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I. INTRODUCTION

At one time, federalism may have seemed a peculiarly American institution. Today, however, we can see federalism as a special case of the more general problem of allocating power among geographic units. Problems of federalism arise in structures as large as

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the European Union[1] and the even larger global trade system under the General Agreement on Tariffs and Trade ("GATT").[2]

Free trade increasingly is accepted as a value internationally, as it always has been for commerce within the United States. Yet, both internationally and domestically, free trade must accommodate the reality of the modern regulatory state—a state that shows little tendency to wither away. Regulation often creates competitive disadvantages for foreign producers. Sometimes the disadvantage is intended, but sometimes it is a genuinely unwanted consequence of a domestic policy. Trade-restricting effects frequently occur even with facially nondiscriminatory regulations because the different geographic or market positions of foreign producers often make it more costly to comply with demanding regulations. For example, a rule mandating particular pollution controls for automobiles can force the foreign producer to set up a separate production operation in order to sell in that particular jurisdiction.

When trade between American states is involved, the operative legal rules on trade-restricting measures are provided by the dormant Commerce Clause ("DCC"). The Supreme Court has been particularly vigilant in scrutinizing state laws under this doctrine in recent years.[3] Trade between more than one hundred nations is regulated by a similar set of legal rules in GATT and its many supplemental agreements.[4] The GATT agreements contain many specific rules

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1. The entity now known as the "European Union" ("EU") began life in 1957 as the "European Economic Community" ("EEC"), evolved into the "European Community" or "European Communities" (both "EC"), and has now again changed its name. Nothing in this Article requires mastery of this shifting nomenclature.

2. The original 1947 GATT agreement is cited conventionally in the United States as: *opened for signature* Oct. 30 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The current text of the 1947 GATT, as amended, is reproduced in Volume IV of the GATT's official document series, conventionally cited as "Contracting Parties to the General Agreement of Tariffs and Trade, Basic Instruments and Selected Documents" ("BISD"), last published in 1969. The juridical entity created by the 1947 GATT agreement as amended is scheduled to be replaced by a new entity, called "GATT 1994." This entity, joined together with the other supplemental agreements negotiated in the 1986-93 Uruguay Round negotiations, will serve as the legal framework for the new World Trade Organization ("WTO") that was also created by those negotiations. GATT 1994 itself will have the same substantive text as the current 1947 GATT. GATT provisions, 1947 or 1994, will be cited simply as: "GATT Article ___."

The BISD series, which in addition to "Volumes" containing basic texts, is issued in annual Supplements. These will be cited as "BISD, ___ Supp."

3. See David O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to "Our Federalism?"*, 9 J. L. & Pol. 609, 629-33 (1993).

4. The law of the European Union also contains an extensive body of DCC-like doctrine under Articles 30 and 36 of the Treaty of Rome, an even richer body of experience for an in-depth comparative study. See generally Donald P. Kommers and Michel Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experiences*, in Mauro

regulating certain types of trade barriers. The GATT agreements also contain a number of DCC-like prescriptions, prohibiting national regulatory measures that constitute "unnecessary obstacles to international trade"[5] or a "disguised restriction on international trade."[6] While GATT case law is not as fully developed as DCC law, recent decisions and negotiations have begun to elaborate it sufficiently to permit comparisons.

In this Article, we will consider the DCC in comparison with the GATT legal system.[7] We believe enough commonalty exists to justify an effort at a comparative treatment. Both legal systems are struggling with the same basic difficulties. The modern regulatory state inevitably produces burdens on trade, if only because of the unavoidable lack of regulatory uniformity. For various reasons, many of these burdens likely are unwarranted, and at least some are in fact due to protectionist efforts by local industries. Yet, tribunals have only a limited warrant to override the policy choices of local legislatures. Tribunals must accord respect to the democratic process as well as to the prerogatives (or sovereignty) of local governments. To be sure, DCC law and GATT law operate in two quite different political and institutional settings, not to mention the different paths of legal evolution that have brought them to this point. But that is what makes the comparison interesting.[8]

We begin in Part II by considering briefly the basis for the quasi-constitutional legal protection of free trade, and the central tensions implicit in that legal mandate. In Part III, we explore the existing legal rules applicable to trade-restricting regulatory measures, first under DCC doctrine, then under GATT. Although some of our discussion of DCC doctrine may be familiar to constitutional scholars, we believe that lower court developments are noteworthy

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Cappelletti, Monica Seccombe and Joseph Weiler, eds., 1 *Integration Through Law*, Book 3, *Forces and Potential for a European Identity* 165 (Walter de Gruyter, 1986).

5. The quotation is from Article 2.2 of the revised GATT Standards Code, as adopted at the conclusion of the Uruguay Round. Agreement on Technical Barriers to Trade, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on April 15, 1994, at page 117. The new Uruguay Round Standards Code will be cited hereinafter as "*1994 GATT Standards Code.*" The entire Final Act will be cited hereinafter as "*1994 GATT Final Act.*"

6. The term comes originally from the preamble to GATT Article XX. See note 64.

7. In particular, we will focus on the application of the DCC to regulations. There is another, quite complex body of law covering state taxation of interstate commerce.

8. This comparison is interesting enough to modify the views of one of the authors regarding the DCC. Compare the views expressed in this article with those in Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 Const. Comm. 395 (1986).

and less well-known.[9] Similarly, the GATT material is unfamiliar to many American legal scholars. In Part IV, we summarize our conclusions from this comparative examination. We suggest that lack of clarity may be a necessary characteristic of legal doctrines wrestling with the opposing forces in this area, and offer a map of the small area of firm ground available to legal tribunals.

II. FREE TRADE AS A SUBJECT FOR LEGAL PROTECTION

A. Why Constitutionalize Free Trade?

The DCC can be considered a weak form of constitutional law —constitutional inasmuch as it limits the power of state regulators, weak inasmuch as Congress can resurrect state regulatory power by legislation. GATT can also be considered quasi-constitutional because it is designed to channel the ordinary legislative processes of GATT member governments. Before becoming immersed in the details of these doctrines, it is important to review the fundamental issue of why free trade should receive such extraordinary legal protection.

Free trade may be a desirable state of affairs, but so are many other things that are left to the discretion of governmental units. Why not leave local units of government, whether American states or the world's trading nations, with unlimited control over this area? Why have a GATT or DCC at all?

Economic theory would have no difficulty explaining why free trade is better—protectionist trade barriers usually hurt the state imposing them as much or more than they harm trading partners. But that is not an answer that distinguishes free trade from other social and economic policy issues. In other areas, we accord legislatures the freedom to choose economically harmful results, including the freedom to choose the least efficient way to accomplish a particular social objective.

The conventional explanation of the extraordinary legal protection given to free trade policy is that, unlike most other policy measures, trade restrictions cause direct and immediate harm to "outsiders" who actually are members of the same wider community. External controls are required, the argument goes, because local units

9. In our survey of the lower federal courts, we have focused on environmental law, which is currently a major source of DCC litigation.

will not properly take into account these harms to other community members. In a community consisting of several smaller units of government (a United States consisting of individual states, or a GATT consisting of individual nations), the ultimate question is whether the gain of the regulation for insiders[10] outweighs the harm it causes to outsiders. Local legislatures may be well suited to weigh the importance of gains in terms of the costs *they* are willing to pay, but there is no reason to think they have any capacity to make an honest weighing of the balance between their own gains and the costs to outsiders within the larger community. Indeed, human experience tells us that, in a democracy, they have every reason not to do an honest job.

The underlying reason for wanting to prevent these harms to outsiders may simply be the desire to protect community membership. When states institute regulations that unduly burden nonresidents, they are failing to accord those nonresidents the measure of respect due to fellow citizens. This justification also applies to GATT, although to a much weaker degree. Notwithstanding GATT's primary emphasis on the economic gains from multilateral cooperation, the postwar initiative that created GATT also rested on a collective perception that ruthless treatment of the economic interests of outsiders is inconsistent with the conditions of peaceful international society.

The articulated reasons for legal barriers against protectionism usually assign a major role to economic gains that cannot be achieved by the individual decisions of local units. The argument resembles a solution to a prisoner's dilemma.[11] Cooperative agreement can improve the welfare of all of the individual states. An enforcement mechanism is required, not because it is in the interest of each state to defect from the agreement—economists are pretty much united in the view that it isn't—but because the mercantilist perspective that prevails in most political debate makes it seem so. Thus, rather than solving a true prisoner's dilemma, free trade agreements

10. When we speak of "gain for insiders," we refer to the tangible economic gains that accrue to the interest groups seeking trade protection. The observation rests on the assumption that such policy decisions are, in fact, driven by the interests of the groups that benefit from them, aided by whatever misguided perception of overall national interest may be generated in support of them. In most cases, of course, economic theory tells us that there will be no welfare gain to the polity as a whole.

11. A "prisoner's dilemma" is a game-theory situation involving two parties, who must each decide whether to "cooperate" or "defect." Whatever the other party does, each can always increase its payoff by defecting rather than cooperating. Neither party can trust the other. As a result, both defect even when this results in a much lower payoff than joint cooperation. A classic example is an arms race that makes neither side more secure; each would like to quit but cannot trust the other.

also partake in the nature of the "public-interest Ulysses" binding himself to the mast to avoid responding to the calls of the protectionist Sirens.

By itself, this self-control rationale would not distinguish free-trade rules from similar legal restraints that might be imposed to prevent other kinds of economically inefficient legislation. Quite apart from protectionism, legislatures have an innate tendency to favor concentrated groups of firms at the expense of the general public.[12] Why institute legal safeguards against protectionism but not against other forms of special interest legislation? In sum, the reason for the special treatment accorded to free trade policies comes back to the protection of outsiders. These outsiders might not need protection if the economics of free trade carried more political force, but the political reality is one of mercantilism—and it is that political reality that creates the semblance of the prisoner's dilemma.

Legal restraints on protectionism have another characteristic that distinguishes them from legal intervention in other areas of social and economic policy. Free trade is a more tractable judicial goal than the typical *Lochnerian* standards of rationality or economic efficiency that typically serve as standards for review of other social and economic laws. Granted that social and economic legislation often involve noneconomic values, imposition of a free trade standard need not impair those values. Free trade mandates equal opportunity for foreign firms. Being a principle of equality, it does not restrict a state's choice of domestic goals, and narrows the choice of means only to the extent of requiring even-handedness.

On balance, the long-standing policy to provide special institutional restraints against trade barriers, as opposed to other economic interventions, can be explained as a rational choice. This more sophisticated understanding of the bases for such a free trade policy has implications in selecting the standard for DCC cases. It is conventional to distinguish between two possible justifications for the DCC: free trade as a substantive value, and protection of outsiders as a process value. The first goal suggests that courts should adopt some form of cost-benefit analysis, balancing regulatory gains against the harm to the economic objectives of free trade. The second suggests a central role for evidence of intent, as in the analogous situation where the courts protect minority groups against discriminatory legisla-

12. Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 12-37 (U. of Chicago, 1991).

tion.[13] Process and substance are closely intertwined, however, in the area of free trade. Free trade is a substantively valuable goal, but receives legal protection because of process issues, while such protection is feasible, in part, because free trade provides tribunals with a substantive baseline. Consequently, we will suggest in Part IV that both cost-benefit balancing and intent should play a role in the analysis.

B. Questions of Legitimacy

As we will detail in Part III, both the international and domestic legal regimes provide procedures for outsiders to challenge government regulations on the ground that they restrict trade unduly. The legitimacy of both regimes has come under attack. Because of its lack of textual basis, the legal legitimacy of the DCC has been sharply questioned by legal scholars. The actual operation of the DCC has been criticized in terms of the political illegitimacy of judges second-guessing legislatures. In the international arena, where free trade is the specific object of the operative texts, no question of legal legitimacy arises. But critics of the international regime do question its political legitimacy, fearing that GATT will inevitably undermine the "democratic" determination of regulatory policy in important areas such as the environment.[14]

Before turning to these specific complaints, we should explain why we do not rely on a common response to such attacks. In both regimes, an adverse ruling does not completely foreclose pursuit of a regulatory policy. In the DCC context, Congress can implement the policy itself or authorize the state to do so. Under GATT, political negotiation or outright disobedience are like alternatives to compliance. These features do mitigate the potentially anti-democratic effect of both the GATT and DCC. In this Article, however, we place little normative reliance on them for two reasons. First, we lack any systematic knowledge of the operation of either one, and they may be either arbitrary or systematically biased. Second, neither GATT nor the DCC would be worth the bother if we expected most regulations to continue despite adverse rulings. Thus, it must be assumed that legal regimes will, in fact, decisively block local regulatory policies with some frequency.

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13. See Farber, 3 Const. Comm. at 401, 403-06 (cited in note 8).

14. On the competing claims to the legitimizing mantle of "democracy" in this area, see Robert E. Hudec, *"Circumventing" Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. Int'l L. & Pol. 311 (1993).

The challenge to the legal legitimacy of DCC doctrine rests on its lack of a clear textual basis. The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[15] By its terms, it is purely a grant of legislative power to Congress rather than a restriction on the states. This is in contrast to some other portions of the Constitution that explicitly limit state power (for instance, in the areas of tariffs and export fees). A not unreasonable inference could be that the clause has no direct effect on state regulatory power, though it indirectly could affect state regulation by providing the basis for a federal statute, which might in turn preempt state laws. Indeed, some scholars have forcefully argued that the Commerce Clause places no limits on state power in the absence of congressional action.[16]

It is non-controversial, however, that the Constitution was intended to promote internal free trade and in particular to eliminate tariffs between states. GATT (and also EC) experience suggests that a natural (and perhaps necessary) step toward these goals is providing a neutral tribunal with jurisdiction over non-tariff trade barriers. Thus, in the context of other trade-oriented instruments, the DCC seems less like an anomalous development of U.S. legal history, and more like a necessary and reasonable inference from the overall constitutional scheme of political and economic union.

In any event, the formalist objection seems to us to come well over a century too late. Nor do we accept the fall-back argument that, given its basic illegitimacy, the DCC should be narrowly construed.[17] Perhaps the DCC should have had a firmer textual basis, but if we are going to have a DCC at all, there seems little reason to have a suboptimal set of rules.

The political legitimacy of current DCC doctrine has also been challenged as an improper exercise of judicial activism. In the post-World War II era, Justice Black expressed concern that the Court was

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15. U.S. Const., Art. I, § 8, cl. 3.

16. See, for example, Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L. J. 569; Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L. J. 425 (1982).

17. Notably, Justice Scalia (the leading textualist on the Court today) refers to the dormant Commerce Clause as the product of intellectual adverse possession, akin to the ownership rights that accrue when an individual has occupied land belonging to someone else for a sufficient period of time. Consequently, he argues for a restricted standard of review. Justice Scalia's critique of the DCC is explained in his concurrence in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895-900 (1988) (Scalia, J., concurring in the judgment).

second-guessing valid legislative judgments in DCC cases.[18] More recently, Justice Scalia also has questioned the legitimacy of much of modern DCC law:

> I do not know what qualifies us to make [the] ultimate (and most ineffable) judgment as to whether, given importance-level x, and effectiveness-level y, the worth of the statute is "outweighed" by impact-on-commerce z. . . . As long as a State's [law does] not discriminate against out-of-state interests, it should survive this Court's scrutiny. . . . Beyond that, it is for Congress to prescribe its invalidity.[19]

In this distrust of the judicial role in DCC cases (and of balancing in particular), Justice Scalia is joined by a phalanx of scholars.[20]

Even harsher claims currently are being made against the political legitimacy of present and prospective GATT rules in this area. The criticisms range from the hysterical to the scholarly. The former are typified by the well-known "*Sabotage*" advertisement, a full-page ad taken out by the Sierra Club, Public Citizen, Greenpeace, Friends of the Earth, Clean Water Action, and a number of other smaller environmental groups, that appeared in several national newspapers in April of 1992.[21] The advertisement made the following claims:

> . . . President Bush has been pushing for new international trade rules that give a secretive foreign bureaucracy vast new powers to threaten American laws that protect your food, your health, your wilderness and wildlife, and your job. . . .
>
> If this new set of trade rules is passed, it could be used against *thousands* of laws in countries around the world that give priority to clean food and clean water, protect sea mammals and wildlife, preserve trees or other resources, re-

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18. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 788 (1945) (Black, J., dissenting); *Dean Milk v. Madison*, 340 U.S. 349, 357 (1951) (Black, J., dissenting).

19. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring). Justice Scalia expressed a similar view in *Bendix Autolite Corp.*, arguing that the "balancing approach" should be abandoned because it invades the legislative function and is also intellectually incoherent, like "judging whether a particular line is longer than a particular rock is heavy." 486 U.S. at 897. The case in which such a judgment can be most comfortably made, we would observe, is when one of the quantities is zero. It also may be other than nonsensical to assert that the Earth is heavier than a pin is long: after all, the Earth is very heavy, where a pin is very short. See text accompanying notes 102-09.

20. For a recent discussion of the scholarship on the subject, see Michael P. Healy, *The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More*, 43 J. Urban & Contemp. L. 177 (1993).

21. See, for example, *New York Times*, B-5C ("*Sabotage*"). The principal sponsors were also the plaintiffs in the recent unsuccessful lawsuit calling for the Clinton Administration to submit an environmental impact statement for NAFTA. See *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

> strict poisonous pesticide sprays, save rainforests and safeguard small farmers from being overpowered by agribusiness. . . .
>
> European laws to stop the sale of beef shot up with carcinogenic growth hormones like DES, may also have to be *harmonized down*. That is, eliminated. Japanese laws that keep out dangerous food colorings and dyes, known to cause cancer, probably won't survive either. And Thailand's anti-smoking campaign was challenged by the U.S. under GATT.[22]

Setting aside its somewhat misleading factual assertions,[23] the *Sabotage* advertisement does point to many of the specific concerns that commentators express repeatedly in this area. GATT has a number of rules that permit tribunals to invalidate measures as undue restrictions on trade. In particular, both the new agreement on Sanitary and Phytosanitary Measures and the new Standards Code call for examination of health and product safety standards under legal standards such as "disguised restriction on international trade" or "unnecessary obstacles to international trade."[24] These new agreements also encourage governments to use broadly-accepted international standards in their regulations, on the ground that uniform international standards are likely to cause the least trade disruption.[25] In a country like the United States that has many regulations more demanding than international standards, this emphasis on international standards leads to fears of pressures to "harmonize down." Failure to prove the scientific necessity of such high-level regulations could result in claims of GATT-illegality when the regula-

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22. *Sabotage* (emphasis in original).

23. For example, the EC hormone restriction currently being challenged in GATT does not deal with DES, a proven carcinogen long ago prohibited, but rather with synthetic copies of natural hormones that the international food safety organization Codex Alimentarius has so far found to have no harmful effects at all. See generally Adrián Raphael Halpern, Comment, *The U.S.-EC Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade*, 14 N. C. J. Int'l L. & Comm. Reg. 135 (1989); Allen Dick, Note, *The EC Hormone Ban Dispute and the Application of the Dispute Settlement Provisions of the Standards Code*, 10 Mich. J. Int'l L. 872 (1989). Likewise, the Thailand "anti-smoking campaign" consisted of prohibiting the importation of foreign cigarettes while the domestic producers of cigarettes, a state enterprise, were increasing production. See *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1991) (GATT panel decision upholding U.S. complaint).

24. The term "disguised restriction on international trade," which comes from GATT Article XX, is found in paragraphs 7 and 20 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("*1994 GATT SPS Agreement*"), which was concluded in the GATT Uruguay Reund negotiations. The text of the *1994 GATT SPS Agreement* is contained in the *1994 GATT Final Act*, II-A1A-4. The term "unnecessary obstacles to international trade" is contained in Article 2.2 of the *1994 GATT Standards Code*.

25. *1994 GATT SPS Agreement*, ¶¶ 9-10.

tions create differential burdens among foreign sellers.[26] The end result thus might be a weakening of the strict regulations environmental groups have fought long and hard to achieve.[27]

The central tension in both DCC law and in the parallel GATT legal regime is the clash between the perceived need to restrain governments from imposing protectionist regulations and the equally insistent objections to the political legitimacy of doing so. Without unitary government, we inevitably will be faced with conflicts between these goals of free trade and local autonomy. Part III next considers how the operative doctrines of both DCC law and GATT law have attempted to resolve these conflicts.

III. THE LEGAL REGIMES

A. The Dormant Commerce Clause

Since the origins of the DCC, the Supreme Court has continually modified its definition of the judicial role in overseeing state regulation.[28] Initially, the Court took the position that no state regulation of interstate commerce was permissible.[29] This position quickly proved untenable, and the Court then allowed regulation of "local aspects" of interstate transactions.[30] A reformulation of the doctrine in the early part of this century attempted to distinguish between "direct" regulation (impermissible) of interstate commerce and "indirect" (permissible) regulation.[31] Finally, in the past fifty years,

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26. Paragraph 11 of the *1994 GATT SPS Agreement* permits standards higher than international standards, but only on condition that: (1) there is a scientific justification; or (2) that parties follow a prescribed risk-assessment procedure.

27. Examples of U.S. legislation that might be threatened by such international regulation always begin with the so-called "zero tolerance" standard imposed by the "Delaney Clause" of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) (1988), which prohibits the sale of products containing any trace of elements identified as carcinogenic, regardless of how small or harmless the amount. See Daniel A. Farber, Book Review Essay, *Playing the Baseline: Civil Rights, Environmental Law, and Statutory Interpretation*, 91 Colum. L. Rev. 676, 697-98 (1991). The Delaney Clause is a particularly good example of the tensions involved in this area because, while some defend it as the crowning achievement of the consumer health movement, others regard it as just the sort of hysterical and overzealous regulation that should be attacked and struck down by trading partners if we are unable to repeal it ourselves.

28. For historical reviews, see John Nowak and Renald Retunda, *Constitutional Law* 274-88 (West, 4th ed. 1991); Noel T. Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 2-19 (1940).

29. Nowak and Rotunda, *Constitutional Law* at 275.

30. See *Cooley v. Board of Wardens*, 53 U.S. (12 Howard) 299 (1851).

31. See Laurence Tribe, *Constitutional Law* 408 (Foundation, 2d ed., 1988).

the Court has experimented with various methods of evaluating the strength of the state's regulatory interest in comparison with the burden on commerce.

In understanding the Supreme Court's current formulation, it is useful to distinguish between three types of cases involving state regulatory measures.[32] The first type involves explicit discrimination against interstate commerce.[33] *City of Philadelphia v. New Jersey*[34] illustrates the Court's approach to such statutes. New Jersey faced a serious shortage of landfill space. To conserve existing space as long as possible, the legislature prohibited the importation of waste from other states for disposal in New Jersey. The Supreme Court found this legislation unconstitutional on its face. "[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[35] If taken at face value, statements such as this would suggest that explicit discrimination against interstate commerce is virtually prohibited.[36]

The remaining two categories include cases involving laws that do not discriminate on their face between in-state and out-of-state products, but have a visibly burdensome impact on out-of-state producers in practice. In some cases—those in category two—the court describes the impact as a "discriminatory effect" and places the burden on the government to prove the necessity of the law. The doctrine is illustrated by *Hunt v. Washington State Apple Advertising Commission.*[37] Federal law provided a system of grades to be used in labeling apples. North Carolina prohibited the display of any grades on labels other than those approved by the State. Washington apple growers brought litigation contending that the Washington grading system was superior and that North Carolina's ban on the display of Washington grades impaired the marketability of their apples. The law did not discriminate on its face against interstate commerce. The discriminatory effect on Washington apples was sufficient, however,

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32. Cases involving state proprietary functions and subsidies belong to yet another category, such laws being generally immune from DCC scrutiny.

33. For further discussion of the earlier discrimination cases, see James F. Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 Vand. L. Rev. 473, 484, 493-97 (1978).

34. 437 U.S. 617 (1978).

35. Id. at 626-27.

36. The Court recognized a minor exception for quarantine laws. Id. at 628-29. As we shall see in Part IV, the rule has not always been quite this rigorous in practice.

37. 432 U.S. 333 (1977).

to subject the law to heightened scrutiny.[38] Given this discriminatory effect, the state had the burden to "justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[39] The state was unable to carry this burden.

The third category of cases is similar to the second, and also involves facially nondiscriminatory state regulations with some negative impact on interstate commerce. In these cases, however, the courts do not use the term "discriminatory effect" to describe the differential impact, but speak instead of "incidental" or "indirect" burdens on interstate commerce—a distinction that suggests an absence of protectionist purpose. In these cases, the state does not bear the heavy burden of justification invoked in the other two categories. If there is any "thumb on the scale" of this balancing test, it is a presumption in favor of the government.

The leading category-three case is *Pike v. Bruce Church, Inc.*[40] *Pike* involved an Arizona statute governing cantaloupe packing. A state official claimed that enforcement of this law required that the cantaloupes be packed inside Arizona, which would have required the company to build an expensive new packing shed.[41] The Court's opinion attempted to synthesize the previous case law:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have heen variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question hecomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[42]

Notwithstanding the application of this gentler balancing test, the state requirement under consideration in *Pike* itself did not survive.

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38. Id. at 353.
39. Id.
40. 397 U.S. 137 (1970).
41. Id. at 140. This requirement arguably should have been classified as explicitly discriminatory (catogory one), as it distinguished between packing firms on the basis of their location.
42. Id. at 142 (citations omitted).

Since *Pike*, the Supreme Court and lower courts have applied the balancing test to a variety of subjects ranging from state corporation laws to highway safety regulations.[43]

Although this three-part scheme has the appearance of tidiness, in practice it involves difficult line-drawing. One source of difficulty is to be found in the second category of cases, consisting of statutes that are called discriminatory although facially neutral. One problem is that the term "discrimination" is hardly self-explanatory, and the courts have not developed a clear test. Moreover, if a particularly serious form of discrimination (such as a purely protectionist purpose) is present, it would seem reasonable to apply the more stringent formula applied to facially discriminatory laws (the first category). Consequently, category two has some tendency to merge with category one. Indeed, a recent Supreme Court decision rather casually lumps both categories together as involving "clearly discriminatory" statutes.[44]

Under *Pike*, category three purportedly applies when a statute causes merely an "incidental burden" on commerce, whereas category two involves "discriminatory effects." Several lower courts, however, have interpreted *Pike* to apply only to "discriminatory" burdens.[45] With his usual verve, Judge Easterbrook has suggested that *Pike* requires the court to look for discrimination, not for "baleful effect," rejecting the view that *Pike* stands for "the broader, all-weather, bereasonable vision of the Constitution."[46] Thus, as the Supreme Court itself has observed, the line between category two and category three has proved permeable.[47]

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43. See, for example, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (state corporation law); *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 440-42 (1978) (regulation of commercial trucking); *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982) (regulation of the marketing of motion pictures); *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (1975) (ordinance forbidding the sale of phosphate detergents). Professor Stewart reads the cases as establishing a test of "net proportionality." See Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 Wash. & Lee L. Rev. 1329, 1336 (1992).

44. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992).

45. See *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir. 1987); *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Env. Protection*, 857 F.2d 913, 919-21 (3d Cir. 1988); *National Kerosene Heater Ass'n v. Massachusetts*, 653 F. Supp. 1079, 1092-93 (D. Mass. 1987).

46. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989).

47. "[T]here is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 577 (1986). Notably, in a recent DCC case, the Court divided 5-4 on whether a municipal "flow control" ordinance was discriminatory or governed by *Pike*. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). In *C & A Carbone*, Justice O'Connor concurred in the

Although the task of assigning cases to categories has proved more difficult than one might expect, the consequences of that assignment are striking. In practice, the strict scrutiny applied to "discriminatory" statutes usually has proved fatal. Indeed, particularly as to statutes that discriminate on their face against interstate commerce, the courts have sometimes referred (with some exaggeration) to an almost categorical rule of invalidity.[48] To uphold the statute, the state must show that the discrimination is "demonstrably justified by a valid factor unrelated to economic protectionism."[49] Only a few statutes have survived this test.[50]

In contrast to strict scrutiny, the balancing test in practice seemingly has become rather lax. Indeed, there is some argument that it requires only that the state present *some* evidence of a regulatory benefit, particularly when public health or safety is at stake.[51] Courts have been reluctant to "second-guess the empirical judgments of lawmakers concerning the utility of legislation."[52] For example, the Second Circuit applied the balancing test to uphold a New York law requiring special signs, notices on menus, and special containers for imitation cheese products. The district judge had found no health justification for this transparently rent-seeking law.[53]

Because of the sharp differences between the results of these two types of scrutiny, the crucial question in most cases is which type applies. Unfortunately, the courts have not addressed this question in a particularly cogent fashion. Often, they simply pronounce that a statute is or is not "discriminatory." Having attached this label, they then apply the requisite level of scrutiny. We may rephrase the question, then, by asking what aspects of a state law make a finding of discrimination more likely.

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judgment, finding the ordinance invalid under *Pike*, while three dissenters applied *Pike* to uphold the ordinance.

48. See *City of Philadelphia v. New Jersey*, 437 U.S. at 624; *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Env. Protection*, 965 F.2d 1287, 1293 (3d Cir. 1992).

49. *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2023-24 (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)).

50. See, for example, *Maine v. Taylor*, 477 U.S. 131 (1986), discussed in Part IV.

51. See *Electrolert Corp. v. Barry*, 737 F.2d 100, 113 (D.C. Cir. 1984); *National Kerosene Heater Ass'n*, 653 F. Supp. at 1092. See also *J. Filibreto*, 857 F.2d at 922; *Norfolk Southern*, 822 F.2d at 401.

52. *Kassel v. Consolidated Freightways Corp.* 450 U.S. 662, 679 (1981) (Brennan, J., concurring in the judgment), discussed in Part IV.

53. *Grocery Manufacturers of America, Inc. v. Gerace*, 755 F.2d 993 (2d Cir. 1985). *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), is a comparable illustration of judicial deference by the Supreme Court. The Court upheld a state law banning the sale of milk in nonreturnable containers made of plastic, but allowing use of other kinds of nonreturnable containers, a distinction that the state supreme court had found completely irrational.

As we saw earlier, a statute that explicitly distinguishes between products on the basis of their place of manufacture is always considered "discriminatory." In cases involving facially neutral regulations, courts have treated the following factors as signs of discrimination:

(1) *Discriminatory intent.* The real purpose of the statute is to provide an economic advantage to local industries or consumers.[54] Indeed, Professor Regan has argued that this generally has been the true basis for invalidating state laws.[55]

(2) *Use of a proxy characteristic.* The statute may regulate on the basis of some characteristic that, while purportedly neutral, has little independent significance and is in reality a proxy for geographic differences—that is, the characteristic is shared by virtually all in-state firms and virtually no out-of-state firms.[56]

(3) *Embargo.* Although the criteria of the statute may not be transparently irrelevant, the statute nonetheless has the effect of excluding all out-of-state products.[57]

(4) *Competitive advantage.* If a statute provides a significant economic advantage to in-state firms against out-of-state competitors, it is often, but not always, considered "discriminatory." Note that the relevant comparison is between competing firms in the same market, so that this factor is absent when no local competitors exist.[58]

(5) *Uniformity and consistency.* In some fields, such as railroad transportation, variations in local regulations may put an intol-

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54. See, for example, *Continental Illinois Corp. v. Lewis*, 827 F.2d 1517, 1521 (11th Cir. 1987); *Middle South Energy, Inc. v. Arkansas Pub Serv. Comm'n*, 772 F.2d 404, 416 (8th Cir. 1985). *Hunt v. Washington State Apple Advertising Commission*, the leading opinion involving heightened scrutiny on the basis of discriminatory effects, also contained substantial evidence of discriminatory purpose. See *Hunt*, 432 U.S. at 352-353. The same is true in *Kassel*, as Justice Brennan's concurrence points out. 450 U.S. at 685-87. The Third Circuit regards discriminatory intent as the sole basis for strict scrutiny. See *Oberly*, 822 F.2d at 400.

55. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1092 (1986).

56. Compare *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893, 902-03 (E.D.N.Y. 1989) (striking down a New York ban on commercial fishing vessels over 90 feet in length, because only one such vessel was from New York) with *Davrod Corp. v. Coates*, 971 F.2d 778, 795-96 (1st Cir. 1992) (upholding a similar Massachusetts law that applied to many Massachusetts vessels). A comparable GATT doctrine under the "like product" test is discussed in Part III.B.

57. See *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1281-82 (7th Cir. 1992) (striking down an Indiana statute because it virtually blockaded wasto shipments from out of state); *Continental Illinois Corp. v. Lewis*, 827 F.2d 1517, 1521 (11th Cir. 1987) (invalidating a state law that in effect created an insurmountable barrier to out-of-state banks seeking to competo for Florida bank deposits). See also *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1058 (9th Cir. 1987) (upholding statute because it did not restrict flow of goods or discriminate in favor of local firms).

58. See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987); *Government Suppliers Consolidating Service*, 975 F.2d at 1278-79.

erable burden on an interstate operation.[59] Differences between state laws abound and these differences will weigh more heavily on multistate transactions than purely local ones. This is simply an inevitable cost of a federal system, which to some extent firms simply must expect to live with. Thus, the need for uniformity must be especially great before courts will intervene.[60]

Note that the first four of these factors carry decreasing indicia of discriminatory intent. By the same token, however, these four factors are usually accompanied by situations in which the state's regulatory goal lacks credibility and should be given lessened weight in the balance. The final factor seems to speak more to effect than intent, but when a state has deviated from an otherwise uniform national pattern of regulation, questions about motivation also naturally come to mind.

As we see it, the courts are struggling with a dilemma. Whether the goal is substantive (optimizing regulation of interstate transactions) or process-based (compensating for political biases against out-of-state interests), the most logical approach would be balancing. A cost-benefit analysis would insure that the rules were optimal, and also that regulators had taken regulatory burdens on outsiders into account. At least some language in *Pike* seems to lean in this direction. But open-ended balancing is widely perceived to give far too much power to federal judges at the expense of legislatures. Drawing back from the *Lochner*ian implications of balancing, courts are tempted to limit themselves to policing for discriminatory intent. But intent is often difficult to prove, so the temptation is to substitute an objective proxy. For instance, if the court is confident that a statute will produce no regulatory benefits, it may reasonably conclude that the motive must have been protectionist. Yet a "no benefits" test would be too weak, because a statute may produce minor benefits but be overwhelmingly protectionist. The impulse then is to strengthen the test, leading back toward balancing.[61] None of these solutions seems wholly satisfactory. The resulting difficulties

59. Alternatively, a state regulation may be internally inconsistent in the sense that, if identical regulations were adopted by all states, interstate firms would be at an obvious disadvantage compared with local ones. This internal inconsistency test usually applies to state tax laws, but sometimes has been applied to state regulations as well. See *Brown-Forman Corp. v. Tennessee Alcoholic Bev. Comm'n*, 860 F.2d 1354, 1361 (6th Cir. 1988).

60. See *Old Bridge Chemicals v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1292 (1992).

61. Or, despairing of any better resolution, the courts might leave the field entirely; this retreat is blocked not only by precedent but by the clear desirability of some safeguard against protectionist stato legislation.

are currently papered over with conclusory references to "discrimination."

As we will see, similar problems have troubled tribunals and negotiators in the context of international trade. This suggests to us that the problems are fundamental rather than being artifacts of the U.S. legal system, that there are no clear-cut solutions, and that the best that can be done is a rough-and-ready compromise of the competing goals of free trade and local regulatory autonomy.

B. The GATT Analogue to DCC

1. The Legal Structure

Unlike the constraints imposed on state government action under the dormant Commerce Clause, the similar GATT constraints imposed on member governments rest on an explicit mandate. GATT is a formal international agreement containing specific prohibitions of certain kinds of protectionist trade barriers. The basic structure of the GATT agreement begins with "tariff bindings" setting a maximum rate for tariffs on an item-by-item basis.[62] Then, to protect against other measures that would subvert the commercial opportunity created by tariff bindings, the GATT agreement adds a rather detailed code of rules prohibiting most other forms of trade barriers.[63]

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62. Tariff bindings are established by periodic negotiation, and then recorded in individual country schedules that are given binding effect by GATT Article II.

63. The main provisions are the prohibition of non-tariff border restrictions under GATT Article XI:1 and the probibition of discriminatory internal taxes and regulations under the so-called national treatment rule of GATT Article III. The text of Article XI:1, which is subject to numerous exceptions, provides quite simply and broadly:

> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The two key provisions of the national treatment rule of GATT Article III read as follows:

> 2. The products of the territory of any contracting party imported into the territory of any other contracting party 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. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 [that is, internal measures should not "afford protection to domestic production"].
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. . . .

The application of GATT rules ultimately raises the same type of issues confronted by U.S. courts under DCC doctrine. GATT's prohibitory rules are qualified by GATT Article XX, which authorizes exceptions whenever trade barriers are found to be required by other widely-accepted government regulatory objectives such as health, safety, or law-enforcement.[64] Application of Article XX requires GATT tribunals to analyze the extent to which claimed regulatory objectives are served by a particular trade-restricting measure. A similar analysis of regulatory objectives is built into certain supplemental GATT rules that deal with facially neutral measures, such as the 1994 Standards Code prohibition of measures that create "unnecessary obstacles to international trade."[65]

It is instructive to compare the GATT legal doctrines in this area with the DCC doctrines just discussed. As with the DCC, GATT cases can be categorized usefully as facially discriminatory or facially neutral.

2. Cases Involving Explicit Discrimination

As in DCC doctrine, GATT law imposes the greatest restraints on trade-restricting measures that explicitly discriminate between domestic and foreign goods. Under GATT, the main items in this category would be border measures such as quotas and other restric-

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64. The Article reads as follows:

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

(a) necessary to protect public morals;

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

(c) relating to the importation or exportation of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

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

(h) [commodity agreements]

(i) [price-controlled products]

(j) [short supply situations].

GATT Article XX.

65. *1994 GATT Standards Code*, Art. 2.2 (cited in note 5).

tions that limit the volume of foreign goods allowed to enter the national market, and "internal" taxes or regulations that provide more onerous treatment of foreign goods. The DCC case law suggests that such explicitly discriminatory measures are all but per se prohibited under the Commerce Clause, though in practice, courts recognize some exceptions.[66] Under GATT, such discriminatory measures are prima facie outlawed by the rules of the agreement,[67] but GATT Article XX clearly states that even explicitly discriminatory measures can be authorized when such discrimination is shown to be necessary to legitimate regulatory objectives.

GATT's *Section 337* case offers a good example of GATT's approach to this first category of cases.[68] Section 337, a United States patent-enforcement law, established a special procedure applicable only to infringement claims against imported goods, which, in many respects, was more burdensome than the procedure applicable to claims against domestic goods. The explicitly "less favourable" treatment of foreign goods constituted a prima facie violation of GATT Article III:4.[69] The United States sought to establish an Article XX defense, claiming that different procedures were required for infringement claims against imports because of the special difficulties of enforcing patent rights against foreign parties. The GATT rejected most of the Article XX defense, finding that the United States had failed to demonstrate that effective enforcement could not be achieved by nondiscriminatory alternatives.[70] But GATT did rule that one part of the special enforcement procedure was justified, holding that the difficulty of enforcing injunctions against foreign producers justified the use of certain in rem remedies against foreign infringers only.[71]

The main difference between the treatment of explicitly discriminatory measures under GATT, as compared to DCC doctrine, is the GATT's tendency to give somewhat greater attention to possible justifications for such measures. The explicit terms of GATT Article XX encourage defendant governments to raise justification claims, and require GATT legal decisions to address the issue of justification explicitly. As a result, the legal analysis of claims of justification tends to be more fully elaborated in GATT. A string of GATT deci-

66. See note 50.
67. See note 63.
68. *United States: Section 337 of the Tariff Act of 1930*, BISD, 36th Supp. 345 (1990).
69. Id. at ¶ 5.20.
70. Id. at ¶¶ 5.28 to 5.35. A GATT three-person arbitration panel wrote this decision, which was then adopted by GATT as a whole.
71. Id. at ¶¶ 5.32, 5.33.

sions have laid down a demanding framework of analysis in which the burden is on the enacting government to demonstrate each element of the claimed excuse.[72]

The carefully stated exceptions found in GATT Article XX represent an acknowledgment by the GATT's drafters that certain national regulatory goals have a high enough priority to override GATT's free trade goals in cases of true conflict. The relative infrequency of such recognition in DCC doctrine raises a question of whether different priorities are at work within the U.S. federal system. It is possible that a real substantive difference exists. Perhaps the national governments who are the subjects of GATT law are in a relatively more powerful position than the U.S. state governments subject to DCC doctrine, and so are able to exert stronger claims on behalf of their "other" regulatory goals. On the other hand, there is also good reason to think that the difference simply may be a consequence of differing legal structures. Consider: If Congress were to reduce DCC doctrine to a statute as detailed as GATT, would there not be an Article XX explicitly recognizing state regulatory claims in all cases (including facially discriminatory statutes)? And would the statute not be about as generous to these goals as is Article XX? We are inclined to think so. We think the body of DCC case law suggesting the *per se* invalidity of explicitly discriminatory measures understates considerably the potential relevance of state regulatory goals, an understatement probably due to the worm's eye view of the issues presented by case-by-case analysis of relatively easy cases.

3. Cases Involving Facially Neutral Classifications

As is true of DCC doctrine, the GATT law also deals with facially neutral measures that disadvantage foreign firms compared with domestic ones. The GATT doctrine dealing with facially neutral

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72. Important GATT panel decisions construing Article XX include, in chronological order: *United States: Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD, 29th Supp. 91 (1983); *Canada: Administration of the Foreign Investment Review Act (FIRA)*, BISD, 30th Supp. 140 (1984); *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD, 35th Supp. 98 (1989); *United States: Section 337 of the Tariff Act of 1930*, BISD, 36th Supp. 345 (1990); *European Economic Community: Regulation on Imports of Parts and Components*, BISD, 37th Supp. 132 (1991); *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200 (1991); *United States: Restrictions on Imports of Tuna*, BISD, 39th Supp. 155 (1993) (the celebrated "Tuna-Dolphin Decision"); *United States: Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supp. 206 (1993). On the general importance of such burden-of-proof standards to GATT decision making in general, see Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 267-68 (Butterworth, 1993).

measures does not divide into the two rather permeable subcategories found in DCC doctrine, at least not at a visible level. But GATT doctrine has developed some rather illuminating refinements of its own.

Two types of facially neutral measures tend to appear in GATT legal disputes. One common type is the measure that provides different taxes or regulatory treatment for two groups of similar products in a way that places all or most foreign products in the disadvantaged category. An example might be emission controls that impose lower taxes or less burdensome requirements for large-bore engines used in domestic automobiles than for small-bore engines normally used in foreign autos.[73] A second type of facially neutral measure that causes trade problems is the uniform product standard that, although exactly the same for everyone, is substantially more difficult for foreign producers to comply with because of their different geographical or market positions. For example, a product standard requiring a new production process may pose relatively few problems for domestic firms who sell most of their output in the home market, but may be much more burdensome to foreign producers who must set up a separate production line for a single export market.[74]

Both types of facially neutral measures are regulated by GATT Article III in the first instance. Almost by definition, facially neutral regulations fall in the category of so-called "internal" measures—taxes or other regulatory measures that are imposed on imported goods (together with domestic goods) after the imported goods have cleared customs and entered domestic commerce. GATT Article III requires that internal taxes and internal regulations treat foreign goods no less favorably than the "like" domestic goods. This is the so-called "national treatment" rule. Any measure found in violation of Article III would be a prima facie violation, and thus in the same category of explicitly discriminatory measures. Any regulatory justification for such a measure would have to comply with the strict rules of GATT Article XX.

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73. Another example, more European in flavor, might be an alcoholic beverage tax distinguishing between fruit-based distilled alcohol and grain-based distilled alcohol, in a country where most domestic production of alcoholic beverages falls into the former category while most imports fall into the latter.

74. One example, which may or may not have been legal under GATT, was a European Community prohibition against the sale of beef grown with the use of certain hormones. EC producers could adapt by converting all production to more expensive hormone-free production, and could recoup the extra costs under the higher prices they would obtain in the European market due to the regulation's exclusion of beef produced more cheaply with hormones. Exporters who sold only low-value offal (the animal's organs) to EC markets had to set up separate production lines for EC markets, and had no way of recouping extra production costs for the rest of the animal. For commentary on the case, see articles cited in note 23.

The GATT also contains two sets of special supplemental rules that apply to the second type of facially neutral measure—product standards. One is the 1994 GATT Standards Code,[75] and the other is a new 1994 Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).[76] Both agreements take a different approach than the basic doctrine laid down by Articles III and XX. To present an orderly description of GATT law on facially neutral measures, we must start with Article III and then turn to these two supplemental rules. We begin by describing the Article III law applicable to the first type of measure.

a. Spurious Product Distinctions

The emerging Article III doctrine on measures that make regulatory distinctions according to product characteristics has some parallels to DCC cases involving proxy characteristics.[77] A recent GATT decision interprets Article III to permit GATT to regulate such measures according to the credibility of their claimed regulatory purpose. The case involved a Mississippi tax on wines that placed a lower rate on wines made from the *vitus rotundifolia* grape used by most Mississippi vintners; wines made from all other types of grape were taxed at a higher rate.[78] Under Article III, equal treatment is required for all "like" products. The issue was whether wine from the *rotundifolia* grape was a "like product" to wine made from other grapes. The GATT tribunal concluded that the "likeness" issue must always turn on the purpose for which the product distinction is being tested. Holding that the purpose of the Article III "like product" standard is to distinguish between protectionism and good faith regulation, the decision concluded that the "likeness" of the two products must depend on whether any non-trade regulatory purpose was served by distinguishing between the two types of wine.[79]

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75. See note 5.

76. See note 24.

77. See text accompanying note 56.

78. *United States: Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supp. 206 (1993) (analyzing numerous claims of violations against U.S. federal and state laws affecting alcoholic heverages including beer). The *vitus rotundifolia* grape is a variety suitable for warmer climates, including the Mediterranean basin.

79. Id. at ¶ 5.25. The foundations for this ruling were laid by a relatively unnoticed GATT legal ruling in 1987 involving an Article III complaint against Japanese taxes on (of all things) alcoholic beverages. *Japan: Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, BISD, 34th Supp. 83 (1988). In a long and complex opinion, the panel, inter alia, established the separateness of the Article III "like product" test, see id. at ¶ 5.6, rejected discrimination based on an arbitrary product characteristic, see id. at ¶ 5.9(d), and held that the tax treatment of certain dissimilar but directly competitive or substitutable products

The actual decision on this point was aided by a United States concession that the distinction served no regulatory purpose.[80] The various types of wine in question were thus all like products. Under Article III, therefore, all the imported wine products were entitled to be treated as well as any domestic product in that category. The heavier tax against the non-Mississippi types of wine was thus a violation of Article III.[81]

The next step in the Mississippi wine decision normally would have been an inquiry into Article XX justifications, where the burden would have been on the enacting government to demonstrate a regulatory policy justification. However, the regulatory justification for the product distinction had already been considered and rejected when deciding the "like product" issue as a part of the question of violation under Article III. Indeed, the test stated by the GATT decision would require simultaneous consideration of regulatory justification with the decision on the Article III violation itself.

The Mississippi wine decision never reached the question of who bore the burden of proving whether the product distinction served any regulatory purpose. There being no finding of prima facie violation at this stage of the Article III analysis, the Article XX rationale for placing the burden of justification on the defendant did not apply. At this early stage, the only fact before the decision maker was the bare fact that the tax measure in question was trade-restricting, that is, it resulted in a commercial disadvantage for almost all non-Mississippi wine, foreign or domestic. Should that trade-restricting effect be enough, by itself, to render the measure suspect, with the burden on the defendant to justify it? Or, should a tribunal still apply the baseline rule for all legal complaints that the burden is on the complainant to establish at least a prima facie violation?

Intuition suggests that, in practice, a decision-making tribunal probably will be influenced in its approach by an initial common sense characterization of the measure. There will be some cases, like the Mississippi wine tax, in which the degree of trade-restricting effect seems clear and the criteria seem bogus. These initial appearances will result in a strong initial presumption of protectionist purpose. On the other hand, there will be some cases in which the smell of ulterior motive just will not be there—cases, perhaps, when disadvan-

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constituted a protection of domestic production in contravention of the second sentence of Article III:2, see id. at ¶¶ 5.7 and 5.11.

80. *United States: Measures Affecting Alcoholic and Malt Beverages,* BISD, 39th Supp. 206 at ¶ 5.26.

81. Id.

tages are not distributed so unevenly to foreign goods, or when the measure's criteria may have a plausible regulatory ring to them. Decision-making tribunals probably will follow these initial presumptions in deciding how much or how little to ask of the enacting government by way of justification. If this is a correct appreciation of the actual decision-making process in these cases, it may explain why U.S. courts in DCC cases tend to begin their analysis with an unexplained characterization of the measure either as "discriminatory" or only "incidentally" burdensome.

GATT decision makers probably will not have the luxury of disguising their approach so easily. National governments will expect more candor, at least on the surface. And, because national governments will insist on maximum deference to state regulatory claims, GATT law probably will leave the burden on the complainant of proving a violation until at least a prima facie violation of GATT is shown. This formal rule will not change the result in cases involving clear-cut protectionist measures like the Mississippi wine tax, but it should result in greater leeway for governments when protectionist purpose is not as evident.

The GATT legal proceeding that dealt with the Mississippi wine case also contained another claim requiring application of the "like product" test. This claim involved marketing regulations by several U.S. state governments that distinguished between sales of 3.2 percent beer and sales of beer with higher alcohol content.[82] Most of the beer imports from the complaining country had an alcohol content above 3.2 percent.[83] "Beer is beer," said the claimant, arguing that all kinds of beer should be treated as "like products," and so had to be treated the same.[84] Not so, said the GATT decision. The panel concluded that the history of the distinction in alcohol content showed a bona fide concern for health, and revenue maximization, and not for any trade purpose; consequently, the two types of beer should *not* be classified as like products.[85] One suspects that U.S. courts would have reached the same result, calling the trade-restricting effects of these beer marketing regulations an "incidental burden on commerce." It was not a hard case under either approach.

82. Id. at ¶ 2.32, Table 4.
83. Id. at ¶¶ 3.127, 3.129.
84. Id. at ¶ 3.120.
85. Id. at ¶¶ 5.74, 5.75.

b. Differential Compliance Costs

We turn now to the second type of facially neutral measures that can have trade restricting effects—regulations or product standards which, though imposing exactly the same requirements for all products, bear more heavily on foreign producers than on domestic producers. The example given earlier was a regulation that requires setting up a new production process.

The key legal provision of the original GATT agreement applicable to such measures is Article III:4, which requires that internal regulations accord imports "treatment no less favourable" than domestic goods.[86] When the treatment of imports is both explicitly different and more burdensome, the Article III:4 violation would be clear; issues of excuse would be dealt with under Article XX with the burden of justification on the enacting government. When the more burdensome treatment is the result of a facially neutral regulation, however, the meaning of Article III:4 has not yet been made clear. This interpretative difficulty requires an extended explanation.

If we look to United States DCC law on this type of facially neutral measure, we find that the validity of such measures seems to turn, in one way or another, on the balance between the measure's trade-restricting effects and the regulatory purpose the measure claims to serve. When the trade-restricting effects are substantial while the regulatory benefits are nil or minuscule, we expect to find courts ruling against the measure, either on the ground that its regulatory benefits are outweighed by its burden on commerce, or that its lack of credible regulatory purpose is evidence of a protectionist purpose.[87] In dealing with such balancing-type issues, the U.S. courts tend to issue a priori characterizations of the measure as "discriminatory" or merely "incidentally" burdensome. As in the cases discussed earlier, one suspects that a priori characterizations are the means by which courts adjust their degree of scrutiny according to their initial common sense perceptions of the likely purpose of the measure.

This preliminary sorting operation seems quite useful in view of the great diversity of regulatory measures that fall into this category. At one extreme are the devious product standards aimed solely at disadvantaging foreign goods; at the other are a very large number of quite ordinary regulatory measures that happen to impose some

86. See note 63 for the text of Art. III:4.
87. See text accompanying note 61.

greater degree of burden on foreign producers. If the mere existence of greater burdens on foreign producers were to call for strict scrutiny of the measure, governments would be required to mount a major defense for almost every regnlatory action they take.

Article III:4 does not seem to offer much flexibility, however, in dealing with this wide variety of facially neutral measures. Article III:4 separates the question of legal violation from the issue of regulatory justification. The issue of violation is framed solely as a matter of whether the treatment of foreign goods is "less favourable"—in other words, commercially disadvantageous. If the commercial disadvantage is not ruled to be "less favourable treatment," no violation exists, and the case is over. If the commercial disadvantage is ruled to be "less favourable treatment," then the measure is a *prima facie* GATT violation, and the regulatory justification, if any, will be considered only under Article XX, with the burden on the enacting government to prove every element of the exception. The only way that Article III:4 expressly permits consideration of regulatory purpose is *after* the measure has already been ruled a violation. And because the finding of violation involves only the issue of commercial burden under an apparently monolithic "less favourable treatment" standard, GATT may find it difficult to control disguised protectionist measures at one end of the spectrum without having to find all other regulation with adverse trade effects to be in violation (and thus subject to the strict tests of Article XX).

The "less favourable treatment" standard in Article III:4 has been interpreted to cover facially neutral measures in two earlier decisions, neither very authoritative. The GATT's *Section 337* decision contained a single sentence of dictum that a facially neutral measure may constitute less favorable treatment of imported goods if it creates a commercial disadvantage for imports.[88] The second was a decision of a panel constituted under the Canada-U.S. Free Trade Agreement, which applied GATT obligations incorporated in that Agreement.[89] The case involved a facially neutral landing-cum-inspection requirement (an internal regulation) that imposed a substantial burden on subsequent export sales of fish as compared with domestic sales. Applying the GATT Article XI:1 analogne to Article

88. *United States: Section 337 of the Tariff Act of 1930*, BISD, 36th Supp. 345 at ¶ 5.11. See notes 68-71 and accompanying text.

89. *In re Canada's Landing Requirements for Salmon and Herring*, 12 Int'l Trade Reporter Decisions (BNA) 1026 (1991).

III:4, which covers internal measures affecting export transactions,[90] the panel held that, even though the inspection requirement was facially neutral, the greater commercial burden on the export sales made it a "restriction" (i.e., "less favourable treatment") falling within the GATT prohibition.[91] The panel then considered and rejected the regulatory justification for the measure under Article XX.[92] Neither of these decisions addresses, much less solves, the question of how to confine this analysis so that it will not sweep up all government regulations that involve any differential commercial burden for foreign goods.

In the long run, the trick to making Article III:4 a sufficiently flexible and sensitive legal standard lies in finding some way to interpret the "less favourable treatment" standard in a way that will permit tribunals to limit its application to more egregious measures that involve little or no genuine regulatory purpose. This has been done with the "like product" test of Article III, but it is more difficult to achieve with a test that speaks only in terms of commercial disadvantage.

A possible answer may lie, however, in the National Treatment provision of the new Uruguay Round Services Agreement.[93] The new provision restates the national treatment concept in more detail than GATT Article III. It begins by employing the old "less favourable treatment" standard. It then resolves the important question of whether facially neutral measures are covered, saying yes, that the prohibition applies both to "formally identical and formally different" measures whenever they "modify conditions of competition" in favor of domestic suppliers.[94] But the new text then goes on to add that the

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90. Article III does not apply to export transactions. Article XI:1 contains an analogous requirement prohibiting restrictions on "exportation *or sale for export* of any product." Id. at ¶ 6.04 (emphasis in original). The panel explained that it was treating the reference to "sale for export" as an analogue to Article III:4. Id. at ¶¶ 6.04 to 6.06.

91. Id. at ¶¶ 6.08, 6.09, 6.12, and 6.13. The panel's ruling was expressed somewhat narrowly; instead of the broad proposition that any significant commercial disadvantage would constitute a "restriction" within the meaning of Article XI:1, the panel appeared to rest its conclusion on the fact that the primary effect of the landing requirement was to alter the way exports were made:

> The Panel concluded that where the primary effect of a measure is in fact the regulation of export transactions, the measure may be considered a restriction within the meaning of Article XI:1 if it has the effect of imposing a materially greater commercial burden on exports than on domestic sales.

Id. at ¶ 6.09.

92. Id. at ¶ 7.38.

93. General Agreement on Trade in Services ("*GATS*"), Art. XVII, in *1994 GATT Final Act*, II-A1B. See note 2.

94. *GATS* at Art. XVII:3.

prohibition does not apply to "inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers."[95] When will a competitive disadvantage be considered "inherent [to] . . . the foreign character" of the foreign supplier? The answer, presumably, is when the regulation producing the disadvantage is assigned no "causal" weight in that outcome. And when will that be? When, we submit, the regulation has the kind of routine normalcy (dare we say, credibility?) that makes it look like innocently ordinary domestic regulation with no protectionist purpose. The word "inherent" is synonymous with "inevitable" here, the idea being to describe a situation in which there is no way that a regulation, even if enacted with the best of good faith and pure motives, can avoid disadvantaging the foreign supplier. In short, by introducing the all-purpose concept of causation, the drafters of the Uruguay Round Services Agreement may, in fact, have succeeded in introducing the issue of valid regulatory purpose into the legal definition of "less favourable treatment."

This national treatment provision of the new Services Agreement can be viewed as an updated restatement of the national treatment concept, adopted by all GATT governments. The exclusion of "inherent competitive disadvantages" from the category of actionable violations thus also could be incorporated into Article III:4 itself, as a gloss on the meaning of its own "less favourable treatment" language. In either context, incidentally, the concept of "inherent competitive disadvantages" likely would function as a less-than-fully-explained category, not unlike the concept of "incidental burden" in United States DCC cases.

Leaving the puzzle of Article III:4, we turn to two sets of supplemental GATT rules that also deal with the issue of facially neutral product standards that impose commercial disadvantages on foreign producers. One is the new Uruguay Round Version of the GATT Standards Code, initially promulgated in 1979, that applies to any and all product standards.[96] The other is the new Uruguay Round Agreement on Sanitary and Phytosanitary Restrictions ("SPS Agreement"), that pertains to product standards relating to human, animal, and plant health and safety.[97] The Standards Code will be treated as

95. Id. at Art. XVII:1 n.11.

96. The current 1994 version of the Standards Code covers standards defined in terms of the characteristics of the product, as well as standards defined in terms of production processes insofar as they affect the quality of the products themselves. *1994 GATT Standards Code*, Arts. 2.2, 2.8 (cited in note 5).

97. See note 24.

lex specialis superseding Article III:4 to the extent it overlaps, and the SPS Agreement, being even more specific, will be treated as superseding both Article III:4 and the Standards Code to the extent it overlaps.

Both the Standards Code and the SPS Agreement escape the dilemma created by the bifurcated approach of Articles III:4 and XX. Both contain rules that permit tribunals to weigh a measure's trade-restricting effects and its regulatory justification at the same time. Article 2.2 of the Standards Code provides as follows:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end use of products.[98]

The text clearly calls for an analysis and evaluation of the regulatory purpose of the measure.

The SPS Agreement contains a rather lengthy and convoluted set of legal standards, but the basic provisions are similar to those of the Standards Code. Paragraphs 6 and 7 of the Agreement provide:

> 6. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except [as later provided].
>
> 7. . . . Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.[99]

The concept of "disguised restriction" has been interpreted to refer to cases where a claimed regulatory purpose is found to be of so little importance, or is so little served, that it can be called a disguise.[100]

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98. *1994 Standards Code*, Art. 2.2 (cited in note 5).

99. *1994 GATT SPS Agreement*, ¶¶ 6 and 7 (cited in note 24).

100. This interpretation was adopted by a dispute settlement panel convened under the U.S.-Canada Free Trade Agreement. *In re Canada's Landing Requirements*, 12 Int'l Trade Reporter Decisions 1026 at ¶ 7.11 and n.20. To be sure, this interpretation is at odds with the view taken in two GATT panel decisions that "disguised" means not publicly announced; see *United States: Imports of Certain Automotive Spring Assemblies*, BISD, 30th Supp. 107, ¶ 56 (1984); *United States: Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD, 29th Supp. 91, 4.8 (1983). The latter interpretation makes no sense. It seems clear that the governments who agreed to the recent incorporation of the "disguised restriction" formula into

Both of these special agreements call for a balancing analysis similar to what one finds in the opinions of U.S. courts in DCC cases. Some of the points made earlier in this section can be repeated with regard to the likely application of this balancing analysis. First, although GATT tribunals will no doubt be inclined to analyze measures strictly or otherwise according to initial common sense appraisals of their regulatory purpose, they are unlikely to follow the practice of U.S. courts of making ab initio distinctions between "discriminatory" and "incidental" burdens. Rather, as a formal matter they will probably follow the general starting point rule that complainants bear the burden of proving a violation, at least until a prima facie violation is demonstrated. As a consequence, the actual degree of deference to legislative policy is likely to be somewhat greater than in DCC cases, but also is likely to remain somewhat more hidden.

IV. THE UNDERLYING STANDARD: COST-BENEFIT, MOTIVE, OR WHAT?

Having explored the structural similarities and differences between DCC law and its GATT counterparts, we now turn to the key question of the substantive standards. The fact problem we have been discussing involves two main elements: (1) a trade-restricting measure (whether explicitly discriminatory or facially neutral); and (2) some kind of justification for the measure in terms of recognized, non-trade regulatory purpose. The central substantive issue is the way that these two elements are to be evaluated and balanced by the decision maker.

We have identified two related types of substantive standards that can be applied to the situation described by these two elements. On the one hand, a tribunal can do a cost-benefit analysis, asking whether the trade-restricting effect of the measure is justified by the regulatory benefit it achieves. On the other hand, a tribunal can examine the question of whether the measure has a protectionist purpose or motive. As we have noted earlier, the same evidence of minimal regulatory achievement tends to support a guilty verdict under either standard.

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several new Uruguay Round agreements, see note 118, were doing so in agreement with the former meaning.

Paragraph 11 of the *1994 GATT SPS Agreement* provides for acceptance of measures that conform to internationally accepted standards, but provides that higher standards must be justified by scientific evidence.

In GATT, as in DCC cases, the primary objections to the activities of legal tribunals in this area involve challenges to: (1) their capacity to make accurate judgments about the effects of regulatory measures; and (2) the political legitimacy of their making such judgments in the first place. The main difficulty is found when tribunals try to make judgments about the regulatory *benefits* of such measures.

Judgments about the *harms* caused by such measures—the existence and degree of competitive disadvantage—have not proved too troublesome. In GATT law, the issue of commercial disadvantage is not whether some specific commercial loss can be proved (usually impossible due to the number of separate factors influencing any business outcome). Rather, the issue is whether the measure has changed "the conditions of competition," in the words of the Services Agreement.[101] Assessment of competitive impact is essentially a matter of rather simple business economics, applied to undisputed facts. GATT decisions have not encountered much criticism on this score. So far as we are aware, the identification of burdens on interstate commerce also has been relatively non-controversial in DCC cases.

In GATT, as in DCC doctrine, tribunals encounter much stronger objections to decisions about the regulatory *benefits* of the measures in question. GATT tribunals have few credentials to assess the success or social value of regulatory measures and lack any recognized political mandate to do so. The competence of federal courts in this area is also suspect, though perhaps to a lesser extent given the extensive fact-finding procedures available in modern litigation. The difficulty varies, however, according to the particular facts and issues presented.

GATT tribunals have received a fair degree of acceptance for one particular type of decision holding that a regulatory measure produces no benefit at all. These decisions conclude that the same regulatory benefit can be achieved by an alternative measure that is less trade-restricting or not trade-restricting at all. In the *Section 337* case, for example, the panel was able to secure acceptance of its judgment that the special expedited procedure required by the United States for foreign patent violations did no more to protect patent owners against irremediable injury than could be accomplished by various kinds of other trade-neutral preliminary protective remedies.[102] Likewise, in the much discussed *Thai Cigarette* case, the

101. *GATS*, Art. XVII, ¶ 33 (cited in note 93).
102. See notes 68-71 and accompanying text.

panel found that a ban on imports of U.S. cigarettes alone contributed no more to anti-smoking policies than could have been accomplished by trade-neutral restrictions on all cigarette sales.[103] Although comparison of alternatives is often constrained by the difficulty of the technical or scientific judgments involved,[104] these cases show this type of comparison can be a very powerful regulatory tool. Particularly in cases involving discriminatory measures, U.S. courts also have found it easy to point out equally effective but nondiscriminatory alternatives.[105]

In a fair number of other cases, the facts are simply clear enough to allow a credible finding of no regulatory benefit. In the first *Salmon and Herring* decision, tried before a regular GATT panel, the panel rejected Canada's assertion that an export restriction had a conservation purpose on the ground that Canada imposed no limits on export or consumption once the fish had been processed.[106] Likewise in an earlier case, a GATT panel rejected a claim that an import ban on tuna was in aid of conservation measures by noting that the United States had no conservation limits on its own fishermen.[107] In the DCC context, a similar example is provided in *Hunt*, where a specious consumer protection rationale was offered for a blatantly protectionist labeling rule.[108] These claims of regulatory purpose are quite transparently bogus, having been dreamed up in the lawyers' offices only after the measure is challenged. A fairly large number of justifications fall into this category.[109]

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103. See *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD, 37th Supp. 200, ¶ 81 (1991). For another decision employing the same type of analysis, see *Japan: Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, BISD, 34th Supp. 83, ¶ 5.13 (1988) (ruling that achievement of a social policy of taxing alcoholic beverages according to ability to pay did not require using GATT-illegal discriminatory taxes).

104. See, for example, the criticism of the second *Salmon and Herring* decision, notes 115-16 and accompanying text.

105. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) is the leading case. See also *Hunt*, 432 U.S. at 354 (discussing nondiscriminatory alternatives to state labeling requirement).

106. *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD, 35th Supp. 98, ¶ 4.7 (1989). Local processing requirements have been similarly disfavored under the DCC. See *Carbone*, 114 S. Ct. at 1682-83 (citing cases).

107. *United States: Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD 29th Supp. 91, ¶¶ 4.10-4.13 (1983).

108. See *Hunt*, 432 U.S. at 352-53.

109. Although such bogus claims of justification may seem unworthy of responsible governmental behavior, it must be remembered that the officials representing a government owe a responsibility to defend its actions. The way in which such defenses are actually made and handled deserves careful examination.

In most cases, government lawyers will maintain such defenses for only a decent length of time, and will not protest too strongly when they lose. Government attorneys are usually sensitive to the fact that they represent the government as a whole, and not the special interest group that managed to obtain the protectionist measure. This is certainly true in GATT litiga-

It will be substantially more difficult for tribunals to find that apparently neutral health, safety, or environmental regulations produce no regulatory benefit at all. Although the new GATT SPS Agreement does contain a requirement that such measures must have a scientific basis,[110] the Agreement permits risk-avoiding measures when the scientific evidence is unclear,[111] and it is already clear that governments will insist on having a fair degree of leeway in defining and weighing risks of the unknown.

The Supreme Court apparently has given similar leeway to states, even for discriminatory measures. In *Maine v. Taylor*,[112] the Court upheld a Maine statute banning the importation of bait fish. The Court gave great deference to the testimony of three experts who claimed that Maine's fisheries might be placed at risk because of parasites present only in out-of-state bait fish. Despite a contrary opinion from another expert, the Court concluded that Maine was justified in regulating even without definite scientific proof:

> Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. . . . [It need not] sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.[113]

Under the Court's current formulation, the state must overcome a formidable burden of proof, given the strong presumption against facially discriminatory statutes. We are not sure the *Taylor* Court's scrutiny was quite this rigorous in reality. The evidence on behalf of the state shows the statute had a possible justification, but not that it, in fact, was necessary. On the other hand, the evidence apparently was strong enough to satisfy reasonable legislators, who certainly could have believed a ban on out-of-state bait fish produced significant benefits compared to alternatives with lesser trade effects.

Perhaps in recognition of the difficulty of this kind of environmental risk assessment, the GATT SPS Agreement tries to furnish

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tion, where the tenor of legal practice is a far cry from the "scorched earth" methods for which large U.S. law firms are so well known—an important point to remember, incidentally, when considering proposals to allow private legal representation in GATT proceedings. Arguably, the level of government legal practice in U.S. DCC litigation is quite similar to the practice in GATT, in both respects. The decision-making capacity of U.S. courts is no doubt enhanced by these tendencies.

110. *1994 GATT SPS Agreement*, ¶ 6 (cited in note 24).

111. Id. at ¶ 22.

112. 477 U.S. 131 (1986).

113. Id. at 148.

regulators with another handle on the process of risk-assessment. It provides that members "shall avoid arbitrary or unjustifiable distinctions in the levels [of protection against risks] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."[114] The drafters apparently believed that GATT tribunals would be able to compare levels of risk avoidance from one case to another, and thus would be able to use the regulating government's own standards as a basis for finding that some levels of risk avoidance were excessive.

The most difficult case for both U.S. courts and GATT tribunals will be the one in which it must be admitted that the regulation in question does produce some possible regulatory benefit, but in which the benefit seems clearly too small to justify the cost in terms of trade restriction. This is the type of case in which the term "balancing" can be applied correctly and in which the greatest objection may be raised against judicial intrusion into the political process. A ruling that a regulatory benefit is too small to justify the cost of the trade restriction usually will be challenged as an usurpation of the government's political functions. Arguably, such a decision was made by the panel convened under the Canada-U.S. Free Trade Agreement in the second *Salmon and Herring* case, when the panel ruled that the regulatory gain of a one hundred percent landing requirement would not have been large enough, compared to less trade-restrictive alternatives, to justify the commercial burden if that commercial burden had been placed on Canadian buyers of fish.[115] The decision has already been criticized on these grounds.[116] It remains to be seen

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114. *1994 GATT SPS Agreement*, ¶ 20 (cited in note 24).

115. *In re Canada's Landing Requirements*, 12 Int'l Trade Reporter Decisions 1026 at ¶¶ 7.09, 7.10 and 7.35 to 7.38. The ultimate issue being decided by the panel could be described as one of motive, in formal rather than historical terms. An earlier GATT decision had interpreted GATT Article XX(g) as covering measures "primarily aimed at" conservation, see *Canada: Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD, 35th Supp. 98, ¶ 4.6 (1989). The panel in this case applied the "primarily aimed at" test as follows:

> [T]he Panel concluded that in determining whether the Canadian landing requirement would have been adopted for conservation reasons alone, the central issue was whether the conservation benefits of the landing requirement would have been large enough to justify imposing the commercial inconvenience in question. To comply with the trade neutrality required by Article XX(g), the issue must be posed in terms of whether Canada would have adopted the landing requirement if that measure had required an equivalent number of Canadian buyers to land and unload elsewhere than at their intonded destination.

In re Canada's Landing Requirements, 12 Int'l Trade Reporter Decisions 1026 at ¶ 7.10.

116. See David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 Cornell Int'l L. J. ___ (forthcoming) (taking the view that the panel improperly substituted its own conclusions as to the statistical necessity of a 100% sample for the conclusions of Canadian government scientists).

whether a tribunal constituted under the GATT itself would construe its mandate to authorize such candidly expressed judgments.

The allocation of the burden of proof in a particular case will have a substantial impact on the actual difficulty of making these decisions. It requires a rather strong case for a tribunal to state, on its own authority, that a trade-restricting measure produces no regulatory benefit. But, if the measure in question is prima facie a violation of GATT or the DCC, the tribunal will be able to express the same conclusion by finding that the government has failed to demonstrate the regulatory purpose to the tribunal's satisfaction.

Another issue that cuts across the difficulties of assessing regulatory benefits is whether the tribunal will articulate its decision in terms of cost-benefit analysis, or in terms of protectionist motive. In the GATT context, each standard has its advantages and disadvantages. In cases in which a zero-benefit finding is possible, a cost-benefit decision that stresses the lack of any justification is probably the cleanest. The same zero-benefit finding also could support a decision in terms of protectionist motive, but a decision based on motive probably will draw objections from national governments that do not appreciate having their integrity questioned. As a practical matter, of course, the community of member governments will react more aggressively against the violator if it is persuaded of actual bad faith.

When there is some small but inadequate amount of regulatory gain, a GATT finding of violation that sounds like a cost-benefit analysis will draw the heaviest criticism, for it will sound like second-guessing the value judgments of a national government. A decision that uses the same evidence to support a finding of protectionist purpose may to some extent avoid that objection, albeit at the expense of eliciting another objection against impugning the motives of a client government. Interestingly, the second *Salmon and Herring* decision was articulated partly in terms of purpose, albeit not enough to escape criticism for second-guessing.[117]

Despite the obvious hazards of decisions as to purpose or motive, the GATT does have one frequently employed legal standard that seems to legitimize some consideration of the governmental purpose behind a measure. The preamble to GATT Article XX calls for rejection of regulatory justifications that are found to be a "disguised restriction on international trade." Although the word "disguise" can be viewed as an objective criterion merely connoting the inadequacy of a regulatory justification in cost-benefit terms, its more literal meaning

117. See notes 115-16 and accompanying text.

suggests a conclusion about purpose—about a disguised real purpose behind a false disguised purpose.[118] The prohibition against "disguised restrictions" seems to have gained even greater currency recently, having been employed again in several new Uruguay Round agreements.[119] It is not surprising to find governments expressing legal standards in terms of the real purpose behind regulatory measures, because that, in fact, is what they are thinking about when they see trade-restricting regulatory measures. They readily perceive the protectionist motives behind such measures even though they certainly would not welcome tribunals examining their own behavior on that ground. The presence of these mixed attitudes present a delicate challenge for GATT tribunals.

The Supreme Court has had similar difficulties in dealing with DCC cases involving potential (but speculative) safety benefits. *Kassel v. Consolidated Freightways Corp.*[120] involved an Iowa truck regulation. Unlike other states in the central part of the country, Iowa prohibited the use of certain kinds of trucks, specifically 65-foot combination trailers in which a two-axle truck pulls a single-axle trailer, which, in turn, pulls a single-axle dolly and a second single-axle trailer. Companies wishing to use 65-foot doubles for cross-country trips were required to route them around Iowa or detach the trailers and ship them through separately, or, alternatively, to use the smaller trucks permitted under Iowa law. The total added costs to trucking companies was about $12 million per year.[121]

The Justices were unable to agree on an analytic approach in *Kassel*. Justice Powell's plurality opinion applied a balancing test and focused on the dubious benefits of the Iowa law.[122] The trial court found convincing evidence that the 65-foot combinations were at least as safe on interstate highways as the shorter trucks allowed by Iowa law.[123] The plurality's deference to the state was reduced because

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118. This nuance was relied on in the second *Salmon and Herring* decision, *In re Canada's Landing Requirements*, 12 Int'l Trade Reporter Decisions 1026 at ¶ 7.11 (stating, "[t]he preamble to GATT Article XX, which expressly prohibits 'disguised' restrictions on international trade, is an acknowledgment by the Parties that they will submit the purposes of trade-restricting conservation measures to third-party scrutiny"). For another view of this provision, see the two GATT panel rulings cited in note 100.

119. The term has been adopted as a legal standard in: (1) in Article 3 of the TRIPS Agreement, cited as *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, in *1994 GATT Final Act*, II-A2C (cited in note 5); (2) in Article XIV of the *GATS* (cited in note 93); and (3) paragraphs 7 and 20 of the *1994 GATT SPS Agreement* (cited in note 24).

120. 450 U.S. 662 (1981).

121. Id. at 674.

122. Id. at 671.

123. Id. at 668.

several exemptions insured that the burden of the law fell disproportionately on out-of-state shippers. One exemption was for agricultural vehicles; the other for cities bordering on states that allowed 65-foot twins. Justices Brennan and Marshall, however, rejected even this limited use of a balancing test, and instead focused on evidence of discriminatory intent.[124] A statute eliminating the Iowa ban was vetoed by the governor, not on safety grounds, but because allowing the trucks would "basically [open] our state to literally thousands and thousands more trucks per year."[125] Justice Brennan found this to be an impermissible effort to shift the costs of trucking (including accidents) to neighboring states.[126] In dissent, then-Justice Rehnquist argued that some plausible safety benefits might be present and that the purported existence of discriminatory intent was irrelevant.[127]

The analytic difficulties presented by *Kassel* and *Salmon and Herring* are, in some sense, typical of this entire area. We have no "quick fix" to propose for the hard cases. We somewhat gingerly attempted that task in an earlier version of this article, but are now convinced that the effort was misplaced. The general problem we are addressing has resisted the best efforts of the Supreme Court (for over 150 years), GATT tribunals, international negotiators, and a host of talented legal scholars. The reason, we believe, is that in some ultimate sense the problem is unsolvable. Taken to their logical conclusion, either free trade or local autonomy could virtually eliminate the other, and negotiating a workable border between the two depends as much on history, politics, and local terrain as on any overarching vision. No matter how a legal test is articulated, it cannot satisfactorily resolve the tensions between local autonomy and free trade in all conceivable cases. In the end, the law must have a certain irreducible messiness in dealing with such fundamental tensions.

Messiness is not, however, the same as chaos. Both the DCC and GATT do have fairly adequate ways of dealing with facially discriminatory measures. Both place a heavy burden on the regulating government to justify the measure (though the GATT experience suggests that the articulated DCC standard may be too high). Both run into trouble with facially neutral measures, which run the spectrum from devious bad faith on one hand and innocent run-of-the-mine regulation on the other. Even here, however, there are a considerable number of easy cases. The difficult cases are those in between

124. Id. at 679-87 (Brennan, Marshall, J.J., concurring in the judgment).
125. Id. at 684.
126. Id. at 686.
127. Id. at 704-05 (Rehnquist, J., dissenting).

—where a clear but limited benefit exists, where the benefit is hard to predict (perhaps because of scientific uncertainty), or where assessing the benefit requires a difficult, and possibly culturally based, value judgment. The U.S. courts are currently trying to sort their way through these cases by means of a poorly articulated "discrimination" test, seemingly moving away from the *Pike*-type balancing text. GATT tribunals are just now beginning to confront the harder cases. Particularly in these difficult cases, common sense tells us that most tribunals are likely to be strongly affected by their perceptions about the motive of the government that enacted the measure.[128]

Kassel suggests another argument against sharply distinguishing between discriminatory intent and effect. When the Iowa regulation was originally adopted, discrimination seemed not to have played an important role. By the time of the governor's veto message, which was avowedly discriminatory, the original rationale seemed to have evaporated. As then-Justice Rehnquist complained in dissent, it seems odd to say that the original ban became unconstitutional solely because of what happened during an unsuccessful effort to change it.[129] Moreover, in many cases where discriminatory motivation is even stronger, there will be less evidence of it, because no one will even attempt to pass repeal legislation. If the purported rationale of a law has evaporated but the measure continues to burden commerce, we could, reasonably but fictitiously, impute a discriminatory motive to the legislature's failure to repeal. Or we could simply say that the law fails even the most lenient balancing test, because its benefits are illusory. We see no reason to agonize over the difference in these formulations.[130] The conclusion that protectionism was, in fact, the purpose of the government is the most powerful possible condemnation. In reality, it will be the thought running through almost everybody's mind, whether the conclusion is reached because the purported benefits seem so minuscule or because of actual evidence of historical

128. As applied to a collective group like a legislature, "intent" is to some degree a legal fiction, since groups do not actually have mental states of their own, and it is highly unlikely that every legislator (or even every majority legislator) ever possessed an identical mental state. When we talk about protectionist motivation, what we really mean is that protectionist effect played a stronger causative role in the passage of legislation than its purported regulatory benefits, and one reason for believing that is often the weakness of those benefits. Even if some Iowa legislators in *Kassel* had the impression that the legislation increased safety, it seems unlikely such tenuous evidence would have been enough to result in legislation, except for its protectionist attractions.

129. *Kassel*, 450 U.S. at 705.

130. One formulation alludes to the political dynamics preventing repeal, and the other focuses on the regulation itself. But they ultimately both reveal that the regulation is outside the bounds of normal legislative practice for domestic industries.

motive. Concerns about government motive may not be fully articulated in the final opinion. Even the U.S. courts have sometimes treated the subject of legislative motive gingerly (as illustrated by the plurality opinion in *Kassel*). The GATT tribunals have a weaker institutional position and even more reason to be wary. Overt or not, consideration of motive seems inevitable, however, and a more explicit treatment of the issue by tribunals probably would be helpful.

Despite the great conceptual difficulties posed by regulatory trade barriers, both U.S. and international tribunals seem largely to have struggled their way to defensible results. Because of the difficulty of constructing a clean doctrinal solution, the quality of the process, and that of the decision makers, is and will remain critical.