of obligations under international agreements.[549] Countermeasures, thus, cannot justify a State's unilateral actions to sanction other States when those States' practices do not comply with the first State's domestic policies rather than international agreements. Even where a State is allowed to use a countermeasure for its environmental or economic injury, an injured State is required to exhaust all "dispute settlement procedure" that can provide remedy for the violation of the specific international agreement by another State, in the relevant regime before it can take a countermeasure.[550] For example, a State is encouraged to try dispute settlement procedures such as consultation, negotiation, mediation, inquiry, conciliation, arbitration, and judicial process, before it determines to take countermeasures.[551] When

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[549] *See* Brownlie, *supra* note 458, at 496 (discussing the condition of local remedies).

[550] "Exhaustion of dispute settlement procedures" in this context must be distinguished from exhaustion of local remedies. Exhaustion of local remedies means that "a State can justify its measures for other States only when "any available and effective local remedy has not been exhausted" under international law. Exhaustion of local remedies requires parties to use local legal procedures where injury occurs to them in foreign country. Murase 1999, *supra* note 447, at 430; *see also* Brownlie, *supra* note 458, at 492-510; ILC 2001, *supra* note 548, art. 44(b). Unilateral environmental measures covered in this dissertation, however, assume that the injury occurs in an aggrieved country or outside of its jurisdcition. In this context, the WTO, does not require the exhaustion of local remedies. In *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* and *Argentina-Measures Affecting Imports of Footwear,Textiles, Apparel and Other Items,* the Panels rejected the argument that States had to exhaust local remedies before bringing a case under the DSU. Report of the Panel, *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87 (Apr. 27, 1994), GATT B.I.S.D. (41th Supp.) at. 229; Panel Report, *Argentina- Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R (Mar. 27, 1998). *See also* William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. INT'L ECON. L. 79, 104 (2001) [hereinafter Davey 2001].

[551] Special Rapporteur on the Contents, Forms and Degrees of Internatinal Responsibility, *Preliminary Rep. on the Contents, Forms and Degrees of Internatinal Responsibility*, U.N.Doc. A/CN.4/330 (Apr. 1, 1980) (by William Riphange), *reprinted in* [1980] v.II pt.1 U.N.Y.B. Int'l L. Comm'n 107, 111; Special Rapporteur on the Contents, Forms and Degrees of Internatinal Responsibility, *Third Rep. on the Contents, Forms and Degrees of Internatinal Responsibility*, U.N.Doc. A/CN.4/354/Add.1, 2 (Mar. 12-30, May 5, 1982) (by William Riphange), *reprinted in* [1982] v.II pt.1 U.N.Y.B. Int'l L. Comm'n 22, 25, 30, 47; Special Rapporteur on the Contents, Forms and Degrees of Internatinal Responsibility, *Fourth Rep. on the Contents, Forms and Degrees of Internatinal Responsibility*, U.N.Doc. A/CN.366/Add.1 (Apr. 14-15, 1983) (by William Riphange), *reprinted in* [1983] v.II pt.1 U.N.Y.B. Int'l L. Comm'n 3;

WTO Members cannot resolve a dispute through negotiations, they then try to reach a resolution through a WTO run judicial process.[552]

The WTO dispute settlement system recommends its Members to take four steps, including both judicial and non-judicial processes, to resolve disputes.[553] First, the preferred option is for parties to reach a mutually acceptable solution through a dispute resolution process such as consultation and negotiation, mediation, inquiry, and conciliation. Second, in the absence of a mutually agreed solution, the withdrawal of the inconsistent measures is preferred. Third, when the withdrawal of the measures is not practical, then parties can resort to compensation being paid to one. Fourth, the solution that should only be taken as a last resort, one party can take retaliatory measures such as suspension of concessions or other obligations against the other.[554]

Compensation and the suspension of concession or other obligations under the WTO can be countermeasures in the WTO when a defaulting Member State fails to comply with WTO rules and DBS's decision on its violations. Arbitration Panels in *European Communities-Regime for the Importation, Sale and Distribution of Bananas* (EC-Banana) and *European Communities-Measures Concerning Meat and Meat Products* (EC-Hormones) viewed that "the purpose of [these] 'countermeasures' [is] to induce compliance [not to

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Special Rapporteur on the Contents, Forms and Degrees of Internatinal Responsibility, *Fifth Rep. on the Contents, Forms and Degrees of Internatinal Responsibility*, U.N.Doc. A/CN.4/380 (Apr. 4, 1984) (by William Riphange), *reprinted in* [1984] v.II pt.1 U.N.Y.B. Int'l L. Comm'n 1 (cited by Murase 1995, *supra* note 510, at 367).

[552] William J. Davey, *The Limits of Judicial Processes*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 460, 462 (Daniel Ebthlehem, Donald McRae, Rodney Neufeld, & Isabelle Van Damme eds., 2009).

[553] DSU, *supra* note 21, art. 3.7.

[554] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 335 (2000).

justify punishment]."[555] Under the principle of proportionality, the level of compensation and the suspension of concession should be equal to the level of nullification or impairment caused by the offending party.[556] However, as noted above, using a countermeasure as an enforcement tool should be done only as a "last resort." Article 23.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) gives WTO Members the option to use the rules and procedures of the DSU in order to seek redress of a violation of WTO obligations.[557] Measures by Members must comply with procedures under Article 22 of the DSU.[558] These provisions explicitly emphasize the WTO's preference for multilateral approach rather than unilateral approach in the dispute procedures.[559] The Panel of *European Communities-Measures Affecting Trade in Commercial Vessels* noted that "the phrase 'seek the redress of a violation' [under Article 23.1 of the DSU]... [was] designed explicitly with a view to 'strengthening the multilateral system'."[560] The Panel also said

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[555] Decision by the Arbitrators, *European Communities-Regime for the Importation, Sale and Distribution of Bananas: Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 6.3, WT/DS27/ABR (Apr. 9, 1999) [hereinafter EC-Banana Arbitration Report]; Decision by the Arbitrators, *European Communities-Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada: Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 39, WT/DS48/ARB (Jul. 12, 1999) [hereinafter EC-Hormone Arbitration Report]; Decision by the Arbitrators, *European Communities-Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States: Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 40, WT/DS26/ARB (Jul. 12, 1999) [hereinafter EC-Hormone Arbitration Report].

[556] EC-Banana Arbitration Report, *supra* note 555, ¶¶ 6.43, 6.16; EC-Hormone Arbitration Report, *supra* note 555, ¶ 40 (WT/DS/26/ARB), ¶ 39 (WT/DS48/ARB).

[557] DSU, *supra* note 21, art. 3.1. Article 23.1 of the DSU provides that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

[558] DSU, *supra* note 21, art. 23.2(c).

[559] US-Shrimp Panel Report, *supra* note 212, ¶ 7.43.

[560] Panel Report, *European Communities-Measures Affecting Trade in Commercial Vessels*, ¶ 7.190, WT/DS301/R (Apr. 22, 2005) [hereinafter EC-Vessels Panel Report].

that "[i]f Members were free to attempt to seek the redress of a violation by trying to achieve unilaterally ..., it is difficult to see how the obligation to have recourse to the DSU could contribute to the 'strengthening of the multilateral system'."[561] Further, it found that Member's unilaterally taking action for remedies violated DSU Article 23.1 when those remedies could be achieved through a WTO dispute settlement procedure.[562] Thus, a Member's measures for redress will constitute a violation of WTO obligations when it takes measures unilaterally without first attempting to follow the dispute settlement procedures under the DSU.

In sum, a State's using a trade measure as a countermeasure is not encouraged in the WTO when it is to sanction other States for the State's environmental injuries or to compensate for its economic injuries arising from different environmental policies. A State needs to take efforts to reach a mutually agreed solution and, if that's not possible, to give compensation. Trade measures must be the last choice for a State. A countermeasure is still not appropriate to redress national environmental protection policies because it imposes sanctions on other States that act wrongfully.

6.3.2. Unilateral Measures as an Enforcing Tool

States use trade measures to enforce environmental policies to comply with either domestic rules, which are based on national goals, or international rules, primarily based on international agreements. Regarding enforcement of international obligations, States can

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[561] *Id.*; *see also* Panel Report, *United States-Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

[562] EC-Vessels Panel Report, *supra* note 560, ¶¶ 7.195, 7.196, 7.221.

use trade measures according to trade sanction provisions under international agreements or can rely on unilateral trade measures made when there are no provisions in an international agreement. This section analyzes these three different unilateral measures: those taken to enforce domestic rules, to enforce international rules with support of international agreement, or to enforce international rules in the absent of international agreement support.

6.3.2.1. Unilateral Measures as an Enforcing Tool of Domestic Rules: A State's Unilateral Measures to Compel Other States to Harmonize toward its Domestic Policies

The WTO does not allow its Member States to take trade measures to force other countries to accept their domestic policies.[563] For example, a State could take measures against products manufactured in a way that does not meet its standards because different environmental standards often result in different costs to produce products.[564] However, these measures would interfere with international trade.[565] It is, though, inevitable that countries have different policies since countries all have different histories, political objectives, and economic circumstances.[566] And the fact that there is a diversity of domestic policies and regulations amongst countries has not been considered a distortion of international trade.[567]

WTO decisions have expressed that a State's unilateral measures against other

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[563] GATT Report 1992, *supra* note 2, at 20.

[564] GATT Report 1971, *supra* note 20, at 19.

[565] *Id.*

[566] GATT Report 1992, *supra* note 2, at 20; GATT Report 1971, *supra* note 20, at 4.

[567] GATT Report 1992, *supra* note 2, at 20.

States' different domestic policies are not allowed[568] because the measures taken to offset differences can hinder other States' rights under the WTO. The Panel did not accept unilaterally harmonized domestic policies in international trading relations. Both the *US-Tuna (Mexico)* and *US-Tuna (EEC)* Panels found that the import restriction based on different environmental policies could not be justified by the environmental exceptions of GATT Articles XX(b) or XX(g).[569] GATT Article XX does not provide exceptions for trade measures to prevent countries from pursuing their own domestic policies that differ from those of the country taking measure.[570] Thus, trade restrictions aimed at compensating for differences in environmental policies are unilateral or protectionist measures that are not supported under the WTO.[571]

A unilateral sanction for foreign products on the basis of non-harmonized standards constitutes a violation of the WTO's non-discrimination and non-protectionist obligations.[572] The WTO does not provide its Member-States with provisions for offsetting these differences in domestic policy by permitting trade sanctions.[573] Under the WTO, a country cannot condition access to its market on the exporting country's environmental policies or standards.[574] Unilateral measures that treat foreign products differently from one another

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[568] *Id.* at 34.

[569] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.28, 5.33, 6.3; US-Tuna (EEC), *supra* note 12, ¶ 5.27.

[570] Roessler, *supra* note 232, at 34.

[571] GATT Report 1992, *supra* note 2, at 20.

[572] Leebron, *supra* note 8, at 81. In Article VII of the GATS and Article 6 of the TBT Agreement, the WTO, however, partly allows the importing countries to impose restrictions on exporting countries that fail to harmonize their policies with that of their trading partners.

[573] Roessler, *supra* note 232, at 38.

[574] GATT Report 1992, *supra* note 2, at 10.

depending on the environmental policies of different exporting countries are inconsistent with the MFN obligation under GATT Article I.[575] GATT Article III's national treatment obligation also prohibits countries from explicitly placing different and more burdensome treatment on imports.[576] Therefore, the non-discrimination requirement aims to prevent trade distortions and helps protect Member States from being excluded from the market through unilaterally imposed domestic policies by an importing State.[577]

The environmental exceptions provided by GATT Article XX are narrowly interpreted and do not generally justify unilateral trade measures designed to coerce other countries to change their domestic environmental policies. For example, the *US-Tuna (Mexico)* Panel found that the unilateral measures at issue were not "necessary to" protect dolphins under GATT Article XX(b).[578] Both the *US-Tuna (Mexico)* and the *US-Tuna (EEC)* Panels ruled that coercive trade measures were not "primarily aimed at" conserving dolphins within the meaning of the GATT Article XX(g).[579] The *US-Shrimp* Panel also recognized that the requirement to comply with the United States standards under Section 609[580] was a unilateral measure by which the United States forced other countries to adopt

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[575] Leebron, *supra* note 8, at 81.

[576] Farber & Hudec, *supra* note 1, at 70-71.

[577] GATT 1992, *supra* note 2, at 10.

[578] US-Tuna (Mexico), *supra* note 12, ¶ 5.28.

[579] *Id.* ¶ 5.33; US-Tuna (EEC), *supra* note 12, ¶ 5.23-5.27.

[580] There are two types of certification for countries under Section 609(b)(2). First, under Section 609(b)(2)(C), a country may be certified as one where there is no risk of incidental taking of sea turtles during commercial shrimp trawl harvesting. The second type of certification is provided by Section 609(b)(2)(A) and (B). Under these provisions, as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States must adopt a regulatory program that is comparable to that of the United States. Plus, it must have a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels. Essentially, this requires a country to adopt a regulatory program requiring commercial shrimp trawling vessels to use TEDs in areas where there is a likelihood of

the U.S. conservation policies.[581] The Panel found that the U.S. unilateral actions were "unjustifiable discrimination" that could not be overcome by an Article XX exception and, if left in place, could threaten the multilateral trading system of the WTO.[582]

However, Article XX grants a Member State the ability to take unilateral measure in order to force exporting countries to comply with the environmental policies of the importing country. The Appellate Body in *US-Shrimp* and *US-Shrimp (21.5)* recognized that a State's unilateral policies could fall within the scope of the GATT Article XX exceptions.[583] The *US-Shrimp* Appellate Body noted that a State could apply a uniform standard within its jurisdiction to implement its domestic policies.[584] The Appellate Body, however, ruled against a State's coercive policies that required other States to adopt the same regulatory standard domestically and did not take into account the different conditions of those other Members' territories.[585] Thus, Article XX does not justify harmonizing toward a State's laws or regulations when the State's harmonization requirement is coercive to other States.

In sum, a State's unilateral measures coercing other States to harmonize toward its domestic environmental policies are inconsistent with WTO rules. These unilateral measures are discriminatory and protectionist, which threatens the WTO's multilateral trading system. Even though unilateral measures are justified as necessary to or relationg to environmental protection policy objective, they are not allowed when the State

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intercepting sea turtles. Section 609, *supra* note 299.

[581] US-Shrimp Panel Report, *supra* note 212, ¶¶ 3.140, 7.44-7.45.

[582] *Id.* ¶¶ 7.44-7.51, 7.55, 7.60-7.61.

[583] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 121; US-Shrimp (Article 21.5) Appellate Body Report, *supra* note 509, ¶ 138.

[584] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 164.

[585] *Id.*

harmonization requirement affects other States' policy choices. A State's unilateral measures forcing other countries to change their own domestic environmental policies can undermine their sovereign rights, and can also undermine the objectives and principles of the WTO.[586]

6.3.2.2. Unilateral Measures as an Enforcing Tool of International Rules: A State's Unilateral Measures to Compel Other States to Comply with International Obligations

6.3.2.2.1. Unilateral Measures in Support of International Agreement

Trade measures are effective regulatory tools for the enforcement of international agreements addressing transboundary and global environmental problems.[587] Multilateral Environmental Agreements (MEAs) stipulate economic sanctions as a compliance method because international environmental instruments lack accountability or enforcement mechanisms.[588] Economic sanctions under MEAs also encourage more States to participate because they eliminate any competitive advantage that could be gained from not having to meet MEAs' restrictions.[589]

WTO rules do not seem to prohibit measures to resolve transboundary environmental problems through MEAs, regional trade agreements (RTAs), or bilateral trade agreements

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[586] US-Tuna (EEC), *supra* note 12, ¶¶ 5.26, 5.37-5.38.

[587] Parker, *supra* note 540, at 100-107, 112, 122; Esty, *supra* note 5, at 19-20; Lang & Hines, *supra* note 34, at 66.

[588] Esty, *supra* note 5, at. 19-20, 144, 150.

[589] Lang & Hines, *supra* note 34, at 65.

(BTAs).[590] The WTO recognizes that multilateral agreements can provide common norms for addressing transboundary pollution between countries and economic sanctions for enforcing compliance with these norms.[591] The *US-Shrimp* (21.5) Panel confirmed it by noting that, when trade sanctions are allowed under an international agreement or when they are "taken to the completion of serious good faith efforts to reach a multilateral agreement," imposition of a unilateral measure is allowed as a "provisional measure" not a "permanent measure" for the purposes of Article XX.[592] WTO Member States can use trade restrictions to enforce MEAs as long as they apply those restrictions without discrimination, namely "regardless of the origin or destination of the product."[593] However, using trade sanctions for MEA compliance enforcement can be controversial in the WTO because trade sanction provisions under MEAs do not grant a country rights to judge other parties' compliance with MEAs.[594]

Under international law, WTO rules prevail over obligations of pre-1994 MEAs and post-1994 MEAs prevail over obligations of the WTO.[595] Article 30.3 of the 1969 Vienna Convention on the Law of Treaties states that "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty relating to the same subject matter."[596] The Panel in *US-Tuna (EEC)* noted that "treaties [concluded] prior to the

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[590] Bhagwati 1993, *supra* note 7, at 184; Birnie et al., *supra* note 23, at 777.

[591] GATT Report 1971, *supra* note 20,at 4.

[592] US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶. 5.88.

[593] GATT Report 1992, *supra* note 2, at 10-11.

[594] Jackson 1992, *supra* note 68, at 1244-45; Bhagwati & Srinivasan, *supra* note 8, at 198;

[595] Sands, *supra* note 518, at 944.

[596] Vienna Convention on the Law of Treaties 1969 art. 30.3, May 23, 1969, 1155 U.N.T.S. 331 (1980).

conclusion of the GATT were of little assistance in interpreting the text of Article XX(g)."[597] Even post 1994 MEAs, however, would not prevail over the WTO rules for countries that are not parties to the MEA. The *EC-Biotech* Panel denied the parties the ability to rely on the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol) because disputing Members, the United States and Canada, were not Parties to the Biosafety Protocol.[598]

Two different situations can be considered in evaluating the consistency of trade measures under MEAs with WTO rules. First, in a dispute between States that are both parties to an MEA, the issue is whether the one party's trade restriction under the MEA on the other party is consistent with WTO rules. The DSBs will review obligations and requirements under the GATT 1994, namely whether the measure is applied to comply with the obligations of non-discrimination and non-quantitative restriction. If the measure is found inconsistent with those obligations, then the issue is whether the inconsistent measure meets requirements under GATT Article XX. Trade measures can be consistent with WTO rules provided those measures meet non-discrimination obligations under GATT Articles I and III.[599] However, those measures would still violate non-quantitative obligations under GATT Article XI, though those violations can be overcome through meeting a GATT Article XX exception. For example, a country can enforce an import ban on hazardous material

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[597] US-Tuna (EEC), *supra* note 12, ¶ 5.20.

[598] The *EC-Biotech* Panel did not treat the relationship between the WTO with the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol) favorably. The Panel noted that since the complainants, the United States, Argentina, and Canada, are not Parties to the Protocol, "the Protocol is not applicable in the relations among these WTO Members and all other WTO Members, and, thus it is not required to take into account the Protocol in interpreting the WTO agreements at issue in this dispute." EC-Biotech Panel Report, *supra* note 491, ¶ 7.75.

[599] Sands, *supra* note 518, at 945-46.

that is proved to be dangerous because that import ban is justified by Article XX exceptions even if such enforcement would violate Article XI.

Second, in disputes between an MEA party and a non-party, the issue is whether the MEA party's trade restriction on the non-party to implement obligations under the MEA is consistent with WTO rules. In that instance, the DSB will not consider the trade sanction provisions or the environmental principles under the MEA as seen in its decision in *EC-Biotech*. The MEA party's measures can violate Article I because its measure is applied discriminately between the MEA party and the non-party, though that violation can be justified when the measures meet the requirements of Article XX. The WTO prefers that a MEA party use alternative measures rather than use trade restrictions in situations where a MEA party is applying trade sanction provisions under the MEA to a non-MEA party. For example, a party could adopt an alternative measure that sets a target amount for reducing CFCs and taxes CFC consumption.[600]

In any case, the DSB will not determine whether enforcement of the obligation under the MEA is consistent with WTO rules because the WTO does not have jurisdiction to judge the obligations under MEAs. As such, WTO/GATT dispute settlement bodies have never addressed whether trade restrictions based on MEA obligations conform with WTO/GATT rules.[601] In situations where country A is clearly violating obligations under the international agreement and country B takes trade measures against the violation, the WTO is supposed to dismiss the case and not examine whether A's action is justified under the

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[600] *Id.*

[601] Birnie et al., *supra* note 23, at 767; WTO, Environment: Negotiations: The Doha mandate on multilateral environmental agreements (MEAs), http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm (last visited May 7, 2011).

obligation of the specific international agreement. When WTO DSBs review trade measures based on obligations of MEAs, they only determine whether the measures at issue are consistent with WTO rules separately from obligations under MEAs because they do not have any capacity to judge a state's obligations under MEAs.

6.3.2.2.2. Unilateral Measures without Support of International Agreement

Where MEAs do not provide trade sanctions for compliance or enforcement measures, a State can unilaterally use trade sanctions to coerce other State to comply with obligations under the MEAs. A State may impose economic sanctions to meet environmental obligations under an MEA, and that sanction will be "economically unilateral" even though the obligations are "environmentally multilateral."[602] If a country takes trade measures against other countries to force obligations under international agreements, then these measures are coercive unilateral measures.

The WTO does not allow a State's unilateral measures to coerce other countries to comply with obligations under international agreements. In *US-Canadian Tuna*, the United States argued that Canada's harvesting tuna was a "unilateral management approach" inconsistent with international arrangements under the Inter-American Tropical Tuna Commission (IATTC).[603] The United States noted that Section 205 of the Fishery Conservation and Management Act of 1976 (Section 205), which is a U.S. statute, was aimed at "[encouraging] other countries to cooperate in international conservation of

[602] Esty, *supra* note 5, at 140.

[603] US-Canadian Tuna, *supra* note 211, ¶¶ 3.10, 3.11.

tuna."[604] The United States' action was an unjustifiable unilateral measure because it forced other countries to comply with international obligations through its domestic law or regulations. The *US-Shrimp (Article 21.5)* Panel noted that "recourse to trade-related measures not based on international consensus is generally not the most appropriate means of enforcing environmental measures, since it leads to the imposition of unwanted constraints on the multilateral trading system and may affect sustainable development."[605] A county's obligation to comply with international agreements domestically must not affect other countries' own domestic implementation of their international obligations under the established principle of international law.[606]

In sum, a State can pursue the international harmonization requirement under the MEAs when it takes unilateral measures to compel other States to comply with international obligations under the MEAs. While trade-related measures agreed to in international agreements can be allowed, those measures without the support of international consensus may be not allowed. However, the WTO is not the appropriate forum to deal with compliance with obligations under the MEAs, but rather the WTO DSBs will judge whether the trade-related measures to enforce MEA obligations are legitimate under WTO rules. The next section discusses legitimacy requirements of unilateral measures in the WTO.

6.4. Legitimacy Requirements of Unilateral Measures in the WTO

States' trade measures to promote environmental protection not only disrupt the

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[604] *Id.* ¶ 3.12.

[605] US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶ 5.55.

[606] *See infra*, Chapter 7.3.1.

WTO's multilateral framework,[607] but also negatively impact the domestic economy by distorting the market system.[608] Accoridnlgy, unilateral environmental measures must be legitimate for a country to justify its measures as a countermeasure or as a compliance method within the WTO rules. To determine legitimacy, three aspects can be considered: first, measures taken after multilateral solutions; second, measures satisfying non-discrimination and non-protectionist requirements; and third, measures equivalent to values of the environmental goals.

First, using environmental trade measures to protect the global commons must be pre-required via international efforts such as international negotiation and cooperation, an international agreement, or a global compliance mechanism.[609] In the absence of trying to achieve a cooperative environmental goal, unilateral environmental trade measures can be illegitimate, and ineffective because then it leads to unnecessary conflicts and trade restriction.[610] Before imposing unilateral standards, countries can engage in close consultation with affected producers and governments.[611] A country negotiatesor concludes bilateral or multilateral agreements before taking a unilateral measure that is a less trade-restrictive and reasonably available alternative in the WTO.[612]

Second, unilateral measures will be justifiable when they are neither discriminatory nor protectionist under the international trading system. When international action fails to

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[607] Murase 1999, *supra* note 447, at 424; Cheyne, *supra* note 541, at 461; Esty, *supra* note 5, at 144.

[608] *See supra*, Chapter 5.2 of this dissertation.

[609] Parker, *supra* note 540, at 109-10.

[610] *Id.* at 112.

[611] *Id.* at 118.

[612] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 166-170.

resolve transboundary pollution, it is likely that there will be more national measures, such as trade policy measures, enacted to achieve the national goal of reducing the pollution.[613] The *US-Shrimp (21.5)* Appellate Body's decision seems likely to leave room for a State to take unilateral measures for environmental protection given that it ruled that the United States' multilateral efforts to protect turtles were "good faith efforts" and that was enough to potentially justify trade restrictions.[614] However, failure to come to agreement through a multilateral negotiation or cooperation must not necessarily justify a country's reliance on unilateral measures. The *US-Shrimp (21.5)* decision did not support the United States taking measures even after it engaged in good faith efforts to reach a multilateral agreement. Rather the Appellate Body ruled that the United States' efforts to achieve multilateral agreement with all relevant parties met the non-discrimination requirement under the Article XX Chapeau, but that alone did not make the US action compliant with the WTO.[615] Thus, protectionist or arbitrary measures will be viewed as illegimate and unjustifiable trade measures, and not as environmentally justifiable trade measures.[616] Unilateral measures are legitimate only when they are proved to be necessary or relating to environmental policy objective.

Third, retaliation through trade measures must only be compensatory and therefore,

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[613] Peter J. Lloyd, *The Problem of Optimal Environmental Policy Choice, in* THE GREENING OF WORLD TRADE ISSUES 49, 49 (Kym Anderson & Richard Blackhurst ed., 1992).

[614] US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶ 5.88; Birnie et al., *supra* note 23, at 776. The Author also evaluated the *Shrimp* decision and its interpretation that a country's unilateral measure would be justified if it is taken after negotiations and attempts at cooperation fail.

[615] US-Shrimp (Article 21.5) Appellate Body Report, *supra* note 509, ¶¶ 122, 134.

[616] Parker, *supra* note 540, at 111-12.

equivalent to the value of the nullified or impaired trade obligation.[617] WTO legal barriers against trade restrictions only are removed to the point at which the value of the environmental goals can justify overriding the WTO's economic goals.[618] Further, the WTO views trade measures as the last resort for environmental protection in international relations.

When a trade measure is illegitimate, it will lose its effectiveness as either a countermeasure or an enforcing tool in the WTO.[619] Thus, when a WTO Member State takes trade measures to enforce national environmental policy goals or international obligations under the MEAs, it must also consider obligations and requirements under the WTO.

6.5. Summary

A State can justify its unilateral measures on the grounds that those measures are aimed at taking a countermeasure to address its environmental or economic injuries or aimed at enforcing its environmental policies or obligations under the MEAs. A State can restrict trade unilaterally for foreign producers unless they comply with its environmental policy objective. The harmonization requirement is a pre-requisite for a State to take unilateral measures. In other words, a State chooses unilateral trade measures to force other States to harmonize toward its environmental policies or MEAs' environmental policies. However, this State's unilateral approach conflicts with the WTO's multilateral

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[617] DSU, *supra* note 21, art. 22.4; EC-Banana Arbitration Report, *supra* note 555, ¶¶ 6.43, 6.16; EC-Hormone Arbitration Report, *supra* note 555, ¶ 40 (WT/DS/26/ARB), ¶ 39 (WT/DS48/ARB); Hudec 1996b, *supra* note 64, at 115.

[618] *See* Hudec 1996b, *supra* note 64, at 109, 120, 123, 127.

[619] Parker, *supra* note 540, at 111.

approach when the unilateral approach is discriminatory or trade-restrictive against foreign products.

The WTO provides its Members with uniform international trade regulations to adjust national policies and regulations and establish common economic policies and laws in international trade. The WTO prefers its Member States to take multilateral approaches, through negotiation, cooperation, and agreement adoption, to create an internationally harmonized trading system rather than to take unilateral measures. The main reason the WTO discourages using unilateral measures is that States misuse such unilateral measures for protectionist purposes. Because trade barriers based on environmental policies or regulations are non-tariff barriers, the WTO does not prefer them. From the WTO perspective, it prefers its Members to engage in its legal proceedings or to adopt multilateral resolutions to avoid trade conflicts between countries and to secure the international trade system.

Unilateral trade measures are not necessarily "optimal policies" or "efficient methods" to address environmental problems.[620] In terms of international cooperation, some policies can be suggested to address environmental problems by providing compensation, offering financial assistance, or engaging in a system of technology transfer rather than to implement discriminatory trade restrictions.[621] For example, to protect sea turtles, the United States would have provided its counterpart countries with financial assistance or technology transfer to promote the use of TEDs rather than promoted the use of TEDs by

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[620] Snape, *supra* note 506, at 84, 86; GATT Report 1992, *supra* note 2, at 4, 25-26; Esty, *supra* note 5, at 69-70.

[621] GATT 1992, *supra* note 2, at 27-30.

restricting the import of shrimp caught without using TEDs. In contrast to the *US-Shrimp* decision, one of reasons the *US-Shrimp (21.5)* Panel upheld the U.S. measure was that it recognized the U.S.'s effort to use a multilateral approach to resolve the problem, namely providing for the technololgy transfer of TEDs, meets the non-arbitrary or not-unjustifiable discrimination requirements under the GATT Article XX Chapeau.[622]

Even though the WTO does not prefer unilateral measures, it does not prevent all unilateral measures, but rather only those unilateral measures that have the ability to coerce other States to adopt the same environmental policies. When a State's unilateral measures are coercive, they are not acceptable because they can intrude on other States' rights to implement their own environmental policies. In some instances, trade measures may be the effective enforcement mechanisms.[623] A country's unilateral measures can be permitted where no available enforcement alternatives or international agreements exist.[624] However, "justifiable" measures must be distinguished from "unjustifiable coercive" measures.[625] If coerciveness is involved in a national environmental policy, then that policy will not be acceptable in either international law or the WTO. The next chapter further discusses how this coercive unilateral measure affects other States' rights.

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[622] US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶¶ 5.118-5.120. The difference between *US-Shrimp* and *US-Shrimp (21.5)* is that, in *US-Shrimp*, the U.S. provided technology transfer of TEDs only to the fourteen Caribbean/Western Atlantic countries, and this was found to be "unjustifiable discrimination" between countries and inconsistent with the GATT Article XX Chapeau. *See* US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 175-176.

[623] Snape, *supra* note 506, at 86; GATT Report 1971, *supra* note 20, at 4.

[624] GATT Report 1971, *supra* note 20, at 4.

[625] Parker, *supra* note 540, at 122.

7. A STATE'S SOVEREIGN RIGHTS AND OBLIGATIONS IN THE WTO TO HARMONIZE ENVIRONMENTAL POLICIES

7.1. Introduction

Environmental problems cannot be resolved "in isolation" because environmental considerations are intertwined with social and cultural values and economic development.[626] A nation's environmental regulations and policies may differ from other countries on the basis of that nation's pollution level, technical and economic capacity, and value preference.[627] Thus, environmental problems are dealt with more efficiently within a state's own policy objectives.[628] International relations require these value preferences to be respected within each country due to the principle of state sovereignty.[629]

Harmonizing environmental policies toward a specific set of domestic environmental policies or international rules would be contrary to the principle of state sovereignty. A State's right can constrain another State's right to implement and enforce its own environmental policies when a State exercises its right unilaterally in order to coerce another to adopt uniform environmental policies. This State harmonization requirement can threaten the other State's sovereignty. The State harmonization requirement can also conflict with the WTO harmonization requirement, which tries to

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[626] Brownlie, *supra* note 458, at 275.

[627] Esty, *supra* note 5, at 157; Jackson 1994, *supra* note 16, at 600; OECD 1974, *supra* note 109, ¶¶ 6, 9, 21-27; Robertson, *supra* note 15, at 311.

[628] Bhagwati 1993, *supra* note 7, at 165.

[629] Brownlie, *supra* note 458, at 289.

balance rights between States. The State harmonization requirement needs to balance a State's right to implement and enforce environmental policies and a State's obligation to respect others' rights.

Harmonizing regulations toward WTO rules can also hurt States' sovereign rights to determine and enforce their environmental policies. The WTO requires a Member State to abide by WTO obligations and to implement the ruling of the WTO DSBs when it is a party to the dispute. This WTO harmonization requirement is criticized for overwhelming its Member States' sovereignty over their domestic economic or environmental policies. WTO harmonization requires a State to balance its own rights and its obligations under the WTO.

Because the State sovereignty principle grants a State absolute discretion over its implementation of policies within its jurisdiction, it is critical for a State to argue for respect of its sovereignty when a State's environmental policies are significantly challenged by another State's policy requirement or a WTO institutional requirement. Both the State and WTO harmonization requirements can affect States' right to implement and enforce national environmental policies. The former would justify its intervening in others' sovereign rights based on common concern of environmental protection; and the latter requires Member States to introduce a homogenized trading system and conform their domestic economic policies to WTO rules.

This chapter discusses these two different scenarios of when and how the State or the WTO harmonization requirement affects a State's sovereignty to implement and enforce its own domestic environmental policies. It is organized as follows: section 7.2 discusses

the principle of state sovereignty in international law; section 7.3 examines a State's unilateral action affecting other States' sovereign right to legislate and enforce their environmental policies and laws; and, section 7.4 analyzes the WTO harmonization requirement and States' sovereign right to make environmental policies.

7.2. The State Sovereignty Principle in International Relations

Sovereignty is a State's "internal power or constitutional capacity."[630] State Sovereignty represents three aspects: exclusive jurisdiction, state equality, and non-intervention.[631] A State has "absolute power over its subjects" such as its population and territory internally.[632] Sovereignty grants equality of States in international relations so a State is not constrained by any other higher powers.[633] Thus, no State can intervene in the area of another States' sovereignty.[634] However, this traditional concept of state sovereignty is not completely acceptable in modern international relations. The absolute character of sovereignty is challenged in certain circumstances related to human rights violations, war

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[630] Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 1 RECUEIL DES COURS 9 (1964); Brownlie, *supra* note 458, at 289.

[631] Brownlie, *supra* note 458, at 289; John H Jackson, *Sovereignty: Outdated Concept or New Approaches*, *in* REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 3, 4 (Wenshua Shan, Penelope Simons & Dalvinder Singh eds., 2008) [hereinafter Jackson 2008]; Vaughan Lowe, *Sovereignty and International Economic Law*, *in* REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 77, 83 (Wenshua Shan, Penelope Simons & Dalvinder Singh eds., 2008).

[632] *See* Brownlie, *supra* note 458, at 289; Jackson 2008, *supra* note 631, at 11; John Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, *in* THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 367, 369 (2000) [hereinafter Jackson 2000].

[633] Brownlie, *supra* note 458, at 289; Jackson 2008, *supra* note 631, at 4, 11.

[634] Brownlie, *supra* note 458, at 289; Jackson 2008, *supra* note 631, at 4; Lowe, *supra* note 631, at 83.

crime, or terrorism.[635] Therefore, States or international organizations can justify their intervention into the sovereign territory of another State on the ground of resolving global concerns.

Globalization has also contributed to changing the traditional doctrine of exclusive state sovereignty[636] because it has increased political, legal, and economic limitations on it.[637] Increased interdependence through globalization increases the influence other States' actions and obligations of international institutions have on a State.[638] International institutions play an important role in coordinating international matters, which are difficult for a nation-state to resolve on its own.[639] This international interdependence engenders tension between traditional state sovereignty and the international regime.[640]

State's economic regulatory decisions can come into conflict with the mechanisms for international cooperation where a State's national policies do not comply with

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[635] Jackson 2008, *supra* note 631, at 13, 20; Lowe, *supra* note 631, at 80;

[636] Jackson 2008, *supra* note 631, at 3; *see generally* Jackson 2000, *supra* note 632; *see also* Lowe, *supra* note 631; Ernst-Ulrich Petersmann, *State Sovereignty, Popular Sovereignty, and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?, in* REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 27 (Wenshua Shan, Penelope Simons & Dalvinder Singh eds., 2008); Michael W. Dunleavy, *The Limits of Free Trade: Sovereignty, Environmental Protection, and NAFTA, in* NAFTA AND THE ENVIRONMENT 265 (Seymour J. Rubin & Dean C. Alexander eds., 1996).

[637] Petersmann, *supra* note 636, at 28. The author defines sovereignty from the human rights perspective. According to the author, modern sovereignty reallocates power from the government to individuals or people. Respect for individuals includes diversity and regulatory competition in international trade. From the perspective of human rights, the free trade system must be supported because the sovereignty to engage in free trade can help ensure human rights. The GATT and the WTO are based on the liberalization and regulation of welfare-reducing trade barriers, and thus the WTO is the mechanism through which individuals can gain sovereign rights. *Id.* at 28-32; *see also* Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

[638] Jackson 2008, *supra* note 631, at 10.

[639] *Id.* at 6.

[640] *Id.*

obligations under the international institutions.[641] For a State to cooperate in international relations, it must concede some of its state sovereignty.[642] By way of example, States consent to be bound by international legal constraints that arise out of treaties.[643] Thus, accepting any treaty reduces a national government's freedom of actions because some actions may be inconsistent with the treaty and thus would be a violation of international law.[644] WTO Member States' rights also are constrained because they gave up some of their sovereignty by conferring their rights to the WTO to achieve some important policy results.[645]

However, these modern aspects of sovereignty do not necessarily prevail over States' sovereign rights. A State's obligations under international law must be recognized to the extent that the State consents. An international organization must exercise its power in a way that is based on each State's sovereign values because the meaning of sovereignty differs in different States.[646] When an intervention overwhelms State sovereignty to address issues of the global commons, it must be exercised only under the auspice of international law principles. The following sections discuss whether a State's sovereign right is constrained by the unilateral action of another State and obligations of international law.

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[641] Jackson 2008, *supra* note 631, at 22; Dunleavy, *supra* note 636, at 265.

[642] Dunleavy, *supra* note 636, at 271

[643] Brownlie, *supra* note 458, at 289; Jackson 2008, *supra* note 631, at 11; Jackson 2000, *supra* note 632, at 369.

[644] Jackson 2000, *supra* note 632, at 380.

[645] *Id.* at 379.

[646] DAN SAROOSHI, INTERNATIONAL ORGANIZATION AND THEIR EXERCISE OF SOVEREIGN POWERS 9-11 (2005).

7.3. A State's Unilateral Action Affecting Other States' Sovereignty

7.3.1. A State's Unilateral Action Affecting Other States' Sovereignty to Enforce Environmental Policies

7.3.1.1. A State's Unilateral Action Affecting Other States' Sovereignty to Enforce Domestic or International Environmental Policies

A State's unilateral action based on its domestic environmental policies or its international obligations under MEAs can constrain other States' sovereign rights. A State has the sovereign right to implement its policies and to impose trade restrictions to achieve both its domestic environmental goals and the goals it has taken collectively through MEAs.[647] However, a State's authority to enforce its environmental policies is limited in international relations when its exercising authority is only a unilateral action affecting sovereign rights of other States. A State's unilateral action constrains other States' sovereign rights to regulate and implement their environmental policies when it puts pressure on others to make their national policies more uniform.[648] This unilateral constraint results in a State's intervening in the environmental policies of other States by using economic rules.[649] A State's intervening national policies go against the sovereignty

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[647] As for unilaeral measures to enforce domestic rules or international rules, *see supra*, Chapter 6.3.2. of this dissertation.

[648] Daniel Bodansky & Jessica C Lawrence, *Trade and Environment, in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 505, 522 (2009).

[649] When a State affects other States' domestic environmental policies, such action can be considered eco-imperialism. Weiss 1992, *supra* note 542, at 732. The author defines eco-imperialism as instances "when the strong nations use trade power to force their preferred values on the weaker nations while the equally autonomous values of the weaker nations cannot be forced upon the stronger nations in the same way, strong nations' action can be called eco-imperialism." *Id.*; *see also* Bhagwati & Srinivasan, *supra* note 8, at 181; Bhagwati 1993, *supra* note 7, at 171.

principle of international law, that a State's domestic problems should be solved within its own jurisdiction. States and international institutions must "refrain from intervening in the internal or external affairs of other States."[650]

Therefore, when a State's unilateral measure poses the potential to infringe on another State's sovereignty, there has to be a balance between a State's right to take measures and another State's right to implement its own environmental policies. Here three different types of balance between States can be considered: first, balance between States' rights to implement their domestic policies; second, balance between a State's common concern for environmental conservation and another State's discretion to choose its own policy; and, third, balance between a State's right to take environmental measures and its obligation to respect other States' rights under the WTO.

First, the State harmonization requirement to compel another State to adopt uniform environmental policies must consider the balance between States making their own choices to shape their environmental policies. Under international law and in the WTO, a State is not permitted to take unilateral action to coerce other States to make their domestic policies uniform with the other State's because this can hinder other States' rights to implement their environmental policies. Thus, balance is required when a State's policy choice affects another State's policy. Rio Principle 2 provides that each State has the sovereign right to choose its own environmental policies on the basis of its national need.[651] WTO decisions

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[650] Browline, *supra* note 458, at 292.

[651] Rio Declaration, *supra* note 67, principle 2. In addition, States have to consider its obligation not to damage the environment of other States. Principle 2 says that "[s]tates have ... the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

have ruled against a State's unilateral measure when it affects another States' right to make policy choices. The Panel in *US-Tuna* noted that a State's unilateral measures based on the environmental exceptions provided by the GATT Articles XX(b) and XX(g) can "jeopardize other States' rights" under the GATT.[652] The *US-Shrimp* Appellate Body recognized that the 1996 Guidelines and certification requirements under Section 609 prevented other countries from executing and implementing their own domestic policies.[653] Meanwhile, in international trade, some constraints exist related to the rights of trading countries because the exporting country must meet the requirements of the importing country in order to access the importing country's market.[654] Constraints exist both in one State's taking coercive unilateral measures, and in another State's accessing the market. Accordingly, to create a balance between States' policy choices, a State must respect another States' autonomy and right to determine and implement their national environmental policies under international law and the WTO.

Second, a State taking environmental measures needs to balance between a State's common concern on environmental conservation and another State's discretion to make its own policy choice. Trade measures can be allowed when international agreements use economic sanctions to enforce their provisions preventing transboundary environmental harm.[655] State's measures are also permitted when there is no international agreement to enforce to address the problem, or when no alternative exists to achieve national

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[652] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.27, 5.32; US-Tuna (EEC), *supra* note 12, ¶ 5.26.

[653] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 161.

[654] *See supra*, Chapter 6.2.1 of this dissertation.

[655] GATT Report 1971, *supra* note 20, at 4.

environmental policy objectives.[656] However, the notion that the protection of the environment is a common concern "as a whole" can weaken a nation-state's autonomy over its conventional jurisdiction.[657] International obligations under MEAs do not necessarily authorize a State the legal justification to take unilateral measures.[658] There needs to be a balance between a State's common concern for the environment environmental protection and another State's discretion of policy choice. Rio Principle 12 finds the balance in "international consensus" by encouraging States to rely on international consensus when taking environmental measures to deal with transboundary or global environmental problems.[659] Thus, balance between a State's common concern and another' discretion lays in creating international cooperation related to environmental conservation for areas of common concern.

Third, a State's rights are constrained to the extent necessary to ensure its obligation to respect other States' rights in the WTO and not excessively exercise discretion in a way

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[656] *Id.*

[657] Bhagwati 1996b, *supra* note 18, at 10-11. Some argue that unilateral measures "outside national jurisdiction" to protect the global commons should be acceptable because enforcement of protection of the global commons is recognized as a nation's obligation under customary international law. Weiss 1992, *supra* note 542, at 731-33. However, under international law, it is not established yet whether environmental protection is an international responsibility or whether global environmental damage is considered an international crime.

[658] Hudec 1996b, *supra* note 64, at 157.

[659] Rio Declaration, *supra* note 67, principle 12. It states:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

that affects other States' rights to market access in international trade. Allowing States to enact national environmental policies under the concept of state sovereignty can, in fact, give a State a way to disguise trade protectionism by claiming a legitimate environmental protection goal.[660] National governments decisions should be given considerable deference, but that deference should not be absolute.[661] When a country is granted the absolute discretion to determine its environmental policies, it can abuse this power in using its policies to justify trade protectionism.[662] A State's excessive exercise of its rights will not be allowed in the WTO because it can threaten other Member States' right to trade freely. The *US-Shrimp* Appellate Body noted that prohibiting a State's abuse of right is a general principle of international law.[663] In this context, the WTO requires its Member States to balance between a State's discretion to take environmental measures and another State's right to access to the global market. The next section discusses this balance further.

In sum, in international relations, a State has the right to implement its environmental policies and to take measures to enforce them. However, this unilateral action is limited to the extent necessary for other States to exercise their rights. A State's right to take measures on the basis of environmental policy must be balanced with other States' autonomy to make environmental or economic policy choices.

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[660] Esty, *supra* note 5, at 57; Dunleavy, *supra* note 636, at 272.

[661] Esty, *supra* note 5, at 58.

[662] *Id.* at 57-58.

[663] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 158.

7.3.1.2. A State's Rights of Environmental Protection and Other States' Rights under the WTO

The WTO encourages its Member States both to exercise their own rights to take environmental protection measures and to respect other States' rights under the WTO. The purpose of the GATT 1994 and WTO covered agreements is not to guarantee that Members use domestic policies of specific technical regulations, SPS measures, subsidies, anti-dumping duties, or countervailing duties, but rather to ensure that these domestic policies do not undermine market access rights.[664] The 2001 Ministerial Declaration (Doha Declaration) reaffirmed the objective of sustainable development in the WTO[665] and recognizes environmental protection and social development as part of the mandate of an economic system.[666] The Doha Declaration also notes that Members' measures should not constitute an "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade" and those measures should be in accordance with the WTO agreements.[667] Those principles are also embodied in both the SPS Agreement and TBT Agreement.[668] The GATS also requires a Member State not to take "arbitrary or unjustifiable discrimination" or "a disguised restriction on trade in services" in adopting or

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[664] Roessler, *supra* note 232, at 42, 52; Debra P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 J. INT'L ECON. L. 483, 491-92 (2007)

[665] World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 6, WT/MIN(01)/DEC/1 (Nov. 20, 2001), 41 I.L.M.746 (2002) [hereinafter Doha Declaration].

[666] Marie-Claire Cordonier Segger & Markus W. Gehring, *Introduction* to SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW, *supra* note 33, at 5, 21.

[667] Doha Declaration, *supra* note 665, ¶ 6.

[668] SPS Agreement, *supra* note 172, preamble ¶ 1, arts. 2.3, 5.5; TBT Agreement, *supra* note 178, preamble ¶ 6.

enforcing measures necessary to protect human health or the environment.[669] Even though safeguard measures are allowed under Article XIX of the GATT 1994 and the Safeguard Agreement, they require an "injury" test to constrain Member States' ability to revoke concessions exceeding the costs to its trading partners.[670] While the GATT and the WTO have granted Members' the right to choose their own economic system and trade policies,[671] they have not allowed Members' measures when they are arbitrary or unjustifiable discrimination and a disguised restriction on international trade. These provisional devices impose a certain degree of constraint on WTO Member States' ability to exercise their right in order to defend other Member States' market-access rights. This implies that, if the WTO decides to include an Environment Agreement as one of its covered agreements, then that WTO Environment Agreement would regulate environmental measures not to hinder international trade, but rather to provide a framework for environmental protection in international trade.

The WTO Panels and Appellate Bodies have found it necessary to limit Member States' abuse of national environmental policies.[672] The Appellate Body confirmed this by

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[669] GATS, *supra* note 176, art. XIV(b). It states:

> 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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (b) necessary to protect human, animal or plant life or health.

[670] Sykes 1991, *supra* note 352, at 286, 298.

[671] In *Italy- Agricultural Machinery*, in which Italy extended favorable credit to purchasers of Italian-made tractors and the UK brought action alleging violation of national treatment provision in Article III:4, the Panel found that the GATT does not limit the right of a member State to adopt measures that appeared necessary to it to foster its economic development or to protect a domestic industry, provided that such measures were permitted by the GATT. Italy-Agricultral Machinery, *supra* note 216.

[672] US-Tuna (Mexico), *supra* note 12, ¶ 6.2; *see also* US Gasoline Panel Report, *supra* note 230, ¶ 7.1; US Gasoline Appellate Body Report, *supra* note 264, at 30; US-Shrimp Panel Report, *supra* note 212, ¶¶

ruling that the GATT Article XX Chapeau shows that WTO Members recognize "the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX ... and the substantive rights of the other Members under the GATT 1994."[673] Thus, States' environmental policy goals are legitimate only when they comply with obligations under WTO rules, respect other Members' rights under the WTO, adhere to the non-discrimination and non-protectionist principles, and secure the multilateral trading system of the WTO. In this context, the statement of the *US-Shrimp (Article 21.5)* Panel is controversial. It noted that Malaysia's environmental policy priorities can be distorted to meet the policy requirements of the United States in order to export shrimp to the United States.[674] This statement seems to imply that a certain level of constraint on the exporting State's policy priority is acceptable in order to respect the importing State's autonomy to implement its environmental or economic policies. However, the Panel's choice to use the term "distort" was not appropriate in terms of a State's national policy priorities or sovereign right.

In sum, while the WTO recognizes that a Member State has the right to determine and implement its environmental policies; it also encourages that Member State to respect other States' rights to choose their own economic and environmental policies.

6.6, 7.45, 7.55, 9.1; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 186; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 210.

[673] US-Shrimp Appellate Body Report, *supra* note 12, ¶¶ 156-159; *see also* US-Shrimp (Article 21.5) Panel Report, *supra* note 243, ¶¶ 5.50, 5.51; Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 224.

[674] US-Shrimp (Article 21.5) *Panel* Report, *supra* note 243, ¶ 5.103.

7.3.2. A State's Unilateral Measures Acting Extra-territorial Jurisdiction for Environmental Protection

States have jurisdiction, which is "the general legal competence of States such as judicial, legislative, and administrative competence within its territory."[675] A State has the authority to regulate and to enforce those regulations within its territory.[676] When a State's law binds the sovereignty of other States, the exercise of law is an "excess of jurisdiction" or extra-jurisdiction.[677]

Jurisdiction is based on the principle of territoriality where every State possesses an exclusive authority over its nationals within its territory.[678] One of the fundamental principles of international law is that a nation's public law can only be applied and enforced in its territory and that any extraterritorial extension of sovereign power is unjustified.[679] Extraterritorial jurisdiction has "significant harmful effects within the territory asserting jurisdiction."[680] A State cannot take measures or enforce national laws in the territory of another State unless that State consents[681] because a State's extraterritorial action can limit the jurisdiction or sovereign rights of other States.[682] A State can exercise extraterritorial

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[675] Brownlie, *supra* note 458, at 299; *see also* Mann, *supra* note 630, at 30; *see generally* Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser.A/B) No.53 (Apr. 5, 1933) (recognizing that jurisdiction is one of the most obvious forms of the exercise of sovereign power).

[676] Brownlie, *supra* note 458, at 299; Mann, *supra* note 630, at 9-15. The author distinguishes international jurisdiction from domestic jurisdiction of internal power, constitutional capacity or sovereignty. *See* Mann, *supra* note 630, at 9.

[677] Mann, *supra* note 630, at12, 24-28.

[678] Brownlie, *supra* note 458, at 299, 309; Mann, *supra* note 630, at 24-40.

[679] Murase 1995, *supra* note 510, at 349.

[680] Higgins, *supra* note 17, at 74.

[681] Brownlie, *supra* note 458, at 299, 309.

[682] Lallas et al., *supra* note 193, at 340. Extra-territorial jurisdiction includes nationality, protective,

jurisdiction only when "its exercise is not excessive and it does not attempt to enforce its jurisdiction within the territory of another State."[683] It is unacceptable for a State to try to enforce its laws upon its nationals when they are in another State's territory.[684]

Extraterritorial jurisdiction will be legitimate in certain instances including "the non-intervention principle, the proportionality principle, and the substantial link."[685] As interdependence between States is increased, the absolute application of the principle of territorial jurisdiction is difficult.[686] Even though a State cannot enforce its jurisdiction outside its territory, a State may be able to create legal norms, which effectively control the conduct outside its territory.[687] In this instance, a State's extraterritorial exercise of jurisdiction is legitimate only when it does not intervene with the jurisdiction of other States under established international law.[688] A State's extraterritorial jurisdictional measure must be mutual and proportionate with the other States' breach of international law.[689] To apply extraterritorial jurisdiction, a State must demonstrate that its exercise of

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passive-personality, and universal jurisdiction. The nationality principle grants a State the jurisdiction over its nationals within its territory and abroad. The passive-personality principle grants a State the jurisdiction over its national outside territory when its nationals are harmed. The protective principle grants a State the jurisdiction outside territory for its security. Universal jurisdiction grants a State the jurisdiction outside its territory or over non-nationals for international crimes such as genocide, war crimes, piracy, or slavery. *See* Higgins, *supra* note 17, at 56-65, 73-74; *see also* Brownlie, *supra* note 458, at 300-307.

683 Higgins, *supra* note 17, at 73.

684 *Id.*

685 Brownlie, *supra* note 458, at 311-12.

686 Mann, *supra* note 630, at 36-40.

687 Murase 1995, *supra* note 510, at 351.

688 Brownlie, *supra* note 458, at 311-12.

689 *Id.*

jurisdiction is substantially linked to the subject-matter.[690] In the *US-Tuna* case, there was no "direct link" between "the act of incidental killing of dolphins" and "the act of importing tuna into the United States."[691] The Panel ruled against the United States' import restriction because of this lack of a direct link between "protection of dolphins and import restriction of tuna" could make the Panel rule against the import restriction of the United States.[692]

A State's unilateral action to affect areas outside its jurisdiction is not allowed under the established international law and the WTO.[693] Extraterritorial jurisdiction is "distinguished" from extra-jurisdiction.[694] Extra-jurisdiction is when a state acts in excess of its own jurisdiction.[695] It is a fundamental principle of international law that a State cannot exercise jurisdiction over nationals and territory with which it "has no absolute concern."[696] Meanwhile, extraterritorial jurisdiction implies that a country exercises its jurisdiction outside its territory.[697] The *US-Tuna (EEC)* Panel distinguished extraterritorial jurisdiction from extra-jurisdiction. While the *US-Tuna (Mexico)* Panel used the term of "extra-jurisdiction," the *US-Tuna (EEC)* Panel introduced the term of "extra-territorial jurisdiction" regarding environmental conservation.[698] The *US-Tuna*

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[690] *Id.* at 352-54; Mann, *supra* note 630, at 43-51.

[691] Murase 1995, *supra* note 510, at 353.

[692] *Id.* at 354.

[693] Bhagwati & Srinivasan, *supra* note 8, at 179.

[694] Birnie et al., *supra* note 23, at 771.

[695] Mann, *supra* note 630, at 37, 43-51.

[696] The Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation, (1933) 49 CLR 220, 235, 236, 239 (Austl.)

[697] *See generally* Brownlie, *supra* note 458, at 299-311.

[698] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.25-5.32; US-Tuna (EEC), *supra* note 12, ¶¶ 5.15-5.33.

(Mexico) Panel rejected Parties' extra-jurisdictional application of GATT Articles XX(b) and XX(g) to protect the environment on the basis that natural resources were only "within the jurisdiction of the importing country under GATT Articles XX(b) and XX(g)."[699]

GATT Article XX has been interpreted to allow conditionally national measures when they are for the protection of extraterritorial resources.[700] GATT/WTO decisions recognized the exercise of extraterritorial jurisdiction to protect the environment in certain circumstances. The Panel in *US-Tuna (EEC)* and the Appellate Body in *US-Shrimp* recognized that certain circumstances warrant States using extra-territorial jurisdiction to protect and conserve natural resources under GATT Article XX.[701] The *US-Tuna (EEC)* Panel noted that "the text of Article XX does not spell out any limitation on the location of the exhaustible natural resource to be reserved under Article XX(g) and of the living thing to be protected under Article XX(b)."[702] There the Panel found that "states could regulate only the conduct of their own nationals and vessels outside of their territory to conserve the living things and the exhaustible natural resources under Article XX(b) and XX(g)."[703] The Appellate Body in *US-Shrimp* noted that "there is sufficient nexus between the migratory species and the United States jurisdiction for the purpose of Article XX(g)."[704]

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[699] US-Tuna (Mexico), *supra* note 12, ¶¶ 5.26, 5.31-5.32. The Panel ruled that, since a country can only control production or consumption within its jurisdiction, a trade measure would have to be taken within its jurisdiction under Article XX(g). *Id.* ¶ 5.31. *See also* Cheyne, *supra* note 541, at 452-53.

[700] Birnie et al., *supra* note 23, at 771.

[701] US-Tuna (EEC), *supra* note 12, ¶¶ 5.15, 5.20, 5.31-5.33; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 133.

[702] US-Tuna (EEC), *supra* note 12, ¶¶ 5.15, 5.20, 5.31-5.33.

[703] *Id.* ¶¶ 5.17-5.20, 5.33. This decision "is based on the active personality jurisdiction under which a State may control the actitivies of its own nationals." Schoenbaum 1997, *supra* note 200, at 280; Cheyne, *supra* note 541, at 455.

[704] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 133.

The Appellate Body recognized this nexus only in "specific circumstances," for example the fact that sea turtles can freely "pass in and out of waters subject to the rights of jurisdiction of various coastal States."[705]

These cases conditionally recognized that GATT Articles XX(b) and XX(g) allow for national measures designed to protect resources using extraterritorial jurisdictions, but not measures that are extra-jurisdictional.[706] However, the application of extraterritorial jurisdiction is limited. When a country decides to apply its domestic law extraterriorially, that is a unilateral decision by that country, not a decision made by international agreements.[707] In these instances, extraterritorial application may involve a government's unilateral action that goes against a foreign government's different policy objective.[708]

In summary, within its own jurisdiction, a State is free to enact environmental regulations and enforce those regulations related to both domestic and global concerns. However, a State cannot exercise its power beyond its jurisdiction. In addition, because the theory of state sovereignty is based on territoriality, a State cannot regulate and implement its domestic environmental policies outside its territory except in certain instances. Under international law and the international trade system, a State's unilateral action taken outside of its jurisdiction is limited to instances where a substantial link exists between trade measures and an environmental policy objective.[709]

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[705] *Id.*

[706] Cheyne, *supra* note 541, at 453; Schoenbaum 1997, *supra* note 200, at 280.

[707] Murase 1999, *supra* note 447, at 437.

[708] *Id.*

[709] Bhagwati & Srinivasan, *supra* note 8, at 179.

7.4. The WTO Harmonization Requirement and a State's Sovereignty Rights

The issue of how the WTO harmonization affects state sovereignty can be examined in terms of relationship between the WTO harmonization requirement and a States' diversity in value preferences, and between a State's obligations and rights under the WTO. This section discusses these issues.

7.4.1. The WTO's Harmonization and a State's Diversity of Environmental Policies

Harmonizing to the WTO requires reconciliation with national economic policy choices. The WTO strives to expand the harmonized international trading mechanism, which improves economic development through the reduction of tariffs and trade barriers, and elimination of discriminatory treatment.[710] For States to harmonize toward international rule and eliminate policy differences across borders, they must make concessions related to their sovereignty.[711] Further, requiring a State to accept internationally harmonized economic rules can preclude a State from determining internally optimal economic policies.[712] National economic policies clash with international economic regulations when national value policy preferences disfavor foreign products.[713] Thus, the WTO harmonization requirement needs to be reconciled with State's national policy choices, which are based on diversity in each country.

A uniform legal system between States can be attained by accepting internationally

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[710] GATT 1994, *supra* note 169, preamble; WTO Agreement, *supra* note 74, preamble.

[711] Dunleavy, *supra* note 636, at 268-69.

[712] Leebron, *supra* note 8, at 65; Dunleavy, *supra* note 636, at 269.

[713] Jackson et al., *supra* note 184, at 539.

harmonized system or by introducing a legal system of other States. On the one hand, international instruments can provide States with internationally harmonized system. On the other hand, the State's previously introduced legal system could serve as a model for other States' legal systems, which would also result in uniform or similar legal systems or policies. A uniform legal system or policies, thus, can reflect a State's willingness to accept previously successful legal systems or policies. However, implementing a uniform legal system and policies in each State will not necessarily be exactly the same because changes can occur in the process of a State accepting and incorporating either international or another State's legal system or policies into its domestic ones. Every country has its own specific social, cultural, religious, political, and economic priorities.[714] Thus, any uniform international system must recognize that there will be a large degree of diversity due to cultural differences, historical backgrounds, government systems, or economic attainment and adjust accordingly.[715]

In the WTO's international economic mechanism, it can be controversial to have different treatment on the ground of different value preferences.[716] In this context, the WTO can be criticized for being a homogenizing force on culture and community.[717] In *Canada-Herring and Salmon*, the Canadian policy regulating exports of unprocessed salmons and herrings was for the continuation of its longstanding fishery resource

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[714] Jackson 1969, *supra* note 120, at 56.

[715] Jackson 1994, *supra* note 16, at 600.

[716] Jackson 1992, *supra* note 68, at 1243.

[717] Steve Charnovitz, *Competitivenes, Harmonization, and the Global Ecolonomy, in* AGRICULTURE, TRADE, AND THE ENVIRONMENT: DISCOVERING AND MEASURING THE CRITICAL LINKAGES 47, 56 (Maury E. Bredahl, Nicole Ballenger, John C.Dunmore, & Terry L.Rose ed., 1996).

preservation and management program, which had existed in Canada's west coast since 1908, was called into question.[718] In its defense, Canada noted that each country could have "different national priorities on fisheries."[719] The Panel recognized "the harvest limitations restrictions on domestic production" as measures within the meaning of Article XX(g), but ruled against Canada because Canada could preserve fisheries without imposing export prohibitions on them.[720] In *Thailand-Cigarette*, the Thailand Tobacco Act, which was implemented in 1938, was declared inconsistent with the GATT rules.[721] In both instances, long-standing policies were declared incompatible with the GATT/WTO. These diverse priorities in national policies raise a question about to what extent the WTO requires its Member States to alter their value preferences in social, cultural, political or economic policies to make them more uniform with the WTO's economic rules.[722]

The WTO does not require its Member States to enact and implement the same economic policies and laws.[723] WTO rules do not address Member States' harmonization of regulations or standards, but rather provides Member States with rules for international trade.[724] Except for tariff concessions, WTO Member States are free to legislate, implement, and enforce their domestic policies and laws so long as they are compatible

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[718] Canada-Herring and Salmon, *supra* note 247, ¶¶ 3.5-3.7.

[719] *Id.* ¶¶ 3.7.

[720] *Id.* ¶¶ 4.4, 4.7

[721] Thailand-Cigarettes, *supra* note 248, ¶ 87. Requirements of existing legislation to be effective in the WTO are to: be legislation in the formal sense; predate the Protocol; and, be mandatory in character by its terms or expressed intent. *Id.* ¶ 83; *see also* GATT Panel Report, *Norway-Restrictions on Imports of Apples and Pears*, ¶ 5.7, L/6474 (Jun. 22, 1989), GATT B.I.S.D. (36th Supp.) at 306.

[722] Jackson 1969, *supra* note 120, at 295.

[723] Robertson, *supra* note 15, at 310-11.

[724] Jackson 1994, *supra* note 16, 600; Ala'i Interview, *supra* note 13.

with obligations under the WTO.[725] The SPS Agreement, for example, does not require WTO Members to introduce specific uniformed SPS standards. Similarly, the TBT Agreement does not provide WTO Members with harmonized technical standards. The WTO only requires its Member States to incorporate their commitments and agreements under the WTO into their domestic laws in order to implement those commitments and agreements.

WTO rules do not constrain States' authority to determine and implement their legitimate environmental policies so long as their policies meet WTO obligations of non-discrimination and market access.[726] The WTO does not preclude its Member States from implementing regulations or taxes to curtaildomestic pollution and the activities that contribute to pollution.[727] WTO Members can establish their health or environmental policies based on different values and priorities, and it is difficult to require Member States to apply common criteria in their domestic policies in these areas.[728] Constraints under WTO rules are imposed on State's discriminatory or protectionist measures that are taken unilaterally without negotiating other Member States.[729] The purpose of non-discrimination obligations under the GATT Articles I and III is for national choices for social, political, and economic policies not to constrain goods in international trade.[730] TBT or SPS measures, subsidies, or quantity quota should be made by balancing the desire

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[725] Jackson 1994, *supra* note 16, at 600.

[726] Bhagwati & Srinivasan, *supra* note 8, at 188-90; GATT Report 1992, *supra* note 2, at 5, 7.

[727] GATT Report 1992, *supra* note 2, at 7.

[728] Roessler, *supra* note 232, at 34-35.

[729] GATT Report 1992, *supra* note 2, at 5-6.

[730] Matsushita et al., *supra* note 3, at 215-16; Roessler, *supra* note 232, at 49.

to avoid distortions in international competition and the right to enforce national environmental policies.[731] Diversity in regulation between different countries is expected under the WTO trading system unless international agreements exist that provide a common norm.[732]

General exceptions under GATT Article XX are interpreted to not constrain domestic policy goals for health and environmental protection. The Panel in *Thailand-Cigarette* noted that "[GATT Article XX(b)] ... allow[s] [Member States] to give priorities to human health over trade liberalization" as long as trade measures meet the "necessity to" requirement under the provision.[733] Under GATT Article XX(b), "necessity to" is not interpreted in a way that judges the Member State's justification of its environmental policies, but instead examines the trade measures that implement the environmental policies.[734] The *US-Shrimp* Appellate Body noted that the certification requirement under the Section 609 constituted "arbitrary discrimination" under the GATT Article XX Chapeau because Section 609 required exporting countries to adopt the same regulatory program as that in the US without considering the conditions of the exporting countries.[735] The Panel in *EC-Asbestos* recognized the non-economic character of GATT Article XX as well. It noted that "certain interests may take precedence over the rules governing international trade and authorizes the adoption of trade measures aiming at preserving these

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[731] GATT Report 1992, *supra* note 2, at 8.

[732] GATT Report 1971, *supra* note 20, at 4.

[733] Thailand-Cigarettes, *supra* note 248, ¶ 73.

[734] Roessler, *supra* note 232, at 34-35.

[735] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 177.

interests while at the same time observing certain criteria."[736] Accordingly, GATT Article XX respects non-economic considerations of its Member States' economic policies.

These legal requirements and DSBs' decisions under the GATT/WTO demonstrates that the purpose of the WTO harmonization is not to remove the diversity of national value preferences, but to require that national trade measures are consistent with WTO rules.[737] A State's value preferences are permitted to the extent that they do not threaten the value or reliability of the WTO's commitment to a free and open market.[738] It is because, if every different governmental policy goal and values were accepted as an environmental exception to the WTO, then the international legal system of trade would be threatened.[739] Accordingly, the WTO harmonization reconciles with States' domestic policies by the WTO recognizing the diversity of policy choices in each different society and by States meeting their value preferences in making policy choices in line with the fundamental principles of the WTO.

7.4.2. A State's Rights and Contractual Obligations in the WTO

WTO harmonization requires a Member State to comply with obligations under the WTO and parties to a dispute to implement decisions of the WTO DBS. This section discusses whether this WTO harmonization requirement limits a State's right to determine

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[736] EC-Asbestos Panel Report, *supra* note 258, ¶ 8.129.

[737] Roessler, *supra* note 232, at 42. In this context, the international trade law principle of comparative advantage and the international law principle of state sovereignty have the common goal internationally of allowing a State to adopt its optimal policies that supports diversity of national policies. Leebron, *supra* note 8, at 71.

[738] Hudec 1996b, *supra* note 64, at 129, 146.

[739] US-Shrimp Panel Report, *supra* note 212, ¶ 7.45; Hudec 1996a, *supra* note 112, at 5.

and enforce its environmental policies.

7.4.2.1. State Sovereignty and Contractual Obligations in International Law and the WTO

7.4.2.1.1. State Sovereignty and Contractual Obligations under International Law

The international trading system should not interfere with the ability of nations to determine or employ measures to achieve environmental goals.[740] In international law, States have the right to determine their own laws and policies and what acts are allowed to take place within its sovereign territory.[741] International instruments cannot hinder a State from freely pursuing its domestic objectives.[742] The WTO does not have authority to legally challenge national policies.[743] A State is only bound to the obligations of the specific international treaties it agrees to. In the absence of adherence to the WTO agreements, a State is free to deny market access to any other State for any reason and to impose trade restrictions discriminately.[744] Similarly, in this instance, the State is not bound by the obligations of MFN and national treatment and can discriminate against

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[740] Lallas et al, *supra* note 193, at 271, 335.

[741] Brownlie, *supra* note 458, at 277. Regarding territorial jurisdiction, the author introduces the concept of "decisional sovereignty" in the *Nuclear Test* case decision, which stated that a State has right "to determine what acts should take place within its territory." *See* Request for an examination of the situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N. Z. v. Fr.), Order, 1995 I.C.J. Reports 288 (Sep. 22); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226 (Jul. 8).

[742] Bhagwati 1993, *supra* note 7, at 165-66; Farber & Hudec, *supra* note 1, at 63.

[743] Esty, *supra* note 5, at 56.

[744] Hudec 1996b, *supra* note 64, at 149.

imported products.[745]

However, when a State agrees to an international instrument, some limitations are imposed upon States' sovereign rights based on the agreement.[746] Thus, accepting any treaty or trade agreement diminishes the freedom of the State to implement domestic policies or take any national actions.[747] When a State agrees to confer its power to an international organization, it agrees to limit its right to exercise the powers conferred to the international organization.[748] Thus, certain types of actions inconsistent with the treaty norms would give rise to an international law violation.[749] WTO Member States are bound by treaty obligations when they accept and agree to WTO agreements.[750] The Panel in *US-Shrimp* noted that "by accepting the WTO Agreement, Members commit themselves to certain obligations which limit their right to adopt certain measures."[751] WTO Member States must comply with basic obligations of MFN, national treatment, non-quantitative restriction and concession, and obligations under WTO covered agreements. In summary, a State's sovereignty as it relates to its ability to make its own domestic policy choices is constrained to the extent that it accepts and agrees to the WTO Agreement.

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[745] Jackson 1997, *supra* note 198, at 158.

[746] Hudec 1996b, *supra* note 64, at 149; Sarooshi, *supra* note 646, at 1-2.

[747] Jackson 2000, *supra* note 632, at 380; Dunleavy, *supra* note 636, at 268.

[748] Sarooshi, *supra* note 646, at 69.

[749] Jackson 2000, *supra* note 632, at 380.

[750] Hudec 1996b, *supra* note 64, at 116-17.

[751] US-Shrimp Panel Report, *supra* note 212, ¶ 7.26.

7.4.2.1.2. WTO Dispute Settlement Decisions as International Law Obligations

WTO rules and DSB decisions are binding as international legal obligations.[752] A dispute settlement body's ruling can extend the powers conferred to an international organization.[753] When the WTO DSB rules that a Member State is violating WTO rules, it creates an international legal obligation requiring that State to change its economic policy, namely the inconsistent measure, to make it consistent with WTO rules.[754]

However, decisions of WTO dispute settlement bodies enforce the existing obligations and do not impose new obligations on Members, nor does it inappropriately limit a Member State's discretion in legislating.[755] Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add or diminish the rights and obligations provide in the covered agreements." The dispute settlement mechanism is not designed to fill, create new rules, or set forth norms in areas the WTO does not already, for example environment or labor standards.[756] Further, the decisions of the DSB are binding only on the States that are party to the dispute.[757]

The WTO's jurisprudence exacerbates the tension between internationalism and

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[752] Pauwelyn, *supra* note 554, at 341; John H. Jackson, *The WTO Dispute Settlement Understanding-Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 63-64 (1997) [hereinafter Jackson 1997a].

[753] Sarooshi, *supra* note 646, at 12-13.

[754] Pauwelyn, *supra* note 554, at 341; Jackson 1997a, *supra* note 752, at 60; Sarooshi, *supra* note 646, at 96-97.

[755] Davey 2001, *supra* note 550, at 96.

[756] John H. Jackson, *Dispute Settlement and the WTO Emerging Problems*, 1 J. INT'L ECON. L. 329, 347 (1998) [hereinafter Jackson 1998].

[757] Sarooshi, *supra* note 646, at 70.

national sovereignty,[758] because WTO decisions can have important effects in a domestic court's jurisprudence.[759] The Appellate Body in *US-Shrimp* found that the U.S. Court of International Trade's decision allowing the import ban was inconsistent with the GATT Article XX Chapeau and the import ban should be withdrawn. [760] This decision expresses the notion that State courts must consider international law obligations when interpreting national law.[761] The decision rejecting the U.S. domestic court's ruling, however, casts a question about the extent to which States can exercise their national environmental policies and jurisdiction in the WTO system.

Even though States' confer their rights to the WTO, the DSB decisions' legal effects and the WTO agreements' limits on Members' rights can be criticized on the basis that the WTO is restricts the sovereign rights of Member States to exercise control over their natural resources via export or import control."[762] Next section examines on whether the WTO' multilateral trading system deprives Members States of rights to determine appropriate national environmental policies.

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[758] Jackson 2008, *supra* note 631, at 6-7.

[759] Jackson 1997a, *supra* note 752, at 64.

[760] US-Shrimp Panel Report, *supra* note 212, ¶ 7.56; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 173.

[761] Jackson 1997a, *supra* note 752, at 61.

[762] Lang & Hines, *supra* note 34, at 63-64.

7.4.2.2. A State's Right to Determine its Environmental Policies in the WTO

7.4.2.2.1. WTO Rules on States' Authority of National Environmental Policies

The WTO recognizes its Member States' authority to legislate and enforce their national environmental policies and laws. The national treatment obligation under the GATT Article III is interpreted to allow WTO Member States to determine legitimate environmental policies unless those environmental policies are taken with protectionist intent.[763] The GATT Article XX provides a State with rights to regulate and implement its policies on public morals, health, and the environment.[764] The WTO DSBs' interpretation of measures "necessary to" protect the environment as "least trade restrictive" under Article XX(b) is criticized as hindering a State's sovereign right to solve domestic environmental problems.[765] Article XX(b), however, allows a State to determine its own environmental policies and the level of desirable protection these policies will require.[766] With regard to the level of protection, the Appellate Body in *EC-Asbestos* held that within the meaning of Article XX(b), "WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."[767] Thus, States may impose environmental requirements on foreign producers provided the requirement is for the implementation of an environmental policy that meets the requirements of Article XX.[768]

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[763] US-Automobiles, *supra* note 182, ¶ 5.8.

[764] Jackson 1997, *supra* note 198, at 233.

[765] Schoenbaum 1997, *supra* note 200, at 277.

[766] *Id.* at 285; *see also* SPS Agreement, *supra* note 172, Annex A ¶ 5.

[767] EC-Asbestos Appellate Body Report, *supra* note 234, ¶ 168.

[768] Hudec 1996b, *supra* note 64, at 116-17, 151.

The WTO Agreements also recognize its Member States' choice of environmental policies. The Preamble of the WTO Agreement (WTO Preamble)[769] incorporates the concept of sustainable development, which was introduced by the World Commission on Environment and Development (WCED) in 1987[770] and firmly established by the 1992 Rio Declaration.[771] The WTO Preamble also recognizes that Members' respective needs and concerns differ depending on economic development and this affects how each protects the environment. Paragraph 1 of the WTO Preamble states that parties recognize that they are "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development," which implies the importance of respect for the different environmental policies in Member States. Thus, the WTO Agreement recognizes WTO Members rights to take their own appropriate measures to protection the environment.

The WTO covered agreements also provide Member States with the authority to

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[769] WTO Agreement, *supra* note 74, preamble ¶ 1. It provides:

> The Parties to this Agreement, [r]*ecognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for *the optimal use of the world's resources* in accordance *with the objective of sustainable development, seeking both to protect and preserve the environment* and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. (emphasis added)

[770] The most commonly referenced form of sustainable development is the definition by the World Commission on Environment and Development (WCED: Brundtland Commission). Recognizing the linkage between the environment and economic and social issues, the Brundtland Commission recommended "sustainable development" as "development that meets the needs of the present and future generations" in 1987. WCED, *supra* note 66, at 43-46. The Brundtland Commission emphasized that development should be maintained in a way that balances, reconciles, and integrates economic, environmental, and social priorities. Segger & Gehring, *supra* note 666, at 5.

[771] Principle 3 of the Rio Declaration refers to inter-generational equity in the Brundtland Commission's Report. It states that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Rio Declaration, *supra* note 67, principle 3.

determine their own policies. The SPS Agreement recognizes a State's discretion to determine its own appropriate health policies by incorporating the notion of the precautionary principle as an exception to risk assessment and international standards requirements. Article 5.7 of the SPS Agreement allows precautionary measures to be taken in the absence of sufficient scientific evidence, rather than waiting for a time when the risk assessment requirement can be met. The precautionary principle provides that States should not allow the absence of full scientific certainty to prevent them from enacting measures to protect the environment.[772] The precautionary principle grants States discretion in their policy making to act in order to prevent any harm to human health or the environment.[773] Article 3.3 also allows Members to take appropriate domestic policies to protect the environment that choose standards higher than international standards. The Appellate Body in *EC-Hormones* recognized that the precautionary principle is reflected in Articles 5.7 and 3.3 and paragraph six of the preamble.[774] These provisions allow WTO Members the discretion to determine their own optimal policies for human health and environmental protection.

The TBT Agreement permits WTO Members to adopt appropriate technical regulations to fulfill a legitimate governmental objective related to their environmental

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[772] Winspread Conference on the Precautionary Principle of January 26, 1998, The Wingspread Consensus Statement on the Precautionary Principle, available at http://www.sehn.org/wing.html (Dec. 22, 2008).

[773] James Cameron, *The Precautionary Principle*, *in* TRADE, ENVIRONMENT AND THE MILLENNIUM 287, 288 (Gary P. Sampson & W. Bradnee Chambers eds., 2nd ed. 2002) (1999); David Freestone & Ellen Hey, *Origins and Development of the Precautionary Principle*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 3, 13 (David Freestone & Ellen Hey eds., 1996); Hunter et al., *supra* note 37, at 511; Ellen Hey, *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, 4 GEO. INT'L. L. REV. 303, 307 (1991-1992).

[774] EC-Hormone Appellate Body Report, *supra* note 491, ¶ 124.

policies. The Preamble, paragraph 6 of the TBT Agreement, provides that "no country should be prevented from taking measures ... for the protection of human, animal or plant life or health, of the environment."[775] Under Article 2.2, a Member State can adopt a technical regulation to "fulfill a legitimate objective" of the environment.[776] Article 2.4 permits Member States to adopt and use national standards for technical standards when international standards are absent.[777] The Appellate Body in *European Communities-Trade Description of Sardines* noted that the TBT Agreement acknowledged the right of WTO members to establish the objectives of their technical regulations.[778]

Article XIV(b) of the GATS also allows WTO Member States to adopt or enforce measures "necessary to protect human, animal or plant life or health."[779] Accordingly, the

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[775] TBT Agreement, *supra* note 178, preamble ¶ 6.

[776] *Id.* art. 2.2. Article 2.2 provides:

> 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....

[777] *Id.* art. 2.4. It says:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

[778] WTO Report of the Appellate Body, *European Communities-Trade Description of Sardines*, ¶ 276, WT/DS/231/AB/R (Sep. 26, 2002).

[779] GATS, *supra* note 176, art. XIV(b). Article XIV(b) of the GATS provides:

> 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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures necessary to protect human, animal or plant life or health.

WTO gives Member States discretion to choose and enforce their optimal environmental policies, though with some limitations based on contractual obligations and legitimate requirements under the GATT 1994 and the WTO agreements.

7.4.2.2.2. WTO Jurisprudence on States' Authority of National Environmental Policies

The GATT/WTO dispute settlement bodies have recognized its Member States' discretion to adopt and implement their own environmental policies. The *US-Tuna (Mexico)* and *US-Tuna (EEC)* Panels noted that their decisions were based on the "consideration that [they] would affect neither the rights of individual [Member State] to pursue their internal environmental policies and to cooperate with one another in harmonizing such policies, nor the right of [Member States] acting jointly to address international environmental problems."[780] The *US-Tuna (Mexico)* Panel concluding that a State is "free to tax or regulate imported products ... for environmental purposes" unless its taxes and regulations discriminate against imported products or afford protection to domestic products.[781] The *US-Tuna (Mexico)* Panel emphasized that non-discriminatory and non-protectionist obligations in environmental policies are legitimate.

The *US-Gasoline* Panel concluded that "WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with [WTO rules]."[782] The *US-Gasoline* Appellate Body also noted

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[780] US-Tuna (Mexico), *supra* note 12, ¶ 6.4; *see also* US-Tuna (EEC), *supra* note 12, ¶¶ 5.26, 5.37-5.38.

[781] US-Tuna (Mexico), *supra* note 12, ¶ 6.2.

[782] US Gasoline Panel Report, *supra* note 230, ¶ 7.1.

in its concluding remarks that "WTO Members have a large measure of autonomy to determine their own policies on the environment ..., their environmental objectives and the environmental legislation they enact and implement.... That autonomy is circumscribed only by the need to respect the requirements of [the GATT] and other covered agreements."[783] The *US-Gasoline* Panel and Appellate Body noted that so long as Member State's complied with obligations of the GATT 1994 and WTO covered agreements, States could exercise their environmental autonomies.

The *US-Shrimp* Panel highlighted the importance of securing object and purpose of the multilateral trading system in determining national environmental policies. The *US-Shrimp* Panel emphasized that under the WTO Member States have "the right ... to implement the environmental policies of their choice through trade measures, as long as those trade measures do not affect the multilateral system to the point where the WTO Agreement is deprived of its object and purpose."[784] The *US-Shrimp* Panel noted, in its concluding remarks, that "Members are free to set their own environmental objectives. However, they are bound to implement these objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose."[785] Thus, the *US-Shrimp* Appellate Body, similar to *US-Gasoline* Appellate Body, recognized that States can adopt their own policies to protect the environment provided that they "fulfill their obligations and respect the rights of other Members under

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[783] US Gasoline Appellate Body Report, *supra* note 264, at 30.

[784] US-Shrimp Panel Report, *supra* note 212, ¶ 6.6; *see also id.* at 7.45, 7.55, 9.1.

[785] *Id.* ¶ 9.1.

the WTO Agreement."[786]

The *EC-Asbestos* Panel noted that the "necessary to protect" requirement under Article XX(b) does not imply a restriction on Members' "freedom ... to take certain measures rather than others."[787] The *EC-Asbestos* Appellate Body also recognized WTO Members' rights to determine the appropriate level of protection under Article XX(b).[788] In *Brazil-Tyres* in which Brazil invoked Article XX(b) to justify its ban on imports of retreaded tires, the Panel recalled this position noting that "every WTO Member has the 'right to determine a level of protection of health that [it considers] appropriate in a given situation'" within the meaning of Article XX(b).[789] The *Brazil-Tyres* Appellate Body also, in determining measures necessary to protect under Article XX(b), noted that "it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt."[790] The Appellate Body recognized that it is a fundamental principle that WTO members have the right to determine the level of protection that they consider appropriate within the meaning of Article XX(b).[791] The *US-Tuna Labeling* Panel also followed previous decisions by recognizing that WTO Members have the "right to determine the legitimate policies they want to pursue."[792]

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[786] US-Shrimp Appellate Body Report, *supra* note 12, ¶ 186.

[787] EC-Asbestos Panel Report, *supra* note 258, ¶ 8.183.

[788] EC-Asbestos Appellate Body Report, *supra* note 234, ¶ 168.

[789] Brazil-Tyres Panel Report, *supra* note 213, ¶ 5.3.

[790] Brazil-Tyres Appellate Body Report, *supra* note 278, ¶ 140.

[791] *Id.* ¶ 210.

[792] US-Tuna Labeling Panel Report, *supra* note 450, ¶¶ 7.441, 7.622.

In summary, WTO Member States' environmental policies' goals are considered legitimate as long as they fulfill their obligations and respect other Members' rights under the GATT 1994 and WTO covered agreements, comply with the fundamental international trade principles of non-discrimination and non-protectionist, and secure the object and purpose of multilateral trading system.[793] When measures meet these requirements, they are recognized as "necessary to" or "relating to" achieve an environmental policy objective.

7.4.3. WTO's Limited Adjudication to Judge National Environmental Necessity

Under the state sovereignty principle, the WTO cannot interfere with a State's authority to determine and enforce its national environmental policies and laws within its jurisdiction. Member States of the WTO are constrained only in application of their national policies and laws to the extent necessary to comply with their obligations under the WTO. Here, the application of national policies must be distinguished from the legislation or enforcement authority of policies. While constraining the application of national policies and law not to violate WTO rules is acceptable, interfering with national capacity to legislate or enforce policies through the use of WTO rules or a DSB's decision is not acceptable under the state sovereignty principle. Accordingly, even though some limitations are imposed on a State's application of its environmental polices and law, WTO rules and DSBs' decisions demonstrate that WTO Members possess autonomy to determine, legislate, and enforce their environmental policies and laws to the extent that they are legitimate under the WTO

[793] US-Tuna (Mexico), *supra* note 12, ¶ 6.2; US Gasoline Panel Report, *supra* note 230, ¶ 7.1; US Gasoline Appellate Body Report, *supra* note 264, at 30; US-Shrimp Panel Report, *supra* note 212, ¶¶ 6.6, 7.45, 7.55, 9.1; US-Shrimp Appellate Body Report, *supra* note 12, ¶ 186; Brazil-Tyres Panel Report, *supra* note 213, ¶ 210.

economic rules.

The WTO has limited authority to adjudicate national policy choices and enforcement. Neither the WTO itself nor its DSBs have the power to enforce WTO rules or DSBs' decisions in WTO Member States.[794] Compliance with WTO obligations or DSBs' decisions depends on the willingness of Member States or dispute parties to do so. The WTO DSBs, unlike domestic tribunals, cannot enforce their ruling by imposing punishment or fines on parties to the dispute. They only judge whether measures at issue to the dispute is consistent or inconsistent with WTO rules. The method of resolution depends on parties to the dispute. A certain Member State would have to be "willing to bear the cost of measured retaliation" by injured Member States or withdraw from WTO covered agreements.[795]

WTO Panels and Appellate Bodies cannot judge a country's political values or what leads them to determine what policies are necessary based on the degree of serious environmental harm.[796] The Panel in *US-Gasoline* noted that the task of the Panel was to examine whether "the aspect of the Gasoline Rule found inconsistent with [the GATT] was necessary to achieve the stated policy objectives under Article XX(b)," but it was "not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule ... that the Panel did not specifically find to be inconsistent with [the GATT 1994]."[797]

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[794] Steger, *supra* note 664, at 485-86. Professor Steger notes that "[t]he WTO is driven solely by its members acting collectively. The members will not allow the Director-General to have any real power, nor will they delegate any significant policy setting . . . ."; *see also* Sykes 1991, *supra* note 352, at 279.

[795] Sykes 1991, *supra* note 352, at 277, 279, 285.

[796] Hudec 1996b, *supra* note 64, at 150; Murase 1999, *supra* note 447, at 421-24.

[797] US Gasoline Panel Report, *supra* note 230, ¶ 6.22.

The Panel emphasized "that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement."[798] The *Brazil-Tyres* Panel recalled *US-Gasoline* Panel's position in noting that the WTO Panel is "not ... required to examine the desirability of the declared policy goal as such" and so it does not have "to assess the policy choice by Brazil to protect human, animal or plant life or health."[799] Similarly, the *US-Tuna Labeling* Panel noted that the Panel does not determine "what might be an appropriate level of protection to achieve in relation to the objectives identified by the United States for the information of consumers and the protection of dolphins in relation to the manner in which tuna is caught."[800]

The WTO has neither the capability nor the mandate to develop environmental performance standards.[801] Further, the WTO has no explicit provision regarding environmental protection, conservation, or preservation.[802] Thus, given the lack of substantive rules governing the relationship between trade and the environment, it is inevitable that the WTO dispute settlement body would refuse to decide a case in which it has to do so based on the merits of an environmental policy itself.[803] The WTO DSBs only rule on whether the measure at issue is taken in accordance with obligations and requirements

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[798] *Id.* ¶ 7.1.

[799] Brazil-Tyres Panel Report, *supra* note 213, ¶ 7.97.

[800] US-Tuna Labeling Panel Report, *supra* note 450, ¶¶ 7.622.

[801] Esty, *supra* note 5, at 178.

[802] Murase 1999, *supra* note 447, at 424.

[803] *Id.*

under the WTO.

7.5. Summary

Both the State and WTO harmonization requirements must be implemented in a way that protects States' right of environmental policy choice and enforcement. The State harmonization requirement, which restricts trade unless another State does not accept its environmental policy, has the potential to infringe on another State's right to determine and enforce its own environmental policy. One State's right to take measures must be balanced with another State's right to choose national policies under the state sovereignty principle of international law. States' autonomy must be respected and thus policy choices that infringe on other States are not allowed to balance each State's rights. If the State harmonization requirement is based on common concern for environmental protection, then international cooperation is considered a balance to protect other States' autonomy. The WTO encourages balance between a State's rights and obligations. The WTO's balance constrains one State's right on a certain level in order to protect other States' rights because its function is to secure its system by providing freedom of trade for its Member States.

WTO harmonization requiring compliance with obligations under WTO rules and the rulings of WTO DSBs must consider diversity of States' value preferences and the authority of States to make their own policy choices. The WTO cannot judge a State's policy choice, but it can judge a State's application of policy. The WTO only judges whether a State's application of its laws and policies is within the WTO rules. In this context, the WTO requires a balance between a State's desire to avoid distortion in

international competition and another State's right to enforce environmental policies. The WTO cannot judge whether a State's exercise of right infringes on another's right. Rather the WTO judges whether a State's exercise of rights violates any obligations or concessions under the GATT 1994 and the WTO covered agreement in order to protect other States' rights to trade freely within the WTO system.

Further, even though a State's is not allowed to infringe on another's sovereignty under the international law, when it occurs, it becomes a more political than legal issue. This is because the infringing State takes the action despite the fact it knows that it is illegal. International instruments such as the WTO or ICJ may make legal decisions, but they cannot enforce their rulings on the countries nor punish such infringing States.

The modern state sovereignty principle recognized that a State is more influenced by other States' actions or international institutions' activities due to increased interdependence caused by globalization. A State's rights also are constrained to the extent that a State consents to be bound by treaties or international law. However, these constraints on State's rights do not overwhelm state sovereignty because international constraints require a State's agreement. Accordingly, either the State or WTO harmonization must be implemented to respect a State's sovereign right to make its own environmental or economic policy choices.

8. CONCLUSION

This dissertation examines the State and WTO harmonization requirements to counteract the imbalance of economic advantage that results from differences in each State's environmental policies. It discusses three issues of two different harmonization requirements relating to States' environmental policies in terms of protectionism, unilateralism, and state sovereignty: first, whether the State and the WTO have different positions on harmonization requirements for environmental protection; second, whether the two different harmonization requirements can be reconciled with each other; and, third, whether either the State or WTO harmonization requirement is acceptable in international trade relations. This dissertation's research suggests the following conclusions.

First, the State and the WTO harmonization requirements potentially conflict because they have different approaches to reaching a balance between different levels of economic advantages resulting from different environmental policies. While the State harmonization approach represents protectionism, unilateralism, and the State's right to take measures in international trade, the WTO harmonization represents non-protectionism, multilateralism, and the State meeting its obligations under the WTO. The harmonization requirement is a pre-requisite for a State to take unilateral or protectionist measures or to exercise its sovereign right to enforce its environmental policies. The State harmonization requires compliance with that specific State's policy objective in order to access to its market. When other States do not agree to abide by its policy objective, a State is willing to use trade restrictions to force them to accept its policy choice. This State harmonization

requirement can be an effective tool for a State to implement and enforce its environmental policies. However, a State's preference to use trade restrictions as a condition of market access and a State's pre-requisite to harmonize toward its domestic policy can raise conflicts in international trade relations. The WTO does not allow the State harmonization requirement when it is used as protectionist or unilateral measures. Justifying the State harmonization requirement by claiming it is part of its sovereign rights is not fully supported in the WTO either. Thus, a certain level of conflict exists between the State and WTO harmonization approaches.

Second, however, the State harmonization requirement can be reconciled with the WTO harmonization requirement as long as a State takes measures in a way that complies with the rules and principles of the WTO. The WTO system does not completely deny a State's right to take unilateral or protectionist measures because requiring the exporting country to comply with the importing country's policies and regulations is well established in international trade relations. Regarding protectionist measures, even though the WTO prohibits protectionist measures generally, a certain level of protection for domestic industries must be recognized as a governmental necessityn. Only excessive protectionist measures must be discouraged because they potentially threaten the security of the international trading system and distort international trade. Similarly, the WTO does not prefer a State's unilateral measures, but may allow them in certain circumstances. Unilateral measures that are not allowed in the WTO are limited to coercive measures that force other States to adopt the importing State's environmental policies as a condition of market-access. This coercive harmonization requirement also constrains another State's

sovereignty and ability of a State to choose its own value preferences and the autonomy to make policy choices. Because the principle of state sovereignty is widely established in international law, constraint on a State's rights by either another State or the WTO is acceptable only to the extent that a State agrees with the other State or the WTO, or to the extent that it confers its rights to international institutions through RTAs, or the WTO. Accordingly, in certain circumstances, the WTO allows a State's unilateral or protectionist measures as the State's legitimate policy objective because its implementing and enforcing of its national laws and policies fall under its autonomy in international law.

Third, both the State and WTO requirements are acceptable in international relations to the extent that they respect States' abilities to make policy choices. Both harmonization requirements affect States' abilities to make policy choices because they reduce the diversity of national policies that States can use to reflect their environmental needs or values. The State and WTO harmonization requirements need to respect diversity of States' policy choices because States' economic or environmental policies reflect their cultural, historical, or religious value preferences. These value preferences cannot be judged by a specific State or the WTO. When a State's unilateral or protectionist measures are ultimately infringing on another State's sovereign rights in international trade, those measures to reduce differences between environmental policies are not optimal policy choices. It is necessary to balance one State's right to take measures to enforce its environmental policy and another State's right to freely adopt its own appropriate environmental policy.

This dissertation found that the WTO system balances diversity of the State's policy

choices and harmonization to WTO rules. The notion of harmonization in the WTO can be understood in relation to the notion of diversity. The WTO DSBs have excluded the State's value preferences related to environmental protection from consideration in their rulings. However, this does not necessarily imply that the WTO system or DSBs do not respect a State's value preference in making policy choices. A State legislates on the basis of its policy objective or value preferences. A specific value preference in a specific State can be significant in determining governmental policies and legislation when that value reflects social or public concern. Here, the WTO cannot and must not assess a State's value preferences and policy objectives. In analyzing a State's policy-making or legislation procedure, the WTO respects a State's value preferences related to policy objectives and diversity, and the WTO DSBs do not have any authority to judge a State's policy choice.

However, when a State's environmental laws or policies are trade-related, they must be legislated, implemented, and enforced in compliance with the WTO rules and principles with which the Member State agrees. Where a trading partner country complains about these trade-related laws or policies, the WTO DSBs will only judge whether they are legislated, implemented, and enforced in accordance with rules and obligations under the WTO. In the WTO dispute settlement procedure, the DSBs will consistently rule by interpretation and application of WTO rules and principles. Thus, both diversity and harmonization of economic policies exist in the WTO system: diversity exists because the WTO recognizes that a State's policy choice is based on its value preferences, while harmonization exists because the DSBs and the WTO Members uniformly interpret and

apply WTO rules and principles.

This WTO approach to a State's policy choice and uniform application of WTO rules is reasonable in international trade relations because a value preference in one country may not be one in another country. The exclusion of value preference in the WTO leads to criticism that the WTO system and its DSBs' decisions do not consider environmental concerns nor contribute to sustainable development. However, it is an important function of the WTO to prevent its Member States, particularly powerful countries, from misusing their *de facto* harmonization requirements in the name of value preferences for environmental protection, and, thus, eventually distorting international trade. By securing its international trading system, the WTO can contribute to balancing States' different policy choices. If the WTO has to consider all value preferences of its Member States, then we could not expect uniform and consistent rulings from the DSBs. In sum, the WTO balances a State's rights and its obligations under the WTO by recognizing the State's diverse choice of economic policies and encouraging the State's harmonized implementation of its economic policies in compliance with WTO rules.

The substantial balance between promoting sustainable development and achieving the WTO's goals only depends on whether WTO Member States are willing to reconcile these two issues in the WTO system. The WTO is not an international instrument that guarantees its Member States the ability to take measures based on technical regulations, safety standards, or environmental regulations, but is instead an international instrument that provides rules on international trade regarding those issues. WTO rules are agreements between Member States and ones with which they must comply. Without a

mandate from its Member States, the WTO and its DSBs have only limited capacity to deal with reconciling sustainable development with the WTO's goals. A practical solution is necessary among States and this practical solution must be based on genuine environmental concern or concern for future generations. Otherwise, it is difficult to build consensus and achieve international agreement. If multilateral agreement is achieved by States, then the WTO cannot interfere with the mandate of these other international instruments or internationally agreed resolutions by States.

This dissertation suggests that the balance between States' police choices or between a State's rights and obligations under the WTO must be achieved through respect and cooperation both between States and between States and the WTO. Neither the balance between multiple States' policy choices nor the balance between a State's rights and its obligations under the WTO must be led by trade measures because those trade measures do not necessarily prevent environmental degradation. Even if, in certain circumstances, trade measures are inevitable for a State to enforce its environmental policies, those trade measures are not efficient solutions to address environmental problems. Further, when trade sanctions are used, the issue becomes more political rather than remaining an economic or environmental issue. In doing this, a strong State is using trade measures as a non-military weapon that the GATT/WTO system has previously tried to prevent through its international trading system. The critical balance is to create trade policies that reduce the negative environmental impacts, while enhancing the positive impacts of having greater trade liberalization.

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