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Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?

*Kazumochi Kometani**

I. INTRODUCTION

Governments have been increasingly pressed to solve environmental problems which have been progressively growing and spreading. A variety of environmental regulations have been enacted all over the world. These include measures enacted to ensure product safety and sanitary standards. The increased awareness of health and safety has driven governments to introduce a variety of product standards. There is little doubt that these trends will continue.

Environmental measures regulating the sale of products — for example, an environmental tax on products or product safety and sanitary standards — can particularly impact international trade.¹ Suppose that a country prohibits the sale of products containing pesticide residues. Exporting countries may domestically tolerate the residue

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¹ See generally Vinod Rege, *GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries*, 28 J. World Trade 95, 96 (1994).

of this pesticide up to a certain threshold. In this situation, imports of this product would be significantly reduced.

The concern is often expressed that environmental regulations might be enacted in order to protect domestic industries to the detriment of foreign competitors.² In particular, developing countries fear that high environmental standards in developed countries might place a disproportionate burden of cost required to meet these standards on the developing countries themselves.³

In this regard, the WTO Agreement⁴, in order to encourage international trade, places various restrictions on a member state's freedom of policy choices. Environmental regulations of member states must accordingly comply with those restrictions, among which the General Agreement on Tariffs and Trade (GATT)⁵ plays a leading role in the arena of trade in goods.

First, Article XI generally prohibits quantitative trade restrictions.⁶ Second, Article III sets forth the requirement of "national treatment"; it enjoins member states from applying internal laws and taxes "to imported or domestic products so as to afford protection to domestic production";⁷ also, it prohibits those internal laws and taxes which discriminate against imported products in favor of domestic "like products."⁸ Third, Article I requires "most-favored-nation" (MFN) treatment among member states thereby inhibiting discrimination among products which originate in different foreign countries.⁹ Lastly, however, Article XX may exempt laws and regulations that are

² See, e.g., Ralf Buckley, *International Trade, Investment and Environmental Regulation: An Environmental Management Perspective*, 27 J.WORLD TRADE, 101, 102 (1993); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1235, 1244 (1992) [hereinafter Jackson]; George Kleinfeld, *Taxation on Automobiles and GATT National Treatment Obligations - Where to Draw the Line?*, 19 WORLD COMPETITION, Sept. 1995, 77, 90 (1995); C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 NW. J. INT'L L. & BUS. 47 (1990) [hereinafter Runge (1990)]; C. FORD RUNGE, *FREER TRADE PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* 71 (1994) [hereinafter RUNGE (1994)].

³ See, e.g., Runge (1990), *supra* note 2, at 52-56.

⁴ The Agreement Establishing the World Trade Organization, *done* Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

⁵ The General Agreement on Tariffs and Trade, Apr. 15, 1994, annexed to the WTO Agreement, *supra* note 4 [hereinafter GATT]. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, as amended, is incorporated into GATT 1994. In this article, reference to an Article of GATT means that Article of GATT 1947, which is incorporated in GATT 1994.

⁶ GATT, *supra* note 5, art. XI.

⁷ GATT, *supra* note 5, art. III:1; art. III:2, second sentence; art. III:5, second sentence.

⁸ GATT, *supra* note 5, art. III:2, first sentence; art. III:4, first sentence; art. III:5, first sentence.

⁹ GATT, *supra* note 5, art. I.

enacted in pursuit of any of the legitimate purposes enumerated in this Article. In particular, Article XX(b) may exempt from above restrictions those regulations "necessary to protect human, animal or plant life or health."¹⁰ Article XX(g) may exempt regulations "relating to the conservation of exhaustible natural resources."¹¹

Environmental regulations often involve a tax on harmful products, or prohibition on the sale of such products. Since these regulations are "internal laws and taxes," which are subject to GATT Article III, exporting countries may challenge them in reliance on this Article. If a regulation is inconsistent with Article III, in turn, a regulating country can invoke Article XX as a justification. In particular, "[q]uite often, concern for environmental matters focuses on paragraphs (b) and (g) of Article XX . . ."¹² Unless the two countries can settle their dispute through negotiation, a WTO panel may be established to evaluate whether the regulation is consistent with these provisions.¹³ In order to carry out this task, a panel needs to evaluate the arguments of the parties, including asserted facts underlying their reasoning.

Thus, it is critical to determine how these Articles are interpreted, and further, how a WTO panel should evaluate these assertions and underlying facts. The latter issue is called the "standard of review."¹⁴

Under the GATT scheme taken over by the WTO framework, a number of panels addressed these issues. Despite the absence of the *stare decisis* rule,¹⁵ in practice, well-reasoned panel reports have been followed by subsequent panels.¹⁶ In addition, the WTO Agreement provides that "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES

¹⁰ GATT, *supra* note 5, art. XX(b).

¹¹ In this connection, although their discussion is beyond the scope of this article, the WTO Agreement has added new restrictions on two categories of internal laws, which can include environmental measures. One consists of restrictions on sanitary and phytosanitary measures, which are set forth in the "Agreement on the Application of Sanitary and Phytosanitary Measures" [hereinafter Sanitary Code], annexed to the WTO Agreement, *supra* note 4. The other consists of restrictions on technical standards for products, which are stipulated in the "Agreement on Technical Barriers to Trade" [hereinafter TBT Agreement], annexed to the WTO Agreement, *supra* note 4. With respect to these Codes, *see generally* Rege, *supra* note 1.

¹² Jackson, *supra* note 2, at 1239.

¹³ *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 6, 11 [hereinafter DSP Understanding], annexed to the WTO Agreement, *supra* note 4.

¹⁴ *See, e.g.*, JOHN H. JACKSON ET. AL, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 364-66 (3d ed. 1995).

¹⁵ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 89 (1992) [hereinafter JACKSON (1992)].

¹⁶ *Id.* at 89-90.

to GATT 1947"¹⁷ Thus, a WTO panel must take into account the past GATT panel reports.

In the case of *United States - Taxes on Automobiles*,¹⁸ a GATT panel recently addressed U.S. environmental regulations on automobiles which were allegedly enacted in order to reduce the consumption of gasoline. Since this panel report has not yet been adopted by the contracting parties to GATT, it is not binding on a WTO panel. However, this report indicated what Articles III and XX mean in several key aspects based upon detailed analyses. Thus, it is likely that a WTO panel will respect this panel decision. Nevertheless, I disagree in many respects with this panel report. Therefore, this article first explains my proposed framework and continues with my analysis of the panel report.¹⁹

II. DISCUSSION

A. Summary of My Proposal

The main points of my proposal are as follows:

- (a) With respect to Article III:
 - (i) Article III prohibits any environmental regulation which facially discriminates against imported products in favor of domestic like products;²⁰
 - (ii) This Article prohibits any environmental regulation which is aimed at protecting domestic producers even if it is facially neutral;
 - (iii) A regulating country bears the burden of proving that an environmental regulation is not aimed at protecting domestic producers. This responsibility is discharged when a regulating country proves (x) that it objectively needs to achieve the legislative purpose of this environmental regulation, and (y) that the measures used in the regulation are more equally treating both domestic and imported

¹⁷ The WTO Agreement, *supra* note 4, art. XVI, para. 1.

¹⁸ *General Agreement on Tariffs and Trade: Dispute Settlement Report on United States Taxes on Automobiles*, 33 I.L.M. 1397 [hereinafter *United States - Taxes on Automobiles*].

¹⁹ This article does not analyze the issue of production process and method (PPM) standards. However, note 34 *infra* touches on this issue.

²⁰ In sum, the requirement of national treatment demands the equal treatment of imported and domestic "like products." *E.g.*, GATT, *supra* note 5, art. III, para. 5. Past GATT panels have determined the scope of "like products" under Article III "on a case-by-case basis using, *inter alia*, the following criteria: the product's end-users in a given market; consumers' tastes and habits, which change from country to country; and the product's properties, nature and quality." *General Agreement on Tariffs and Trade: Dispute Settlement Report on Japan Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, 34 Supp. BISD 83, ¶ 5.6 (1988). The analysis of this term "like product" is beyond the scope of this article. As a rule of thumb, competing products are "like products." *See, generally*, JACKSON ET. AL., *supra* note 14, at 522-34.

products, namely, less trade-restrictive²¹ than any other alternative. Alternatives to be compared with the subject regulation include, but not limited to, those involving other products than the subject product; and

- (iv) A WTO panel should accept arguments presented by a regulating country on these points described in (iii) above unless they have any manifest error or inconsistency.
- (b) With respect to Article XX:
 - (i) Paragraph (b) of Article XX may exempt those environmental regulations which are aimed at protecting "human, animal or plant life or health." However, the aimed level of protection must be objectively necessary to be achieved;

²¹ In this article, I use the term "less trade-restrictive" to mean "more equally treating domestic and imported products" in relation to the national treatment requirement. However, these phrases could have different meanings because the former focuses the reduction of adverse effect on "trade," which obviously means international trade, whereas the latter places an emphasis not on actual impacts on trade, but on impacts on the competitive relationship between domestic and imported products.

In this respect, Article III demands the equal treatment of imported and domestic products, and thus does not focus on whether the amount of international trade is increased or decreased. As a result, the concept of "less trade-restrictive" is essentially alien to Article III; hence, the standard of "more equally treating imported and domestic products" is a more appropriate usage. Past GATT panels have used the term "less inconsistent with GATT provisions" rather than "less trade-restrictive."

Past GATT panels have also rejected arguments based on the actual trade effects of a subject law. For example, in rejecting an argument raised by the United States that a subject law, applying a slightly higher rate of tax to imported petroleum, has "only an insignificant effect on the volume of exports", one panel stated that the first sentence of Paragraph 2 of Article III protected "expectations on the competitive relationship between imported and domestic products." According to this analysis, therefore, the tax violated the Paragraph. *General Agreement on Tariffs and Trade: Dispute Settlement Report on United States Taxes on Petroleum and Certain Imported Substances*, 34 BISD 137, ¶ 5.1.9 (1988). This statement is cited by another GATT panel in rejecting the United States' assertion that the panel should examine "actual results" of past cases under a subject law in evaluating that law's protective effect. *General Agreement on Tariffs and Trade: Dispute Settlement Report on United States - Section 337 of the Tariff Act of 1930*, 36 BISD 345, ¶ 5.13 (1990).

In contrast, the Sanitary Code and the Standard Code, which address part of the regulations subject to Article III, demand that subject regulations be "less trade-restrictive" than any other alternative. Sanitary Code, *supra* note 11, art. 5.6; TBT Agreement, *supra* note 11, art. 2.2. If these are deemed to set forth special provisions of Article III, they have introduced the different standard of "less trade-restrictive." Alternatively, if these Codes are characterized as setting forth provisions supplemental to Article III, the term "less trade-restrictive" would have the same meaning as the other term "more equally treating domestic and imported products."

I support the latter view, and consequently consider that the term "less trade-restrictive" means "more equally treating domestic and imported products" in the context of Article III. Although an analysis of this issue is beyond the scope of this article, I would like to point out that this view is more consistent with the fundamental policy underlying the WTO Agreement, namely, the theory of "comparative advantage," and that it is possible to interpret the term "less trade-restrictive" as meaning "less restrictive of international trade flows which should result from the competitive relationship between domestic and imported products solely based upon their 'comparative advantage' (and lack of 'comparative advantage')."

- (ii) Paragraph (g) of Article XX may exempt those environmental regulations which are aimed at "the conservation of exhaustible natural resources." In contrast to Paragraph (b), a regulating country may determine the aimed level of conservation at its discretion;
 - (iii) Under both Paragraphs, the measures used in an environmental regulation must be the least trade-restrictive among all alternatives for the same purpose. Similar to Article III, this assessment should be based upon the availability of other measures with respect to a subject product, but also that of measures with respect to other products for the same purpose;
 - (iv) Similar to Article III, a regulating country bears the burden of proof on these points described in (i) above. GATT panels have adopted the "primarily aimed at" standard (iii) above; and
 - (v) Similar to Article III, a WTO panel should accept arguments of a regulating country unless they are manifestly erroneous or inconsistent.
- (c) Under either of these Articles, in exceptional cases, a panel might condemn an environmental regulation (in case of Article XX, as a "disguised restriction on trade") even if that regulation appears to meet with the other requirements.

The following sections will put forth the rationales for these arguments, first under Article III, and subsequently under Article XX. In addressing Article III, this article will focus on Paragraph 2, which addresses internal taxes and other charges only. Other provisions addressing other internal laws, Paragraphs 3 and 5, are similar to Paragraph 2 (as qualified by Paragraph 1) in their terminology²² so that the discussion of Paragraph 2 is applicable to them without any significant modification.

My approach in this article primarily relies on the texts of these provisions. This is a demand of customary international law. Articles 31 and 32 of the Vienna Convention on the Laws of Treaties²³ set forth a guide to interpret treaties; in particular, Paragraph 1 of Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁴ It is widely agreed that these provisions have become part of customary international law governing the interpretation of treaties.²⁵ There-

²² See GATT, *supra* note 5, arts. III:2, III:3, III:5.

²³ The Vienna Convention on the Laws of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

²⁴ *Id.* art. 31, para. 1.

²⁵ LOUIS HENKIN ET. AL, INTERNATIONAL LAW: CASES AND MATERIALS 416-18 (3d ed. 1993).

fore, it is required to interpret GATT Articles III and XX primarily based upon their texts.

B. Article III

1. Interpretation of First Sentence of Article III:2

Paragraph 2 of Article III consists of two sentences. The first sentence states: "The products of the territory of any Member imported into the territory of any other member state shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."²⁶

Loosely constructing the phrase "in excess of" as meaning "more severe than," this sentence should be interpreted as prohibiting only internal taxes that facially discriminate against imported products. Thus, this interpretation permits any facially neutral tax law.

Although this loose reading appears to deviate slightly from the ordinary meaning of "in excess of," no other interpretation can be upheld. Suppose that a member state imposes an internal tax on both imported and domestic like products if they have a certain product property other than the origin of products. This law imposes a tax on some imported products with that property while it imposes no tax on some domestic like products without the property. If the first sentence prohibits any *de facto* discrimination like this law, it means that the first sentence inhibits "the imposition of a tax on a single imported product in excess of that on any domestic like product." Although this interpretation appears more consistent with the first sentence, it is not acceptable.

This interpretation, which more stringently restrains *de facto* discrimination, generates an absurd outcome. It would permit no tax law which imposes a tax only on products with a certain product property. For example, suppose that a country imposes a tax only on certain food products which contain a toxic substance in order to reduce the sale of those harmful products. Since some of the imported food products usually contain that substance while some of the domestic food products do not, this tax will be imposed on some imported products while not imposed on some domestic products. This result would be condemned under the above stringent interpretation. Consequently, in order to reduce the sale of these toxic food products, the country would have to impose the same amount of tax on all of those

²⁶ GATT, *supra* note 5, art. III:2, first sentence.

products irrespective of whether they contain the toxic substance. This conclusion is unacceptable.

However, where the term “in excess of” is broadly interpreted to mean “more severe than,” my interpretation — that which permits any facially neutral tax — is not the only possibility. The text of the first sentence appears to allow one to consider, for example, that the first sentence inhibits “the imposition of a greater tax on imported products than that on domestic like products on average.” However, as discussed in Section C, no other interpretation than my framework is acceptable.

In conclusion, under the first sentence of Article III:2, any facially neutral internal tax is permissible. However, it might fail under the second sentence.

2. *Interpretation of Second Sentence of Article III:2*

Under the second sentence of Article III:2, no internal tax must be imposed for the purpose of protecting any domestic industry. This sentence states: “Moreover, no Member shall otherwise apply internal taxes or other charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”²⁷ Paragraph 1 of Article III states: “The Members recognize that internal taxes and other internal charges . . . should not be applied to imported or domestic products so as to afford protection to domestic production.”²⁸

Because the phrase “so as to” usually means an intent or purpose, it is natural to interpret this sentence as prohibiting any internal tax which is enacted for the purpose of protecting domestic producers. In addition, the word “[m]oreover” used at the beginning of the second sentence indicates that this prohibition applies to any internal tax even if it clears the test set forth in the first sentence. Thus, even if an internal tax law is facially neutral, a WTO panel must review whether the tax intends to protect domestic producers. This is a guide in evaluating *de facto* discrimination. No other interpretation is appropriate. This will be further discussed in Section C.2 below.

3. *Burden of Proof*

(a) Who Bears the Burden of Proof?

The next question is in what situation an internal tax is deemed to be aimed at protecting domestic producers? First, which party must

²⁷ GATT, *supra* note 5, art. III:2, second sentence.

²⁸ GATT, *supra* note 5, art. III:1.

bear the burden of proof? A regulating country should bear this burden of proof. This assertion needs to be scrutinized because a challenging party usually bears the burden of proof that its claim is valid.

It is presumed that any internal tax is at least in part aimed at protecting domestic producers because governments have an inclination to protect their own domestic producers from international competition. Although this appears almost self-evident, it is necessary to look into this in depth for the following reasons. Economic theory teaches that if a government protects a certain domestic industry, consumers should be worse off.²⁹ The government is normally supposed to avoid this result because it has to be sensitive to the interest of consumers, most of whom are citizens with a voting right. However, it is rather reasonable to consider that the government will rarely act in such a rational manner. This paradox can be solved by analyzing the powers and behavior of pressure groups.

First, it is obvious that domestic producers are usually more able to drive their government to enact a law favoring them over their foreign competitors. Foreign manufacturers usually have no employees who are citizens of a regulating country, or even if they have some, their number is far smaller than that of their domestic counterparts. Since politicians are supposed to act so as to gain more votes, they would tend to favor domestic producers over foreign competitors. This tendency might be reinforced if labor unions organize a large portion of employees of domestic producers. In order to ensure job security, domestic labor unions probably support the protection of their employers, namely, domestic producers. Labor unions are usually powerful pressure groups. As a result, they can persuade politicians to favor domestic producers.

How do consumers react? Consumers are usually disadvantaged by any law protecting domestic producers from international competition. However, there are ample reasons to believe that their disadvantage will hardly persuade politicians to refrain from choosing a protectionist measure.

First, the costs to consumers are normally so thinly spread over a vast number of consumers that they have little incentive to resist a protectionist measure. In contrast, the benefit arising from the protection will advantage a small number of domestic producers. Consequently, domestic producers will usually be more eager, and find it more economic, to lobby.

²⁹ See e.g., RICHARD G. LIPSEY ET. AL, MICROECONOMICS chpt. 37 (1993).

Second, most consumers are employees at the same time. As employees they favor government protection of domestic producers for fear that their employers might lose in competition with foreign competitors.³⁰

Lastly, even if a protectionist measure dissatisfies most consumers, they are not necessarily organized as well as producers or labor unions. As a result, their opposition might not amount to a strong driving political force.

And as for distributors and retailers? Indeed, distributors and retailers of foreign products will suffer a loss from a protective measure. In addition, they are often well-organized with strong political muscle. However, their opposition is likely to be set off by those which deal with domestic products. In particular, if domestic products have a larger market share than imported products, the advantage to the wholesale/retail sectors resulting from a protectionist measure might out-weigh its disadvantage. As a result, their opposition is usually not enough to overcome the domestic producers' attempt to seek protection.

It is necessary to further consider the reactions of manufacturers who use subject products. For example, car manufacturers may procure materials such as steel from domestic and foreign sources. Although these manufacturer-users do not necessarily exist with respect to all products, if they exist, it appears that they may be able to effectively resist the protection of domestic suppliers from international competition. This protection usually pushes up the domestic sales prices of materials above their international competitive prices, and consequently, increases the production cost of manufacturer-users. In addition, they are often as well-organized as domestic producers.

However, their opposition typically would not overcome domestic producers' tendency to seek protection. These users are at the same time producers, who might seek (or might have obtained) pro-

³⁰ This is a situation of "prisoners' dilemma." Although consumers can be better off by cooperating with each other to prevent any protective measure, they perceive that they may be far better off by seeking the protection of only themselves. However, if all of them seek protection, they will be worse off.

Also, the value of benefits expected to be gained from protectionism might subjectively out-weigh that of free trade. Free trade does not necessarily guarantee that each individual will be better off although it will be likely to raise the standard of living on the whole. As a result, while the benefit of protection appears sure, the benefit of free trade might appear less sure. Accordingly, the utility of protectionism might be more than that of free trade. This may make protectionism more attractive.

tectionist measures from international competition. If they adamantly resist any measure which protects their domestic suppliers, they might not obtain (or maintain) protection in the future. Indeed, if a proposed protectionist measure impacts them negatively by injuring their international competitiveness, it is likely that they will thoroughly resist the proposal. However, unless this effect is critical, they might tolerate a protectionist measure on behalf of domestic suppliers.

In brief, most domestic parties will likely be more tolerant than hostile toward a protectionist measure because they hope to get protection if and when they need it.³¹ If all domestic parties are convinced that they should actively resist any protectionist measure, no such measure will be implemented. However, this is not realistic. In practice, there remain a number of protectionist measures such as tariffs and subsidies in any country.

In the final analysis, the likely reaction of pressure groups to a certain protectionist measure would be that some well-organized pressure groups (*i.e.*, protected domestic producers and labor unions) strongly support it while there are sporadic opponents. In this situation, even if politicians anticipate that this protectionist measure will decrease the total welfare of their country, will they dare to oppose it? If there are a few examples that a protectionist measure has brought about a favorable outcome, for example, if a previously inefficient industry has succeeded in restructuring itself under a protectionist measure, this might provide a protectionist measure on the table with irresistible attractiveness.

Some may make objections to this view, arguing that governments would try to comply with the requirements of national treatment under the WTO framework for fear that a violation, in particular, a sheer violation, will spur sharp international criticism. However, this restraint does not deter member states from clandestinely seeking protection by manipulating internal laws. This restriction is not so clear as the ceiling on tariffs³² and the regulation of subsidies.³³ In addition, the protective effect of an internal law,

³¹ In case of environmental regulations, it is necessary to take into consideration the behavior of environmentalist groups. It is pointed out that they are likely to act in the same way as protectionists of domestic producers. See ARYE L. HILLMAN & HEINRICH W. URSPRUNG, *The Influence of Environmental Concerns on Political Determination of Trade Policy*, in KIM ANDERSON & RICHARD BLACKHURST (eds.) *THE GREENING OF WORLD TRADE ISSUES* (1992). Also, with respect to the behavior of pressure groups, *generally*. STEFANIE ANN LENWAY, *THE POLITICS OF U.S. INTERNATIONAL TRADE: PROTECTION, EXPANSION AND ESCAPE* chpt. 2 (1985).

³² GATT, *supra* note 5, art. II.

³³ See GATT, *supra* note 5, art. XVI, and the Agreement on Subsidies and Countervailing Measures, annexed to the WTO Agreement, *supra* note 4.

particularly if it is facially neutral, is less conspicuous than that of other protective measures such as tariffs. As a result, the government might think it possible to tacitly protect domestic producers, however, within the bounds of Article III.

Thus, although a protectionist measure is likely to adversely affect the domestic economy in its entirety, it is reasonable to consider that governments tend to favor domestic producers in designing internal laws. Consequently, whenever an exporting country challenges an internal law as protectionist, it is presumed that the internal law is at least in part aimed at protecting domestic producers. Accordingly, a regulating country rather than a challenging country should be responsible to prove that a subject internal law is not absolutely based upon trade considerations. In order to discharge this responsibility, what should a regulating country prove?

Under my proposal, a regulating country should prove the following:

- (i) A subject internal tax is aimed at a policy goal which is objectively necessary to be achieved; and
- (ii) Any other set of measures available to attain this goal discriminates against imports no less than the measures used in a subject internal tax. (However, these compared sets of measures must be able to achieve the goal as feasibly and in as timely a manner as a subject internal tax.) Namely, the chosen measures are the least trade-restrictive.

If they are established, it can be concluded that a country has introduced a subject internal tax solely in order to achieve a legitimate purpose, and accordingly, not based upon trade consideration. The legitimacy of the primary goal of an internal law is not enough to conclude that this law is not aimed at protecting domestic producers.

First, unless its legislative objective is necessary, it would be possible to deem that environmental regulation is used to protect domestic producers. For example, suppose that a country has banned the sale of all beverages that contain a certain flavoring. Further, it is expected that this ban will sharply reduce imports of beverages since most foreign competitors export beverages containing this flavoring while most domestic producers focus on the production of competing beverages without the flavoring. Further suppose that although this flavoring might be harmful to health, it is indisputably proven safe to consume it up to 10mg per day, and therefore, it is unnecessary to completely prohibit the customary use of the flavoring in beverages. In this situation, the regulation of this harmful flavoring can be a legitimate policy. However, since it is unnecessary to reduce the flavoring

in question to zero, it is impossible to deny the possibility that the regulating country might have attempted to protect domestic producers by choosing the prohibition of the flavoring rather than a less stringent restriction. It does not matter whether the regulating country really attempted to reduce the flavoring, in other words, whether the protection of domestic producers is the primary objective or a secondary objective. The text of Paragraph 1 of Article III sets forth no such distinction.

Also, if a subject regulation is more trade-restrictive than a certain alternative, a regulating country can be deemed to pursue, at least as a secondary purpose, the protection of domestic producers by choosing the subject regulation instead of a less trade-restrictive alternative. If it has the effect of favoring domestic producers over foreign competitors, and this effect exceeds that of the least trade-restrictive alternative, this excessive protective effect should be deemed not consequential but intended.

(b) Necessity of Legislative Purpose

As indicated above, a regulating country must prove that the legislative purpose of a subject environmental regulation is objectively necessary to be achieved. In this connection, two points should be kept in mind.

First, needless to say, this purpose must be consistent with the objective of Article III. For example, by no means permissible under Article III is the purpose of imposing a greater tax burden on imported products than domestic products. This ostensibly serves to protect domestic producers, and is therefore inconsistent with the requirements of national treatment.³⁴

Second, should a panel take it into consideration whether the alleged legislative purpose is recognized as legitimate worldwide? No. Even if a certain legislative purpose is not recognized as legitimate elsewhere in the world, a regulating country might need to achieve it for reasons peculiar to that country. The underlying social needs are usually local.

³⁴ Environmental regulations discussed in this article — for example, product standards — will normally pass this “legitimacy” test if they pass the “necessity of legislative objectives” test. These regulations can be presumed to help the sales price of regulated products reflect the external effect of these products, and thus, will not run counter to the fundamental policy of the WTO Agreement, namely, the full realization of “comparative advantage.” In contrast, although further analysis is beyond the scope of this article, this “legitimacy” test might come to the front when a WTO panel addresses environmental regulations concerning the situation of foreign countries, for example, production process and method (PPM) standards.

Following these considerations, it is necessary to identify what should be the purpose of a subject environmental regulation. In this regard, if the goal is not specific enough, *i.e.*, the reduction of a certain harmful product in any manner, it is unlikely that a regulating country will succeed in convincing a WTO panel that the measures used in its environmental regulation are the least trade-restrictive. It is easy to think of a less trade-restrictive alternative. The purpose must be so specific as to describe "to what degree a regulating country seeks to reduce a specified harm." For example, if a country imposes a tax on certain products with an environmentally harmful property, it must clarify that it seeks a specific percentage, *i.e.*, 50%, of the reduction of the then existing unfavorable result from relevant products.

As a result, a regulating country must specify the legislative objective of a subject environmental regulation up to this level, and prove that this specified purpose is objectively necessary to be achieved. Unless the chosen level of reduction is not objectively necessary to be achieved, a regulating country might have chosen this level of environmental protection in order to protect domestic producers.

This required specificity of legislative purpose might appear to impose an overwhelming burden on a regulating country. However, a country usually estimates the result of a regulation up to this level of specificity and submission of a "reasonable" explanation is not an excessive burden.

(c) "Least Trade-Restrictive" Standard on Measures

In addition, a regulating country must prove that the measures used in a subject environmental regulation are the "least trade-restrictive." This will be carried out by explaining that a tax or regulatory burden imposed by a subject law on each product more properly corresponds to the magnitude of the targeted environmental harm the product generates, than any other alternative measures.

Suppose that a country imposes a tax on automobiles in order to reduce the total emission of sulphur-oxide (SOx) contained in their exhaust gases, up to a certain amount. Given that SOx is emitted only by automobiles, there will be a variety of tax schemes available to reduce the total SOx emission. For example, the country can impose a flat amount of environmental tax on those automobiles whose SOx emission per mile exceeds a certain threshold.

However, this scheme might discriminate between domestic and imported automobiles in two ways. First, those automobiles whose

SOx emission per mile is below said threshold will not bear any tax burden although they are partly responsible for the total SOx emission. Thus, if most domestic automobiles emit SOx in the amount just below the threshold while most imported automobiles emit SOx slightly in excess of the threshold, said tax scheme will impose tax on most imported automobiles but only on a small portion of domestic automobiles although both are almost equally responsible for the air pollution targeted by the above environmental tax.

Second, said tax scheme discriminates against, *i.e.*, those automobiles which run less during their life-time. Suppose that although a certain domestic model — Model D — can run in a good condition twice as long as a certain foreign model — Model F —, Model D is twice as expensive as Model F in the absence of the tax in question. Given that other relevant factors including the SOx emission per mile (and thus, the total SOx emission) are completely equal, it would be reasonable to consider that two Model Fs are a perfect substitute for one Model D. However, the above flat tax scheme will change this situation to the advantage of Model D without any justification. Since two Model Fs will bear the SOx emission tax twice as much as one Model D, despite no difference in the targeted environmental harm generated by their use, Model F will become less attractive as a substitute for Model D. In brief, the flat tax discriminates against the use of Model F in favor of Model D by imposing a heavier tax on the former.

In this situation, suppose that the country imposes another SOx emission tax on each driver in proportion to the SOx emission per mile of his/her automobile and his/her mileage. This scheme would reduce the magnitude of possible protection because this scheme would impose the same amount of tax on automobiles with the same SOx emission irrespective of their origin. Thus, if this proportional tax scheme is practicable, it should be concluded based upon the presumption that any internal law is aimed at protecting domestic producers, that the country seeks the protection of domestic automobiles by choosing the flat tax scheme rather than the proportional tax scheme. In other words, in order to rebut said presumption with respect to the above flat tax, the country must prove that there is no available alternative tax scheme that better reflects the total SOx emission of each automobile on the amount of tax imposed on the automobile — more equally treats automobiles in terms of their use — than the flat tax.

In this regard, should a WTO panel take into consideration that a regulating country could regulate, not only a product subject to a chal-

lenged regulation, but also other products, in order to achieve a specified objective? Suppose that both Food Products A and B, which are not like products, contain the same toxic ingredients, and a country has imposed a certain amount of tax only on Food Product A in order to reduce the amount of the toxic ingredients consumed by the public. Suppose further that in order to achieve the same objective, the country was able to choose to impose less tax on both products if they contain the toxic ingredients in excess of a certain threshold. This alternative would more equally treat imported and domestic Food Product A (and equally treat imported and domestic Food Product B). Domestic producers of Food Product A can be deemed to be protected.

Does this demand that a WTO panel condemn this internal tax law? Yes, insofar as this alternative of regulating both is as feasible and timely as the internal tax law the country was chosen. Also, this result appears to better match the text of Paragraph 1 of Article III. This provision simply prohibits member states from "afford[ing] protection to domestic production."³⁵ Accordingly, it does not limit the scope of products which a WTO should consider to those products regulated by a subject law. In the aforesaid example, since a regulating country could have reduced trade-restrictive effect on Food Product A, it could be deemed to have attempted to reduce imports of Food Product A. I do not find any reason to permit the regulation of only Food Product A under Article III. As a result, it is theoretically possible to condemn even an environmental regulation that treats equally all domestic and imported like products, for example, the imposition of a fixed amount of tax on the sale of all certain like products.

Past GATT panels appear to stop short of this point.³⁶ Moreover, arguably a WTO panel should follow this GATT panel practice. A treaty should be interpreted in light of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."³⁷ GATT panel reports were adopted by contracting parties to GATT,³⁸ and therefore, can be deemed to constitute this "subsequent practice."

³⁵ Cf. *United States Taxes on Automobiles*, *supra* note 18, art. ¶¶ 3.206-3.208.

³⁶ Cf. *United States - Taxes on Automobiles*, *supra* note 18, art. ¶¶ 3.206-3.208. In response to the EC's argument, this panel could have considered that the United States might be able to choose gasoline rather than automobiles as the subject of Gas Guzzler Tax, in order to reduce the consumption of gasoline.

³⁷ Vienna Convention, *supra* note 23, art. 31, para. 3, cl. (b).

³⁸ Cf. GATT, *supra* note 5, art. XXIII.2.

However, this limitation cannot find any justification in light of the text of Article III and its legislative objectives. My view certainly places a significant burden on a regulating country in that it must evaluate far more alternative measures. However, this evaluation is practicable, in particular, because the regulating country is required to submit only reasonable arguments on the choice of measures, as discussed later in Subsection 4.

Further, the limitation seemingly recognized under the GATT practice, if applied to Paragraph (g) of Article XX, would widely permit countries to enact environmental regulations in order to protect domestic producers, as later discussed in Section D.3(2)(c). Therefore, I disagree with this GATT practice.

4. Standard of Review

How should a WTO panel evaluate arguments presented by a regulating country? (Please note that "arguments" here include evidence as well as assertions.) This is the issue of the "standard of review." This subsection will separately discuss the review of an alleged legislative purpose and that of the choice of measures.

With respect to legislative objectives, a WTO panel can assume the accuracy of a regulating country's assertions regarding the primary objective of a subject regulation. My proposed framework will condemn a subject regulation which is aimed at protecting domestic producers, irrespective of whether this aim is primary or secondary. As a result, a WTO panel does not have to determine the primary objective.

Next, how should a WTO panel evaluate whether the alleged legislative goal is objectively necessary to be achieved? A WTO panel should accept arguments of a regulating country unless they are manifestly erroneous or inconsistent.

In order to determine what is necessary to be achieved in a regulating country, it is critical to know a variety of relevant factors. Because this necessity is based upon needs peculiar to the regulating country, most of the relevant factors will be related to the domestic situation of the regulating country.

These domestic factors can be fully investigated only in a regulating country. As a result, the government of a regulating country knows them far better than a WTO panel. Also, a WTO panel has limited authority to conduct an investigation within the territory of a regulating country. A WTO panel may "seek information . . . from any individual or body which it deems appropriate," including those

“within the jurisdiction of a Member . . .,” and may consult experts to obtain their opinion.”³⁹ However, it should be presumed that the government is more reliable than any other individual or body of that nation because the government has comprehensive authority and far more resources to conduct investigations within its jurisdiction. Therefore, if the view of such an individual or body differs from that of the government, a WTO panel should primarily rely on that of the government unless it is evidently wrong. As a result, if a WTO panel wishes to reject arguments of a regulating country, it could do nothing but rely on those of exporting countries. However, exporting countries are also unfamiliar with these domestic matters of a regulating country, and needless to say, have no authority to investigate there. Thus, what a regulating country presents is normally far more reliable. As a result, if both parties’ arguments appear reasonable, a WTO panel should show deference to a regulating country.

Another critical issue for a WTO panel is what the standard of review should be regarding whether a subject internal law is the least trade-restrictive. Similar to the necessity of legislative objectives, a WTO panel should accept arguments submitted by a regulating country unless they are manifestly erroneous or inconsistent.

Suppose that the government deems it necessary to reduce the consumption of a certain food product by twenty-percent or more because it has turned out that it could cause cancer. To achieve this goal, various measures are probably available. For example, the government may consider completely forbidding the sales of this product. Also, it would be possible to attain the goal by imposing a certain amount of tax on this product in proportion to the content of the injurious ingredient. If consumers are very sensitive to their own health, it might be enough to require that a warning of cancer be labelled on this product. The choice among these alternatives depends upon various factors; for example, to what degree a newly imposed tax will be reflected in the retail price; how consumers will react to the price increase likely resulting from the imposition of tax; how effectively a warning will change consumer behaviors. Since a regulating country is the most knowledgeable about these factors, a WTO panel should defer to arguments of the regulating country.

In this regard, there is always a risk that a regulating country may arbitrarily choose the facts it argues. However, exporting countries also have the incentive to arbitrarily select materials for submission in

³⁹ DSP Understanding, *supra* note 13, art.13.

order to protect the interest of exporters. Thus, when it comes to the possibility of manipulation, there is no difference between a regulating country and exporting countries. It is therefore inappropriate to discount only the reliability of a regulating country's submission based upon the risk of manipulation.⁴⁰ Rather, since a WTO panel is unfamiliar with facts underlying a regulating country's choice, exercising "judicial restraint," it should accept arguments of a regulating country unless they are manifestly unreliable.

However, two caveats must be made. One is that said judicial restraint should be limited to the evaluation of arguments with respect to matters within the territory of a regulating country. With respect to matters outside the territory of a regulating country, in contrast, there is no reason to respect arguments of a regulating country. Rather, insofar as a challenging country submits reasonable counterarguments, a WTO panel should reject arguments of a regulating country because a regulating country has failed to meet its burden of proof.

The other is that in exceptional circumstances, a WTO panel might have to reject arguments of a regulating country, even if they are related to only domestic matters. For example, when it is fairly established that a coloring material which is used in food is harmless, the prevention of distributing food colored by this material could violate Article III even if a regulating country presents facially reasonable arguments in support of the necessity of the legislative purpose. In particular, if this prevention has the effect of excluding far more imported products than domestic like products from the market, it might be reasonable to consider that the regulating country has attempted to protect domestic producers under the guise of protecting the health of domestic consumers. In this situation, a WTO panel could conclude that the alleged legislative objective is a "sham."⁴¹

This framework is different from the panel's conclusion in the case of *United States - Taxes on Automobiles*. The next section summarizes the panel's report. The section also scrutinizes the EC's view which emphasized a disproportionate burden on foreign products as indicia of violation of Article III.

⁴⁰ The best test of reliability would be carried out in the arena of domestic politics, where all parties know what is the reality. Thus, the WTO would better ensure the reliability of submissions by making them publicly available.

⁴¹ Cf. ALAN O. SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS* 122 (1995).

C. Discussion of GATT Panel of *United States - Taxes on Automobiles*

1. *Summary of Panel Report*

In this case, three domestic regulations of the United States on automobiles were subject to complaints by the EC; one of them imposed a tax on expensive automobiles; the remaining two concerned the fuel-efficiency of automobiles. This article focuses on the latter two environmental regulations: the Gas Guzzler Tax,⁴² and the Corporate Average Fuel Economy (CAFE) regulation.⁴³

(a) Gas Guzzler Tax

The Gas Guzzler Tax was imposed on manufacturers for those automobiles which did not meet a certain minimum fuel-efficiency requirement. The level of this tax was inversely proportional to the fuel efficiency of automobiles: the lower the fuel-efficiency, the higher the tax. This fuel-efficiency was measured by the US Environmental Protection Agency on the basis of a "model type." Designation of model type was based upon several factors affecting the fuel-efficiency of each automobile.⁴⁴

The panel concluded that the Gas Guzzler Tax was in compliance with Article III for the following reasons. First, the words "so as to afford protection to domestic production" appearing in Article III mean that a regulation must not have either the aim or the effect of protecting domestic production. Further, with respect to the first sentence of Article III:2, if neither the aim nor the effect of a regulation is to protect domestic production, and that regulation sets forth an objective characteristic of a product as a threshold for regulation, a product with that characteristic, and another product without it, are not "like products."⁴⁵

Second, a regulation will be deemed to be "aimed at" protecting domestic production if the nature of the measures used in the regulation suggests that "a change in competitive opportunities in favor of domestic products [is] a desired outcome, and not merely an incidental consequence of the pursuit of a legitimate policy goal." At the time of its introduction, the Gas Guzzler Tax was imposed on most existing domestic automobiles while it was imposed on a limited

⁴² 26 U.S.C. § 4046 (1995).

⁴³ 15 U.S.C. §§ 2001-2010 (repealed 1994).

⁴⁴ *United States Taxes on Automobiles*, *supra* note 18, ¶¶ 2.5-2.13.

⁴⁵ *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.23.

number of imported automobiles. Also, under the scheme of the Gas Guzzler Tax, “the amount of the tax payable at the threshold [did] not seem excessive, given the range and progression of the tax.”⁴⁶ These facts suggest that the aim of the regulation was not to protect domestic production.⁴⁷

Lastly, a regulation will not be deemed to have the effect of protecting domestic production in the following situation: “[T]he nature and level of the regulatory distinction made at the threshold [of the regulation] are consistent with the overall purpose” of the regulation, and “[do] not appear to create categories of [products] of inherently foreign or domestic origin.” In this respect, the regulatory distinction of the Gas Guzzler Tax has no such flaw, and hence, it is not deemed to have the effect of protecting domestic production.⁴⁸

(b) CAFE

The CAFE law set a required level of corporate average fuel economy (CAFE) for any manufacturer or importer who sells automobiles in the United States. With respect to each manufacturer, however, the CAFE of automobiles produced in the US, and that of imported automobiles were separately calculated. The CAFE law imposes a civil penalty on car manufacturers and importers that fail to meet a certain CAFE standard. The amount of civil penalty is proportional to the number of their manufactured or imported automobiles, and also, to a discrepancy between the required standard and their actual CAFE.⁴⁹

The panel reported as follows. First, since the CAFE of imported automobiles and that of domestic automobiles are separately calculated, the CAFE of foreign manufacturers producing only automobiles of low fuel-efficiency will be low while US manufacturers which produce both automobiles of low and high fuel-efficiency will be able to average the two together. Consequently, such an imported automobile of low fuel-efficiency may bear a civil penalty greater than a domestic automobile of the same fuel-efficiency. This result violates Article III.⁵⁰ Also, Article III does not permit any regulation which does not treat like products “as such.” Since treatment under the

⁴⁶ *United States Taxes on Automobiles*, *supra* note 18, ¶¶ 5.24-5.25.

⁴⁷ *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.24.

⁴⁸ *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.25.

⁴⁹ *United States Taxes on Automobiles*, *supra* note 18, ¶¶ 2.14-2.24.

⁵⁰ *United States Taxes on Automobiles*, *supra* note 18, ¶¶ 5.47-5.49.

CAFE regulation is based on factors not directly related to automobiles "as such," it is inconsistent with Article III.⁵¹

Second, Article XX(g) may exempt a regulation that is "primarily aimed at" the conservation of exhaustible natural resources. If each of the measures used in a regulation helps achieve this aim, the regulation will be deemed to be "primarily aimed at" the conservation of exhaustible natural resources.

However, the separate calculation of CAFE between domestic and imported cars does not serve the goal of the CAFE regulation: namely, the reduction of gasoline consumption. Therefore, the CAFE regulation is inconsistent with GATT to this extent.⁵²

2. *Review of EC's View on Interpretation of Article III*

In this case, in support of its challenge against the Gas Guzzler Tax, the EC maintained:

European manufacturers accounted for most of the gas guzzler tax revenues. In 1990, 73.36 per cent of the total taxes paid were derived from European manufacturers, although European cars accounted for only 4 per cent of the US market. In contrast, US production accounted for only 19.91 per cent of total tax paid, although it accounted for 72 per cent of the US market.⁵³

In essence, the EC argued that if an internal law imposes a disproportionate burden on imported products compared to those on domestic like products, it should be held in conflict with Article III. Although this view appears to faithfully reflect the text of Article III, I disagree with it for the following reasons.

Under the EC's view, even if its legislative purpose is necessary to be achieved, it is possible that Article III will reject an internal tax law which imposes a far greater tax burden on imported products than on domestic like products. However, this view protects inferior imported products over superior domestic products. If domestic products of a regulating country are more environmentally friendly than imported products, an environmental tax on this product will usually impose a higher burden on the imported products. The EC's view favors the conclusion that this tax should be condemned due to its negative impact on trade. The growing trend of domestically produced environmentally friendly products increases this possibility. Is this acceptable?

⁵¹ *United States Taxes on Automobiles*, *supra* note 18, ¶¶ 5.50-5.54.

⁵² *United States Taxes on Automobiles*, *supra* note 18, ¶¶ 5.56-5.67.

⁵³ *United States Taxes on Automobiles*, *supra* note 18, ¶ 3.111.

Further, the EC's view runs counter to past GATT panel reports. The reports have repeatedly stated that Article III is aimed at protecting "expectations on the competitive relationship between imported and domestic products,"⁵⁴ and rejected respondents' demand that panels should evaluate the actual impact on trade caused by a subject law in order to determine whether it is inconsistent with Article III.

In addition, the EC's view generates another problem. Under the EC's view, it is very unclear in what situation a WTO panel will determine that a given internal tax violates Article III. For example, if a ten percent tax is imposed on eighty percent of imported products while only on ten percent of domestic like products, is this in violation of Article III? Is it violative to impose twenty percent tax on sixty percent of imported products, and only on thirty percent of domestic like products? Nobody can give a clear-cut answer. Accordingly, the EC's view is not administrable.

The EC's view might even result in loosening the restraints imposed by Article III on internal taxes and laws. The EC's view compels a panel to base its decision on subjective criteria, which are not necessarily persuasive to everybody. A WTO panel would usually feel some reluctance to condemn a given internal tax. Oddly enough, as opposed to the EC's probable intent to tighten restrictions on internal taxes and laws, the possible result would be that almost all of them would be determined not in conflict with Article III. This provision would accordingly become of little use.

On the contrary, the subjective standard the EC maintained might significantly increase the submission of cases to the WTO panel procedure, and thereby waste limited resources of the WTO. Thus, as a matter of policy, the EC's view is counter-productive and ill-conceived.

First, under the EC's scheme, it is difficult to predict whether a WTO panel will conclude that a subject environmental regulation is consistent with Article III, and as a result, parties would have difficulty settling a dispute through negotiation. In contrast, under my proposed framework, a complainant can evaluate the possibility of a favorable panel decision by confirming whether a regulating country's explanation is reasonable.

⁵⁴ *General Agreement on Tariffs and Trade: Dispute Settlement Report on United States - Taxes on Petroleum and Certain Import Substances*, *supra* note 21, ¶ 5.1.9. See also *General Agreement on Tariffs and Trade: Dispute Settlement Report United States - Section 337 of the Tariff Act of 1930*, *supra* note 21, ¶ 5.13.

Second, under the EC's view, governments in a dispute could not easily concede. To do so, their negotiators would need a justification to persuade domestic pressure groups to accept the result of the negotiation. However, under the EC's "disproportionate impact" standard, no government could find any persuasive explanation that its own arguments are weak. In contrast, my proposed framework could give this justification. It could be more objectively determined whether arguments are reasonable. Also, from the viewpoint of a complainant, since this framework provides that a WTO panel will defer to a regulating country, it will be easy to find justification for concession.

In summary, no interpretation of Article III should focus on the disproportionately adverse effect of a subject regulation on imported products. Any interpretation based upon this approach would impede a member state from eliminating inferior products from the market, and would provide no workable rules. Therefore, I cannot accept any such interpretation even though it appears to be more consistent with the text of Article III. As an example of my concern, it would, on average, prevent the imposition of a greater tax on imported products than that on like domestic products, as mentioned toward the end of Section B.2.

3. *Review of Panel's View on Interpretation of Article III*

It is plausible that the focus of the panel was not directed to the "actual trade effect." The panel stated: "[T]he Panel did not consider that these figures [of sales and trade-flow data on automobiles subject to the gas guzzler tax] in themselves could provide evidence of a change in conditions of competition favoring domestic automobiles."⁵⁵ Further, the panel appears to rightly focus on the proportionality of a tax burden on each automobile to the magnitude of the targeted environmental harm it generates. When concluding that the Gas Guzzler Tax was permitted under Article III, the panel took into consideration that "the amount of the tax payable at the threshold did not seem excessive, given the range and progression of the tax."⁵⁶

However, this panel did not present any objective criteria in assessing the consistency of subject laws with Article III. Under this view, WTO panels can do nothing but to almost always exercise a "judicial restraint," and consequently, would overlook many

⁵⁵ *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.25.

⁵⁶ *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.25.

clandestinely protective measures. This flaw would be aggravated by the practice that the burden of proof is incumbent not on a regulating country but on a complaining country. Similar to the EC's view, the panel's view might also increase requests for WTO review due to its absence of objective criteria.

In brief, the panel's view would be likely to result in limiting the possibility of a national treatment violation to exceptional circumstances where a WTO panel considered the justification of the regulating country a "sham." This view eviscerates the function of Article III.⁵⁷

4. *Review of Panel's View on Burden of Proof*

Although it is not clear from the report, taking account of past panel decisions, this panel most likely assigned to the complainant the burden of proving that challenged legislation has either the purpose or the effect of protecting domestic producers.⁵⁸

Indeed, it is usually proper to allocate to a petitioner the initial burden of proving that a claim exists. However, this is the case only where it is not presumed that a defendant has injured a right of the petitioner. In the case of internal taxes, in contrast, it should be presumed that they are at least in part aimed at protecting domestic producers, and therefore, that a petitioner, a challenging country, has a claim.

5. *Review of Panel's View on Standard of Review*

It is not clear what standard of review past GATT panels have adopted thus far. This is also the case in *United States - Taxes on*

⁵⁷ There remains the issue of whether the national treatment requirement is applied on the basis of each exporting country, or on the basis of imported products as a whole. Under the former view, for example, any U.S. law must treat domestic products equally compared to products imported from specific nations, i.e., treat domestic products the same as those from Canada, Japan, etc. Under the latter view, in contrast, an internal regulation will only be questioned when it advantages domestic products over those products from foreign countries in general.

In this regard, the panel in *United States Taxes on Automobiles* concluded that the Gas Guzzler Tax had no protective effect because this tax did not place a significant burden on Japanese and U.S. automobiles while the EC automobiles bore a significant burden. *United States Taxes on Automobiles*, *supra* note 18, ¶ 3.111 Accordingly, this panel adopted the latter view under Article III. Although an analysis on this point is beyond the scope of this article, in my view, the texts of Paragraphs 1 and 2 of Article III indicate that under the first sentence of Paragraph 1, a WTO panel should adopt the "country-basis approach"; in contrast, under the second sentence, the "all imports basis approach" is proper.

⁵⁸ Cf. JACKSON ET. AL., *supra* note 14, at 355.

Automobiles. A WTO panel should use the standard of review proposed above.

D. Article XX

This Section will address Article XX, in particular, Paragraphs (b) and (g). In contrast to Article III, past GATT panels have shown greater convergence in their interpretation of Article XX. As indicated below, I agree with part of the GATT interpretative practice. I first summarize this practice, and subsequently review it.

1. Summary of GATT Practice

Article XX sets forth exemptions from other GATT provisions. To explain the qualifying criteria for these exemptions, past GATT panels have developed the following interpretative practice for Paragraphs (b) and (g) of Article XX:

- (i) Paragraph (b) exempts those regulations which are "necessary to protect human, animal or plant life or health," namely, regulations that are less inconsistent with GATT than any other possible alternative measure for this purpose;⁵⁹
- (ii) Paragraph (g) exempts those regulations which are "primarily aimed at" the conservation of exhaustible natural resources;⁶⁰
- (iii) The burden of proving that a regulation under review meets the requirements of Article XX is incumbent on the country invoking it, namely, a regulating country;⁶¹ and

⁵⁹ See, e.g., *General Agreement on Tariffs and Trade: Dispute Settlement Report on Thailand Restrictions on Importation of and Internal Taxes on Cigarettes*, 37 Supp. BISD 200, ¶ 74 (1991). In this case the United States challenged a *de facto* ban imposed by a Thai trading monopoly on imports of cigarettes as violative of GATT Article XI, which generally prohibits quantitative import restrictions. In response Thailand, invoking Article XX(b), maintained that its policy of prohibiting imports of cigarettes was to protect public health. The panel denied exemptions to the ban because Thailand could have chosen less-trade restrictive measures, such as non-discriminatory labelling and ingredient disclosure regulations.

⁶⁰ See e.g., *General Agreement on Tariffs and Trade: Dispute Settlement Report on Canada Measures Affecting Exports of Unprocessed Herring and Salmon*, 35 Supp. BISD 98, ¶¶ 4.4-4.6 (1989); *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.58. The former case addressed Canadian prohibition on the exportation or sale for export of unprocessed herring and salmon. In response to the U.S. claim that this prohibition violated Article XI, Canada contended that the measures under review were permitted under Paragraph (g) of Article XX because they provided information on the harvesting of herring and salmon, thereby aiding in their conservation. However, the panel concluded that because the ban was imposed only on exports, it could not be deemed to be "primarily aimed at" conserving herring and salmon stocks, and therefore, the ban was impermissible.

In my view, the "primarily aimed at" standard deviates from the term "related to." See also, Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. World Trade 37, 50 (1991).

⁶¹ See, e.g., *General Agreement on Tariffs and Trade: Dispute Settlement Report on Canada Administration of the Foreign Investment Review Act*, 30 Supp. BISD 140, ¶ 5.20 (1985); *General*

- (iv) A regulation is not “a disguised restriction on international trade,” if it “had been taken as a trade measure and publicly announced as such.”⁶²

As indicated in Section A of this article, the practices above should be revised in the following manner:

- (u) Paragraph (b) of Article XX may exempt those environmental regulations which are aimed at protecting “human, animal or plant life or health.” However, the aimed level of protection must be objectively necessary to be achieved;
- (v) Paragraph (g) of Article XX may exempt those environmental regulations which are aimed at “the conservation of exhaustible natural resources.” In contrast to Paragraph (b), a regulating country may determine the aimed level of conservation at its discretion;
- (w) Under both Paragraphs, the measures used in an environmental regulation must be the least inconsistent with other GATT provisions among all alternatives for the same purpose. Similar to Article III, this assessment should be based upon the availability of other measures with respect to a subject product, but also that of measures with respect to other products for the same purpose;
- (x) Similar to Article III, a regulating country bears the burden of proof on these points;
- (y) Similar to Article III, a WTO panel should accept arguments of a regulating country unless they are manifestly erroneous or inconsistent;
- (z) A regulation may be condemned as “a disguised restriction” if the alleged legislative objective is deemed a “sham.”

The panel of *United States - Taxes on Automobiles* followed the past GATT panels’ interpretation of Paragraphs (b) and (g) of Article

Agreement on Tariffs and Trade: Dispute Settlement Report on United States Restrictions on Imports of Tuna, 39 Supp. BISD 98, ¶ 5.22 (1993).

The former case addressed a Canadian law requiring that foreign investors in Canada purchase Canadian-made materials. Canada contended that the law was permitted under Paragraph (d) of Article XX even if it violated Article III. The panel held that the responsibility to demonstrate that the law met with the requirements under Article XX was incumbent on Canada because this provision set forth exceptions.

The latter case is often cited as *Tuna/Dolphins I*. Mexico claimed that the United States violated Article III by prohibiting imports of tuna harvested through a method entailing the mass-killing of dolphins in excess of a certain standard. The panel determined that this prohibition was not permitted under Article III, and subsequently, that a party invoking exemptions under Article XX should bear the burden of proof.

⁶² *General Agreement on Tariffs and Trade: Dispute Settlement Report on United States Prohibition of Imports of Tuna and Tuna Products from Canada*, 29 Supp. BISD 91, ¶ 4.8 (1983). Based upon Article XI, Canada challenged the U.S. prohibition on imports of tuna and tuna products followed the seizure of fishing vessels and arrest of U.S. fishermen by Canadian authorities. Evaluating the U.S. invocation of Paragraph (g) of Article XX, the panel determined that “the United States action should not be considered to be a disguised restriction on international trade, noting that the United States prohibition . . . had been taken as a trade measure and publicly announced as such.” *Id.*

XX, as summarized in (i) to (iv) above. Thus, the next subsection, which reviews this panel decision, will explain the rationales for the views from (u) to (z).

2. *Review of GATT Practice*

(a) Texts of Paragraphs (b) and (g) of Article XX

Paragraphs (b) and (g) of Article XX state:

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 Member of measures:

- ...
(b) necessary to protect human, animal or plant life or health;
- ...
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
-

(b) Legislative Purpose of Regulations

(i) *Necessity of Legislative Purpose*

First, it is obvious from the texts of these paragraphs, in order to be qualified for these Article XX exemptions, the underlying objective of a regulation must fall within a range set forth in Article XX. In this regard, under Article III, the legislative objective of a subject internal tax must be specific enough to enable a regulating country to prove that its chosen measure is the least trade-restrictive. This is also the case under Article XX because this provision also require that the measure is the least trade-restrictive, as explained later in Subparagraph (c).

Further, in my view, under Paragraph (b) of Article XX, not only must the legislative objective of an environmental regulation be the protection of human health, etc., but also the specified aimed level of the protection must be objectively necessary.⁶³ This requirement is the same as that which Article III requires with respect to the necessity of legislative objectives, as explained in Section B.3(b) above. This interpretation is supported by the text of Paragraph (b) of Article XX, which can exempt only measures "necessary to protect" human

⁶³ *Contra*, Charnovitz, *supra* note 60, at 49.

life, etc. It would be absurd under the proposed framework to interpret Paragraph (b) otherwise. Should Paragraph (b) not demand this necessity of legislative objectives, it could permit even an environmental regulation which fails under Article III, for example, an environmental regulation whose legislative objective is not necessary, and hence, which was probably taken in order to protect domestic producers. This interpretation emasculates the national treatment requirement.

In contrast, Paragraph (g) does not require that the legislative purpose of an internal law be objectively necessary. This provision uses the term "relating to" instead of "necessary," which is used in Paragraph (b).

This difference in the necessity of legislative purposes between Paragraphs (b) and (g) is supported not only by the difference in their terminology, but also by the difference in the nature of the legislative purposes mentioned in these provisions. The evaluation of the "necessity" under Paragraph (g) requires considerations of not only domestic factors but also information available only in foreign countries, and consequently, a regulating country can hardly prove this necessity.

Let me clarify this through an example of measures which are supposed to be typically addressed under Paragraph (g), namely, exports restraints on exhaustible natural resources. Suppose that in order to conserve the reserve of crude oil for future generations, a country restricts the domestic consumption of oil products, and at the same time, limits exports of the oil products up to a certain amount. In this regard, Article XI generally prohibits quantitative trade restrictions on exports as well as imports; however, it permits "[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member."⁶⁴ Under Article XI, this is the sole exemption which could be applied to quantitative export restrictions on exhaustible natural resources. Therefore, insofar as foreign oil products is available to the regulating country enough to meet with its domestic demand, the export ban will violate Article XI. Subsequently, a WTO panel would evaluate whether Paragraph (g) of Article XX exempts this export ban.

If Paragraph (g) requires the necessity of legislative objectives, the level of limitation on exports must be necessary in light of not only the amount of domestic reserves but also the amount of foreign

⁶⁴ GATT, *supra* note 5, art. XI.2(a).

reserves. Under my framework, a regulating country bears the burden of proof of this necessity. Thus, if foreign countries which have reserves put forth counterarguments with respect to the estimated amount and future availability of their reserves to the regulating country, by adopting these counterarguments, a WTO panel must reject arguments of the regulating country. However, the estimates of foreign countries might turn out wrong in the future. Also, there is no certainty that these foreign countries will supply their reserves to the regulating country in the future as they have argued. As a result, if Paragraph (g) demands the necessity of legislative objectives, a country would be forced to rely on uncertain foreign supply. This result is unacceptable to any country.

Consequently, in contrast to Paragraph (b), Paragraph (g) should be interpreted to permit any level of conserving exhaustible natural resources even if it appears unnecessary. In other words, under Paragraph (g), a country may choose the level of conservation at its discretion.

(ii) *What Are "Exhaustible Natural Resources" Mentioned in Paragraph (g)?*

As indicated above, Paragraph (g) does not question whether a subject law pursues a necessary level of conservation of exhaustible natural resources. Therefore, there is a significant risk that such laws will be used to protect domestic producers, and thus, it is important to clarify the scope of "exhaustible natural resources" mentioned in Paragraph (g). This scope should be limited at least in the following manner.

In my view, Paragraph (g) cannot exempt any measure which a country takes in order to conserve exhaustible natural resources outside its territory because this permission runs counter to the fundamental policy of the WTO Agreement.

It is widely agreed that the principal policy goal of the WTO framework is "to liberalize trade that crosses national boundaries, and to pursue the benefits described in economic theory as 'comparative advantage.'"⁶⁵ This theory of "comparative advantage" indicates that a country can produce goods and services more efficiently by specializing in producing those goods and services in which it has "comparative advantage." Further, by exchanging products which are more efficiently produced because of this specialization, all countries can be

⁶⁵ Jackson, *supra* note 2, at 1231.

better off. As a result of specialization, those industries in each country which have no "comparative advantage" are supposed to shrink. In turn, resources used by those industries will be reallocated to those other industries which have "comparative advantage"; consequently these resources will be used more efficiently.

The endowment of exhaustible natural resources consists in part of "comparative advantage." Therefore, it is rational to permit countries to choose the level of conservation of their own exhaustible natural resources at their discretion. To the contrary, if a country can freely determine the level of conservation, namely, the level of present use, of exhaustible natural resources in foreign countries, it would hinder those foreign countries from realizing their own "comparative advantage." This outcome runs counter to the fundamental objective of the WTO Agreement. Therefore, "exhaustible natural resources" mentioned in Paragraph (g) of Article XX should be limited to those within the territory of a regulating country.

The text of Paragraph (g) confirms this limitation. This provision focuses on exhaustible natural resources of a regulating country in that it can exempt environmental measures only if "such measures [relating to the conservation of exhaustible natural resources] are made effective in conjunction with restrictions on domestic production or consumption."⁶⁶ It is natural to consider that "domestic" qualifies "consumption" as well.

(c) Choice of Measures

The next question is what measure a regulating country should choose to pursue a given objective. At a minimum, it must be less trade-restrictive than any other alternative. This is the case under either Paragraph (b) or (g) of Article XX.

First, the title of Article XX "General Exceptions" indicates that this provision sets forth exceptions to other GATT provisions. As a matter of principle, exceptions should be narrowly interpreted.

Second, Article XX says, "nothing in this [GATT] Agreement shall be construed to prevent the adoption or enforcement of . . . measures . . .," for example, "(g) relating to the conservation of exhaustible natural resources . . ." Since this text does not expressly permit either "any" such measure or "all" such measures, it could be read as confirming only that a member state reserves the authority to pursue enumerated purposes. This authority can be reserved even

⁶⁶ GATT, *supra* note 5, art. XX(g).

when Article XX permits only measures which are the least inconsistent with other GATT provisions among all alternatives. There is no need to permit any measure which is more trade-restrictive.

Therefore, the practice of GATT panels with respect to Paragraph (b), as summarized in (a)(i) above, is plausible.⁶⁷ Also, a WTO panel should apply this framework to Paragraph (g) rather than the seemingly established interpretative practice of the "primarily aimed at" standard. Under the present practice, a country can seek the protection of its domestic producers by choosing a regulation which is not the least trade-restrictive.

This difference between the GATT practice and my framework hinges on the difference in their emphasis within the text of Paragraphs (b) and (g). As indicated above, in contrast to my framework, GATT panels relied on the term "necessary (to protect human health, etc.)" in Paragraph (b) when drawing the requirement of "the least trade-restrictive." GATT panels similarly focused on the term "related to (the conservation of exhaustible natural resources)" in Paragraph (g), following which they interpreted this "related to" as meaning "primarily aimed at."

However, as indicated above, this difference in terminology relates to the necessity of legislative objectives. As a result, this difference is irrelevant to whether Paragraphs (b) and (g) requires that the measures used in a subject regulation be the "least trade-restrictive." Therefore, the GATT practice cannot be upheld.

Further, similar to Article III, when evaluating the choice of measures in light of the "least trade-restrictive" standard, a WTO panel should take into consideration not only the availability of alternative measures concerning a subject product but also that relating to any other products. There is no reason to adopt a different view with respect to Article XX. Also, if the scope of evaluation is limited to a product subject to an environmental regulation at issue, Paragraph (g) of Article XX would unnecessarily permit countries to use environmental regulations in order to protect domestic producers.

Under my framework, Article III demands that the legislative purpose of environmental regulations be objectively necessary to be achieved. In contrast, Paragraph (g) of Article XX can exempt environmental regulations which are aimed at conserving exhaustible natural resources, irrespective of whether this aim is necessary. Thus, in

⁶⁷ *Contra*, Robert F. Housman and Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 ENVTL. L. 545, 565-66 (1993).

reliance on Paragraph (g), a country could enact an environmental regulation to protect domestic producers by choosing any unnecessary level of conservation as its legislative purpose.

Accordingly, if only measures related to a subject product are considered under the "least trade-restrictive" test, a country could enact protectionist measures on any product consuming exhaustible natural resources under the guise of conservation of these resources. Much worse, the scope of such products is very broad. For example, any electric appliance can be included because they consume electric power which is generated by thermal power stations using oil or coal. In my view, this is not acceptable.

This problem would be solved if a WTO panel considers not only possible measures with respect to a product subject to a challenged environmental regulation, but also the availability of measures with respect to other products. Since a regulating country can usually directly restrict the consumption of exhaustible natural resources more feasibly and in a more timely manner, it is highly likely that indirect conservation measures will be determined not the "least trade-restrictive."

This analysis supports the broader inclusion of measures to be considered in applying the "least trade-restrictive" standard. There is no theoretical justification to apply this broader inclusion only with respect to Paragraph (g) of Article XX (or only with respect to Article XX) while not to Article III. Thus, I maintain that a WTO panel should adopt the more stringent framework in evaluating whether the measures used in an environmental regulations are the "least trade-restrictive" under both Articles III and XX.

(d) Burden of Proof

Which party should bear the burden of proving that a subject regulation meets these requirements with respect to its underlying objective and choice of measures? It appears to be agreed that a regulating country should bear this burden.⁶⁸

It would be easier to justify this answer in case of Article XX than Article III. Paragraphs (b) and (g) of Article XX set forth exceptions from other GATT obligations on member states.⁶⁹ Also, as above I pointed out in Section B.3, it is presumed that a regulation is biased to the advantage of domestic producers. Hence, the burden of proof

⁶⁸ See JACKSON ET. AL., *supra* note 14, at 355-57.

⁶⁹ GATT, *supra* note 5, art. XX(b) and (g).

should be on the regulating country which invokes these exceptions and attempts to rebut this presumption. Accordingly, the regulating country should do the following:

- (i) specify the policy goal in question (for example, in case of *United States - Taxes on Automobiles*, to what degree the United States plans to reduce the consumption of gasoline);
- (ii) under Paragraph (b), prove that this specified goal is objectively necessary to be achieved; and
- (iii) substantiate that the regulation is the least trade-restrictive among possible alternative measures to attain that goal.

(e) Standard of Review

Fourth, similar to Article III, it is necessary to clarify how a WTO panel should review arguments of parties. In my view, the process should be the same as explained in Section B.4 above; a WTO panel, exercising a judicial restraint, should accept arguments of a regulating country unless they show any manifest error; however, with respect to matters outside the territory of a regulating country, a WTO panel should reject a regulating country's arguments if a challenging country presents reasonable counterarguments.

(f) "A Disguised Restriction on International Trade"

In exceptional cases, a regulation may be denied exemption as "a disguised restriction on international trade,"⁷⁰ even if it satisfies other requirements under Article XX. Suppose the following: (i) that a regulation in fact puts a burden almost exclusively on imported products; (ii) that this burden is very great; (iii) that it is a bit doubtful that the asserted legislative purpose is necessary to be achieved. In this case, a WTO panel could deem the regulation as seeking to protect domestic producers at least as an ulterior purpose, namely, as "a disguised restriction on international trade."

In contrast, a past GATT panel indicated that a regulation is not "a disguised restriction on international trade," if it "had been taken as a trade measure and publicly announced as such."⁷¹ However, this interpretation is inconsistent with the ordinary meaning of "dis-

⁷⁰ Obviously, "[a] disguised restriction on international trade" is related to the national treatment requirement. In contrast, "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" concerns a violation of the MFN requirement. The detailed analysis of the latter provision is beyond the scope of this article. However, in my view, it enables a WTO panel to reject in exceptional cases a measure which could be deemed to discriminate against a member state in favor of another member state.

⁷¹ See *General Agreement on Tariffs and Trade: Dispute Settlement Report on United States Prohibition of Imports of Tuna and Tuna Products from Canada*, *supra* note 62, ¶ 4.8.

guised,” and hence, cannot be sustained.⁷² In this connection, I would like to again call attention to Article 31.1 of the Vienna Convention. This provision, which constitutes part of customary international law,⁷³ demands that an international agreement be interpreted primarily based upon the ordinary meaning of the words used in the agreement.

(g) Regulations of Products “as Such”

As exemplified in the panel on *United States - Taxes on Automobiles*, GATT panels have frequently questioned whether a subject regulation treats like products “as such.”⁷⁴ Although this appears to be an established practice, I believe that this practice should be abandoned for the following three reasons.

First, this is not a clear-cut criterion. Hence, this makes it difficult for member states to predict the outcome of a panel review. Second, under my framework, this requirement is of no use. The “as such” standard deems that any internal law treating products not “as such” is in violation of Article III, and consequently subjects it to potential review under the strict requirements of Article XX. However, under my framework, a WTO panel will review this internal law under Article III with almost the same test as used under Article XX.

Third, the “as such” standard could theoretically generate an aberrational outcome. Under this standard, how should competition laws be treated? Competition laws usually regulate corporate behaviors including that of domestic producers and importers, not products they deal with; for example, the prevention of predatory pricing addresses, not the sales price of individual products, but the pricing of a line of products. Without a doubt, competition laws are “internal laws,” which are subject to Article III. Further, most restraints in competition law treat products not “as such.” Therefore, the “as such” standard would normally reject competition laws. Nevertheless, Article XX could not save any competition law because the purpose of competition laws — although depending upon the jurisdiction, for example, the maintenance of competition — is not mentioned in any Paragraph of Article XX.

⁷² See, e.g., Jan Klabbbers, *Jurisprudence in International Trade Law: Article XX of GATT*, 26 J. WORLD TRADE 63, 74 (1992); Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Dispute in GATT*, 27 J. WORLD TRADE 43, 55 (1993).

⁷³ HENKIN, ET. AL, *supra* note 25, at 416-18.

⁷⁴ See e.g., *United States Taxes on Automobiles*, *supra* note 18, ¶ 5.50.

Needless to say, I do not believe that any WTO panel would conclude from the "as such" standard that any competition law violates GATT. However, I do not find any theoretical explanation of why a panel could reject this conclusion. In my view, the logical possibility of this absurd outcome clearly indicates that the "as such" standard is alien to Article III.

III. CONCLUSION

Based upon the foregoing analysis, this article proposes the following interpretation of Articles III and XX:

- (a) With respect to Article III:
 - (i) Article III prohibits any environmental regulation which facially discriminates against imported products in favor of domestic like products;
 - (ii) This Article prohibits any environmental regulation which is aimed at protecting domestic producers even if it is facially neutral;
 - (iii) A regulating country bears the burden of proving that an environmental regulation is not aimed at protecting domestic producers. This responsibility is discharged when a regulating country proves (x) that the legislative purpose of this environmental regulation is objectively necessary to be achieved, and (y) that the measures used in the regulation are more equally treating domestic and imported products, namely, they are less trade-restrictive than any other alternative. Alternatives to be compared with the subject regulation include, but are not limited to, those involving other products than the subject product; and
 - (iv) A WTO panel should accept arguments presented by a regulating country on these points described in (iii) above unless they are manifestly erroneous or inconsistent.
- (b) With respect to Article XX:
 - (i) Paragraph (b) of Article XX may exempt those environmental regulations which are aimed at protecting "human, animal or plant life or health." However, it is required that a regulating country objectively needs to achieve the aimed level of protection;
 - (ii) Paragraph (g) of Article XX may exempt those environmental regulations which are aimed at "the conservation of exhaustible natural resources." In contrast to Paragraph (b), a regulating country may determine the aimed level of conservation on its discretion;
 - (iii) Under both Paragraphs, the measures used in an environmental regulation must be the least trade-restrictive among all alternatives for the same purpose. Similar to Article III, this assessment should be based upon the availability of other measures with respect to a subject product, but also that of measures with respect to other products for the same purpose;

- (iv) Similar to Article III, a regulating country bears the burden of proof on these points described in (i) to (iii) above; and
 - (v) Similar to Article III, a WTO panel should accept arguments of a regulating country unless they are manifestly erroneous or inconsistent.
- (c) Under either of these Articles, in exceptional cases, a panel might condemn an environmental regulation (in case of Article XX, as a “disguised restriction on trade”) even if that regulation appears to meet the other requirements.