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**ECO-LABELING STANDARDS, GREEN  
PROCUREMENT AND THE WTO:  
SIGNIFICANCE FOR WORLD BANK BORROWERS**

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## ECO-LABELING STANDARDS, GREEN PROCUREMENT AND THE WTO: SIGNIFICANCE FOR WORLD BANK BORROWERS<sup>†</sup>

### EXECUTIVE SUMMARY

Eco-labels help consumers make safe and healthy purchasing decisions by providing information about environmental and social impacts of products and services. Similarly, “green procurement” policies can lead to environmentally and socially sound purchasing decisions by governmental agencies and other entities. Together, these tools have the potential to create powerful incentives for the marketing of green products and services.

The World Bank has announced that it will “increase its ongoing push for green procurement and support certified products.”<sup>1</sup> Presumably, this statement applies to the Bank’s own procurement practices, as well as to project-related procurement by World Bank borrowers. Eco-labeling can be a useful tool for helping the Bank meet this goal.

Although eco-labels have never been the subject of a dispute in the World Trade Organization (WTO),<sup>2</sup> they are sometimes perceived as having the potential to create barriers to trade. Developing countries fear that labeling schemes may reduce their access to markets and be overly costly or burdensome. Nevertheless, labeling schemes have been adopted in India, Korea, Indonesia, Singapore and elsewhere in the developing world. Eco-labels have helped foster niche markets for such goods as organic produce, natural fibers, and sustainable timber.

The WTO Committee on Trade and Environment tends to take a positive view of eco-labels, most Members having agreed “voluntary, participatory, market-based and transparent environmental labeling schemes were potentially *efficient economic instruments* in order to inform consumers about environmentally friendly products. As such they could help move consumption on to a more sustainable footing. Moreover, they tended, generally, to be less trade restrictive than other instruments.”<sup>3</sup>

Despite this favorable view, it is possible that some issues relating to eco-labels could give rise to trade disputes. Perhaps the most contentious issue is specification of “non-product related” process and production methods (npr PPMs). These are process and production methods that do not affect the characteristics of the finished product. Several

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<sup>†</sup> This paper was prepared by Donald M. Goldberg, Elisabeth Tuerk, Janice Gorin, and David Vivas, with invaluable assistance from Melissa Brandt, Chandra Middleton, and Sasha H. Sajovic.

<sup>1</sup> Press Release, World Bank, Putting Social and ‘Green’ Responsibility on the Corporate Agenda (July 21, 2001) (2001/394/S).

<sup>2</sup> The only dispute involving eco-labels pre-dated the WTO by several years. GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994). The panel found that the voluntary “dolphin-safe” label did not violate the GATT.

<sup>3</sup> Committee on Trade and the Environment, *Report to the 5<sup>th</sup> Session of the WTO Ministerial Conference in Cancún*, WT/CTE/8 (July 11, 2003) at ¶ 30.

dispute bodies under the General Agreement on Tariffs and Trade (GATT) and later the WTO have disallowed national regulations involving npr PPMs. More recently, however, limited use of npr PPMs has been permitted under the general exceptions of GATT Article XX.<sup>4</sup> Whether eco-labels incorporating npr PPMs would survive a WTO challenge remains to be determined.

Government procurement of goods and services is covered by the plurilateral WTO Agreement on Government Procurement (GPA).<sup>5</sup> The GPA permits PPMs to be included in technical specifications and considered when contracts are awarded, as long as they do not create unnecessary obstacles to international trade. The GPA does not appear to distinguish between product-related and non-product-related PPMs.<sup>6</sup> Apart from the GPA, regulations relating to procurement of goods and services by a government for its own use are outside the scope of most WTO rules for goods and services.<sup>7</sup>

GPA parties are encouraged to increase imports from developing countries by providing them with technical assistance, such as document translation and help solving technical problems relating to the awarding of contracts. Developing countries also may obtain exclusions from national treatment rules for their listed entities, products, or services.

There are several ways eco-label standards and criteria could be used by a World Bank borrower to “green” its project procurement without running afoul of WTO rules. It could, for example, give preference in its project-related purchasing to products and services with environmental and social provisions, such as eco-labeling standards and criteria. Alternatively, it could develop a list of acceptable or preferred labels, develop or “cut-and-paste” criteria from labels, or even create its own labeling system, taking into consideration relevant international standards and criteria.

As long as they do not discriminate based on country of origin or create unnecessary obstacles to international trade, these uses of eco-labels for procurement purposes seem to square with the rules of the GPA. For WTO Members not party to the GPA, none of these approaches is likely to create a conflict, for the simple reason that government procurement, as noted above, is excluded from key provisions of other WTO agreements.

While the WTO creates no significant legal impediments to the approaches suggested above, they may raise some concerns for developing countries. As noted, several

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<sup>4</sup> Compare *United States—Restriction on Imports of Tuna*, DS21/R (Sept. 3, 1991) and *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) with *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia*, WT/DS58/RW (June 15, 2001) and *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001).

<sup>5</sup> Agreement on Government Procurement, Annex 4 to the Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999).

<sup>6</sup> *Id.*, at Art. VI.

<sup>7</sup> World Trade Organization, *Government Procurement: traditionally a gap in the trading system*, at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpintr\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpintr_e.htm) (last visited on July 15, 2003).

countries have expressed a fear that the use of eco-labels will be costly, complicated, or may reduce their access to markets. The World Bank could help developing countries adjust to the growing demand for environmentally friendly products and services by encouraging its borrowers to green their procurement practices and continuing to provide financial assistance and capacity building to developing countries seeking to meet the demand for greener products and services.

To address developing countries' cost concerns, the World Bank could:

- Continue to expand developing countries' access to financing to make the transition to cleaner products, services, processes and production methods;
- Help defray the costs to developing countries of testing, conformity assessments, and certification;
- Help defray the incremental costs to developing countries of procuring green goods and services;
- Provide financial assistance to enable developing countries to participate in international standard setting processes.

To address developing countries' concerns about capacity, the World Bank could:

- Sponsor additional workshops on eco-labeling, standards and criteria setting, and green procurement;<sup>8</sup>
- Provide information and analysis on green market trends;
- Help developing countries create pilot projects for selected products;
- Ensure that key documents are translated into relevant languages and are easily accessible to companies in developing countries;
- Assist developing countries in creating and promoting their own labeling and standards and criteria setting schemes, for example by helping them develop conformity assessment procedures and establish testing facilities;
- Consult with developing countries to better understand their approaches to managing and solving environmental problems and developing environment-friendly processes, products and services.

By adopting these measures, the World Bank could help allay developing countries' fears about an inevitable shift in developed country procurement policies and labeling requirements. With adequate support and assistance, developing countries could become leaders in providing the world with environmentally sound products and services.

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<sup>8</sup> The World Bank and WTO recently co-sponsored a workshop on government procurement in Dar es Salaam, Tanzania, 14-17 January 2003. The workshop did not cover environmental issues, however. See the WTO web site at [http://www.wto.org/english/tratop\\_e/gproc\\_e/wkshop\\_tanz\\_jan03/wkshop\\_tanz\\_jan03\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/wkshop_tanz_jan03_e.htm)

**ACRONYM LIST**

CAFÉ	Corporate Average Fuel Economy
CTBT	Committee on Technical Barriers to Trade
CTE	Committee on Trade and the Environment
DPCIA	Dolphin Protection Consumer Information Act
EC	European Community
EPA	Environmental Protection Agency
GATT	General Agreement on Tariffs and Trade 1994
GATS	General Agreement on Trade in Services
GPA	Agreement on Government Procurement
MFN	most favored nation
MMPA	Marine Mammal Protection Act
npr	non-product-related
PPMs	process or production methods
SPS	Agreement on Sanitary or Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
WGGR	Working Group on GATS rules
WGTGP	Working Group on Transparency in Government Procurement
WTO	World Trade Organization



## **ECO-LABELING STANDARDS, GREEN PROCUREMENT AND THE WTO: SIGNIFICANCE FOR WORLD BANK BORROWERS<sup>†</sup>**

### **1. INTRODUCTION**

Eco-labeling, which provides information to consumers about the environmental and social impacts of the products and services they buy and use, can be an essential tool for protecting the environment and promoting sustainable development. Carefully designed “green procurement” policies can lead to environmentally and socially sound purchasing decisions by governmental agencies and other entities. When these two tools operate together, as when government rules require procured goods and services to bear eco-labels, or meet equivalent standards and criteria, they have the potential to create powerful incentives for the marketing of green products and services and thereby promote sustainable development.<sup>1</sup>

The World Bank has announced that it will “increase its ongoing push for green procurement and support certified products.”<sup>2</sup> Given the World Bank’s commitment to sustainable development, this statement presumably pertains not only to the Bank’s own procurement practices, but to project-related procurement by World Bank borrowers.

This paper examines whether the rules of the World Trade Organization (WTO) are compatible with World Bank borrowers incorporating eco-labeling standards and criteria into their project-related procurement practices.<sup>3</sup> It is understood that the World Bank procurement guidelines do not need to comply with WTO rules, and that the findings of this paper are relevant to WTO member countries. This paper reviews WTO agreements, committee reports, and dispute panel and Appellate Body findings and concludes that eco-label standards and criteria can be used by client countries to “green” World Bank financed projects without offending WTO rules. This conclusion is based primarily on the exclusion of government procurement from the main WTO rules for goods and services and the flexibility provided by the rules of the plurilateral Agreement on Government Procurement. WTO jurisprudence relating to procurement and eco-labeling is in a formative stage, however, and several key issues remain to be resolved either through negotiations or additional case law. The paper also discusses concerns about eco-labeling that developing countries have raised in WTO committee and working group discussions, and it suggests some actions the Bank might take to alleviate those concerns.

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<sup>†</sup> This paper was prepared by Donald M. Goldberg, Elisabeth Tuerk, Janice Gorin, and David Vivas, with invaluable assistance from Melissa Brandt, Chandra Middleton, and Sasha H. Sajovic.

<sup>1</sup> See ROBERT GOODLAND, *ECOLABELING: OPPORTUNITIES FOR PROGRESS TOWARD SUSTAINABILITY* 9 (Consumer’s Choice Council 2002) (noting that World Bank funds procure an estimated US\$8 billion per annum).

<sup>2</sup> Press Release, World Bank, Putting Social and ‘Green’ Responsibility on the Corporate Agenda (July 21, 2001) (2001/394/S).

<sup>3</sup> The World Bank procurement policy, as discussed in this paper, applies only to procurement by borrowers. This paper does not examine procurement by the World Bank of goods or services for its own use or procurement related to structural adjustment lending programs.

In addition to their reservations related to WTO-consistency, developing countries have expressed concerns that participation in eco-labeling programs could be costly and technically difficult. The World Bank could help address these concerns by providing technical and financial assistance to developing countries to ensure that they benefit from eco-labeling standards and criteria and green procurement. Actions the Bank might take include:

- Continuing to expand developing countries' access to financing to make the transition to cleaner products, services, processes, and production methods;
- Helping defray the costs of testing, conformity assessments, and certification;
- Helping defray the incremental costs of procuring green goods and services;
- Helping create pilot projects for select products;
- Helping developing countries create and promote their own labeling schemes, taking into account international standards, where relevant.

Section two of this paper provides a general overview of the applicability of trade law to eco-labeling. It analyzes key elements of GATT and WTO jurisprudence related to labeling, including the most relevant agreements, related case law, and possible future directions that countries may take with respect to eco-labeling. Section three contains a similar discussion for government procurement. Section four concludes that WTO rules contain no significant barrier to the addition of eco-labeling standards and criteria considerations to project-related procurement by World Bank borrowers. Section five suggests some actions the World Bank might take to ensure that developing countries benefit from eco-labeling and green procurement.

## **2. ECO-LABELING: A TRADE LAW OVERVIEW**

### **2.1. What Are Eco-labels?**

Eco-labels provide consumers, retailers, government officials, and other interested parties with information about the environmental characteristics and impacts of labeled products and services.<sup>4</sup> Armed with this information, purchasers are able to make more informed choices about the goods and services they buy and signal their preferences to manufacturers and service providers. In this way, eco-labels harness the power of the marketplace to help protect the environment and promote sustainable development. As a policy tool, eco-labeling provides a number of benefits. Well-designed eco-labels can

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<sup>4</sup> For an early discussion of eco-labeling and the WTO, see Arthur E. Appleton, *Environmental Labeling Schemes: WTO Law and Developing Country Implications*, in *TRADE, ENVIRONMENT AND THE MILLENNIUM* 211 (Gary P. Sampson & W. Bradnee Chambers, eds. 1999).

raise consumer awareness, promote food safety, serve quality objectives, help prevent deceptive practices, and support consumers' right-to-know.<sup>5</sup>

From an international trade perspective, however, eco-labels have given rise to several concerns. They are sometimes perceived as having the potential to create barriers to trade and to be misused by government bodies for protectionist purposes. These concerns have been discussed extensively within the WTO Committee on Trade and the Environment (CTE) and the Committee on Technical Barriers to Trade (CTBT).<sup>6</sup>

Developing countries have expressed particular concerns about the use of eco-labels. They fear, first, that labeling schemes may reduce their access to markets for their goods and services in countries applying the schemes and, second, that participation in and compliance with such schemes may entail significant cost, information requirements, and technical expertise, especially if schemes vary across countries.

More specifically, developing countries suspect that labeling schemes, which have been created mainly in developed countries, tend to favor developed countries' domestic producers and service providers and ignore developing country considerations. Adding to their concerns, developing countries face barriers to creating their own eco-labeling schemes and to participating in, and reaping benefits from, international negotiations and standard setting processes. These barriers may include: costs and technical challenges of testing and certification; lack of scientific data for establishing thresholds and limits; lack of access to "clean" technologies; and the high cost of participating in international discussions and rule-making.<sup>7</sup>

Nevertheless, the establishment of labeling schemes in a number of developing and emerging countries, including India, Korea, Indonesia, and Singapore, suggests that these barriers are not insurmountable. Moreover, some developing countries have taken advantage of the opportunity created by eco-labels to develop niche markets for such goods as organic produce, natural dyes and fibers, and sustainably harvested timber. Section 5 discusses several ways the World Bank could help developing countries participate in and benefit from eco-labeling and green procurement.

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<sup>5</sup> MATTHEW STILWELL & BRENNAN VAN DYKE, AN ACTIVIST'S HANDBOOK ON GENETICALLY MODIFIED ORGANISMS AND THE WTO 5 (Consumer's Choice Council 1999).

<sup>6</sup> See e.g., Submission from Switzerland to the Committee on Trade and Environment and to the Committee on Technical Barriers to Trade, *Marking and Labeling Requirements*, WT/CTE/W/192 and G/TBT/W/162 (June 19, 2001).

<sup>7</sup> Veena Jha, *ECOLABELING AND DMCs: A BARRIER OR A TRADING OPPORTUNITY?* (Asian Development Bank 1999); Mubariq Ahmad, *ECO-LABELING OF INDONESIAN TIMBER AND TIMBER PRODUCTS* (Asian Development Bank 1998). Other commentators view eco-labeling and green procurement as potentially beneficial for developing countries. See, e.g., Guy Salmon, *Round Table on Sustainable Development: Voluntary Sustainability Standards and Labels (VSSLs): The Case for Fostering Them*, 9 Organization for Economic Cooperation and Development (Dec. 2002).

## 2.2. Types of Eco-labeling Schemes

Eco-labeling schemes can be classified into three categories: mandatory government-sponsored; voluntary government-sponsored; and voluntary privately sponsored.

### 2.2.1. Mandatory Government-Sponsored Schemes

Mandatory government-sponsored eco-labeling schemes require that certain products sold within the country bear labels providing specified environmental information about the product to consumers. Mandatory labels can contain negative, positive, or neutral content. An example of a neutral content scheme is the U.S. Food and Drug Administration requirement that nutritional information be displayed on the packaging of processed foods. The 1990 Clean Air Act Amendments provide an example of a negative content scheme. They require products containing substances known to harm the ozone layer bear a label warning consumers of the harmful environmental effects of the product.

### 2.2.2. Voluntary Government-Sponsored Schemes

Voluntary government-sponsored schemes make up the largest category of eco-labeling programs. Under such schemes, the government will award the right to bear labels to products that have certain positive environmental characteristics. Producers have discretion to decide whether the market advantage of carrying the label is worth the cost of compliance with the requirements. Frequently, these programs involve life-cycle analysis that attempts to take account of all the product's environmental impacts "from cradle to grave." Germany's Blue Angel program, which awards labels to a wide array of environmentally friendly products, is one example. Nearly all OECD members, as well as other countries including India, Singapore, and Thailand, have adopted voluntary, government-sponsored eco-labeling schemes.

In the United States, the 1990 Dolphin Protection Consumer Information Act (DPCIA)<sup>8</sup> established a voluntary label with positive content, limiting the right to carry a "Dolphin Safe" label to tuna harvested using methods that reduce dolphin mortality. The DPCIA is strictly a labeling measure; it does not contain any import restrictions. When challenged in a 1990 GATT dispute settlement proceeding, the "Dolphin Safe" labeling scheme was found to be GATT-consistent.<sup>9</sup>

### 2.2.3. Voluntary Privately Sponsored Schemes

Voluntary eco-labeling programs may be administered by private entities as well as by governmental entities. Private programs include self-declaration claims and independent third-party claims. The Mobius Loop, which manufacturers use to indicate recyclable

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<sup>8</sup> Public Law 101-627 § 901, 104 Stat. 4436 (1990) (codified in part at 16 U.S.C. § 1385).

<sup>9</sup> GATT Panel Report, *United States—Restriction on Imports of Tuna*, ¶ 5.41ff, DS21/R (Sept. 3, 1991) [*hereinafter Tuna-Dolphin I*].

and recycled content, is an example of a self-declaration claim. An example of a third party program is the Scientific Certification System, a for-profit company that analyzes environmental performance of products.

### 2.3. WTO Agreements Applicable to Eco-labeling

Several WTO Agreements contain rules potentially applicable to eco-labels, including the General Agreement on Tariffs and Trade 1994 (GATT 1994 *or* GATT),<sup>10</sup> the General Agreement on Trade in Services (GATS),<sup>11</sup> the Agreement on Technical Barriers to Trade (TBT),<sup>12</sup> and the Agreement on Sanitary or Phytosanitary Measures (SPS).<sup>13</sup> Each agreement contains its own set of rules, some of which overlap with rules in other agreements. Thus, it is important to know when each of the agreements applies and how they relate to each other. According to the general interpretive note for the WTO Annex 1A Agreements (which include GATT, TBT, and SPS), in case of a conflict between a provision of the GATT and a provision of another Annex 1A Agreement, the latter prevails to the extent of the conflict. In the absence of a conflict, case law points toward concurrent application of Annex 1A Agreements.<sup>14</sup>

#### 2.3.1. The General Agreement on Tariffs and Trade 1994

The GATT 1994 contains the basic disciplines for regulating trade in goods between WTO Members. It contains several obligations that could apply to mandatory eco-labels, notably its prohibitions of discrimination and quantitative restrictions.

##### A. *Most Favored Nation and National Treatment*

Two fundamental GATT obligations are Article I (most favored nation *or* MFN) and Article III (national treatment). These obligations are included, in some form, in all the WTO agreements discussed in this paper. Article I of the GATT requires that “any

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<sup>10</sup> General Agreement on Tariffs and Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999) [hereinafter GATT].

<sup>11</sup> General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999) [hereinafter GATS].

<sup>12</sup> Agreement on Technical Barriers to Trade, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999) [hereinafter TBT].

<sup>13</sup> Agreement on Sanitary and Phytosanitary Measures, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999) [hereinafter SPS].

<sup>14</sup> See, e.g., WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, ¶ 80, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos AB*]. See also Robert Howse & Elizabeth Tuerk, *The WTO Impact on Internal Regulations, in THE EU AND THE WTO; LEGAL AND CONSTITUTIONAL ISSUES* 308 (Hart Publishing 2001). The GATT and the GATS also may apply concurrently. See e.g., WTO Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 221-222, WT/DS27/AB/R (Sept. 25, 1997).

advantage, favour, privilege or immunity” granted to a product from any country also be accorded to a “like product” originating in or destined for any member country.<sup>15</sup> Article III requires member states to treat products imported from other member states no less favorably than “like” domestic products.<sup>16</sup>

### ***B. Like Products and PPMs***

Articles I and III of the GATT prohibit treating products from a WTO trading partner less favorably than domestic like products or like products from another WTO member. Labels that distinguish between products based upon their physical characteristics generally will not give rise to like product concerns, although products need not be identical to be considered alike.<sup>17</sup> Products will be more closely scrutinized for “likeness” if regulations, including labels, differentiate between products on the basis of process or production methods (PPMs). Some PPMs will affect the characteristics of the finished product, in which case the analysis should be essentially the same as in the non-PPM case. Frequently, however, PPMs do not affect final product characteristics. These so-called “non-product-related” (npr) PPMs typically employ life-cycle analysis, which differentiates between products based partly upon environmental impacts associated with processes or production methods (for example, the amount of energy consumed in manufacturing the product).

WTO Members hold different views on whether npr PPMs are a legitimate basis upon which to distinguish products. Many developing countries, fearing that such an inquiry into process and production methods would place them at a disadvantage, oppose an interpretation that would include npr PPMs as a basis for distinguishing between products under Articles I or III or similar provisions in other WTO Agreements.

### ***C. Prohibition of Quantitative Restrictions***

Another GATT obligation that may be relevant for eco-labels is Article XI, which prohibits quantitative trade restrictions.<sup>18</sup> A measure can be subject to the GATT’s Article III non-discrimination provisions or to the Article XI prohibition of quantitative restrictions, but not both. The *Tuna-Dolphin I* panel examined a voluntary labeling scheme, the Dolphin Protection Consumer Information Act (DPCIA), and found that it did not violate Article XI. A mandatory label presents a different issue, however. It could be argued that a labeling requirement for a product is a quantitative restriction even

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<sup>15</sup> GATT, *supra* note 10, at Art. I:1.

<sup>16</sup> *Id.* at Art. III:4.

<sup>17</sup> A GATT Working Party in 1970 identified three elements to be considered when determining likeness: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; and (iii) consumers’ tastes and habits. Working Party Report, *Border Tax Adjustments*, BISD 18S/97 (adopted Dec. 2, 1970). Later, the panel in *EEC Measures on Animal Feed Proteins*, BISD 25S/49 (adopted Mar. 14, 1978) added a fourth criterion, the tariff classification of the products.

<sup>18</sup> Article XI states that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measure, shall be instituted or maintained.” GATT, *supra* note 10.

if the label is merely informative and does not require the product to conform to a particular technical specification. The counter-argument is that a labeling requirement does not limit the importation of a product; it merely requires that it carry a label. A mandatory labeling scheme has not been the subject of a GATT dispute, so the issue remains to be tested.

#### ***D. Environmental Exceptions***

Even if a measure is found to conflict with Article I, III, or XI of the GATT, it can still be saved by the GATT's environmental exceptions. Environmental measures may be justified under Article XX(b), which covers measures "necessary to protect human, animal or plant life or health," or under Article XX(g), which covers measures "relating to the conservation of exhaustible natural resources." GATT jurisprudence requires that a member state seeking the protection of Article XX(b) show that the measure in question is "necessary" to protect human, animal, or plant life or health. This requirement has proven difficult to satisfy.<sup>19</sup> In the case of Article XX(g), the measure must "relate to" the conservation of exhaustible natural resources, and must be "made effective in conjunction with restrictions on domestic production or consumption." Some experts believe the Article XX(g) criteria are easier to satisfy than the criteria for Article XX(b).<sup>20</sup>

In addition, the measure must comply with the requirements of Article XX's introductory paragraph, or chapeau. To do so, it must satisfy several interrelated criteria. In particular, it must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade." These criteria also have proven difficult to satisfy.<sup>21</sup>

#### **2.3.2. Agreement on Technical Barriers to Trade**

Although the question has not been tested, eco-labeling schemes for products are likely to fall under the Agreement on Technical Barriers to Trade (TBT). If they do, then

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<sup>19</sup> Although the measure at issue in *Asbestos* is so far the only one to pass the Art. XX(b) necessity test, the panel and Appellate Body reports in the *EC—Sardines* case contain statements relevant to the necessity test analysis. WTO Panel report, *EC—Trade Description of Sardines*, ¶¶ 4.91-4.117, WT/DS231/R (June 10, 2002) [hereinafter *Sardines panel*]; WTO Appellate Body Report, *EC—Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *Sardines AB*].

<sup>20</sup> See Arthur E. Appleton, *GATT Article XX's Chapeau: A disguised 'Necessary' Test?*, 6-2 Review of European Community and International Environmental Law Vol. 131-138 (1997). See also, Jan Neumann & Elizabeth Tuerk, *Necessity Revisited—Proportionality in WTO Law after EC—Asbestos and EC—Sardines* (2002).

<sup>21</sup> Note that until the panel in *EC—Asbestos* and the Appellate Body and panel reports in the *U.S.—Shrimp 21.5* case, virtually no domestic measure has passed the criteria of the chapeau. See WTO Panel Report, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/3 (Oct. 9, 1998) [hereinafter *Asbestos panel*]; WTO Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia*, WT/DS58/RW (June 15, 2001) [hereinafter *Shrimp II panel*]; WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp II AB*].

mandatory labels fall under Article 2, which covers mandatory regulations.<sup>22</sup> Standards for voluntary labels, including privately administered labels, are contained in the TBT Agreement's Code of Good Practice.<sup>23</sup> Both regulations and standards may "include or deal exclusively with ... labeling requirements as they apply to a product, process, or production method."<sup>24</sup> Eco-labels for services and eco-labels addressing food safety, pest control, or other sanitary or phytosanitary measures are not covered by the TBT but by the GATS and SPS, respectively.

It is also important to distinguish between labels issued by central governmental entities and local governmental or non-governmental labels. WTO Members must "take such reasonable measures as may be available to them" to ensure that local governmental bodies and non-governmental organizations within their territories comply with the relevant provisions for technical regulations and standards.<sup>25</sup> It is currently unclear what types of actions members must take to satisfy the "reasonable measures" requirement. Standardizing bodies may, on their own initiative, notify the WTO that they have chosen to accept and comply with the Code of Good Practice.<sup>26</sup>

#### A. *Mandatory Eco-labels (Regulations)*

Mandatory eco-labels must comply with the TBT Agreement's obligations covering regulations, including those on likeness, necessity, international standards, notice and transparency, and conformity assessment procedures.

##### 1) *Liikeness and PPMs*

Like the GATT, the TBT Agreement contains national treatment and most favored nation provisions.<sup>27</sup> For regulations describing product characteristics, the treatment of like products under the TBT appears to be similar to that under the GATT. For regulations covering PPMs, however, treatment is somewhat different. PPMs are included in the TBT definitions of both technical regulations and standards, but WTO Members disagree on whether this coverage extends to npr PPMs.<sup>28</sup> If labels based upon npr PPMs fall

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<sup>22</sup> A regulation is a "[d]ocument which lays down product characteristics or their related processes and production methods ... with which compliance is mandatory." TBT, *supra* note 12, at Annex 1.

<sup>23</sup> A standard is a "[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory." *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> TBT, *supra* note 12, at Art. 3.1 (for technical regulations); Art. 4 (for standards). Art. 4 also includes regional standardizing bodies to which members belong.

<sup>26</sup> TBT, *supra* note 12, at Annex 3B.

<sup>27</sup> *Id.* at Art. 2.1.

<sup>28</sup> It is generally accepted that mandatory eco-labels for products, processes or production methods are covered at least by the notification provisions of the TBT, regardless of the contents of the label. Note by the WTO Secretariat, *Negotiating history of the coverage of the Agreement on Technical Barriers to Trade with regard to labeling requirements, voluntary standards, and processes and production methods unrelated to product characteristics*, ¶ 3 WT/CTE/W/10 (Aug. 29, 1995).



outside the scope of the TBT, their WTO-consistency presumably will be determined by the rules of the GATT. To date, no panel has applied the concept of like products in a TBT case.

## 2) *Environmental and Health Measures and “Necessity”*

The TBT’s Preamble and Article 2.2 contain language similar to the environmental and health exceptions contained in Article XX of the GATT. The Preamble recognizes that

no country should be prevented from taking measures necessary ... for the protection of human, animal or plant life or health, [or] the environment ... at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.

Article 2.2 requires that technical regulations not be “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade” or “more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.” Legitimate objectives include “protection of human health or safety, animal or plant life or health, or the environment.”

## 3) *International Standards*

Article 2.4 of the TBT provides that, “if relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their [labels].” This provision raises several questions, including what a *relevant* international standard is and what it means to use international standards “*as a basis for*” the label.<sup>29</sup> The TBT Preamble<sup>30</sup> and WTO case law<sup>31</sup> suggest that each WTO Member may determine the level of protection it aims to attain. Article 2.4 also states that Members may deviate from international standards, if those “standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objective pursued.” Article 2.4, particularly in conjunction with the Preamble, appears to

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<sup>29</sup> These questions were addressed most recently in the *Sardines* Appellate Body Report. See *supra* note 19, at ¶ 240-258.

<sup>30</sup> See TBT, *supra* note 12, at the Preamble (“[r]ecognizing that no country should be prevented from taking measures necessary ... for the protection of human, animal or plant life or health, of the environment, or ... at the levels it considers appropriate”).

<sup>31</sup> This has been explicitly stated in the *Asbestos* Appellate Body Report, *supra* note 14, at ¶ 168, and Appellate Body Report, *European Community—Measures Concerning Meat and Meat Products*, ¶ 172, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Hormones*]. The paragraph 173, however, the Appellate Body notes that “[t]he right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right.”

create room for governments to opt for a level of protection higher than the one provided in the international standard. This issue has yet to be considered by a dispute panel, however.

#### ***4) Notice and Transparency***

The TBT Agreement includes several requirements relating to notice and transparency that could be relevant for eco-labels and related environmental policies. The transparency requirements apply when the proposed technical regulation might have a significant trade impact and either differs from the relevant international standard or no relevant international standards exist.<sup>32</sup> The notice and transparency provisions oblige Members to give advance notice of technical regulations that they plan to enact, so that other Members can participate in their development. These requirements can help prevent potentially negative market access effects of technical regulations, but they can also create administrative burdens.

#### ***5) Conformity Assessment Procedures***

The TBT Agreement contains provisions regulating conformity assessment procedures.<sup>33</sup> Conformity assessment procedures are technical procedures applied to ensure that suppliers and their products comply with the technical regulations. The TBT Agreement establishes disciplines applying to conformity assessment procedures undertaken by central government bodies, local government bodies, and non-governmental bodies. While the TBT requirements for these different types of conformity assessment procedures differ, MFN and national treatment provisions are included in all of them. Like other non-discrimination obligations, these provisions aim to ensure that all imported and domestic like products are treated equally.

#### ***B. Voluntary Eco-labels (Standards)***

Voluntary labels must comport with the Code of Good Practice in Annex 3 of the TBT. Provisions for standards under the Code are similar to the provisions for technical regulations under the TBT Agreement. Like the TBT, the Code contains MFN and national treatment obligations and a requirement that standards not create unnecessary obstacles to trade.<sup>34</sup> Domestic standards should be based on international standards “except when such standards would be inappropriate or ineffective.”<sup>35</sup> Standardizing bodies are required to participate in the development of international standards within the limits of their resources.<sup>36</sup> The Code also contains provisions for notice and transparency. At intervals no greater than six months, standardizing bodies must publish work

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<sup>32</sup> TBT, *supra* note 12, at Art. 2.9.

<sup>33</sup> *Id.* at Arts. 5-9.

<sup>34</sup> *Id.* at Annex 3.D, 3.E.

<sup>35</sup> *Id.* at Annex 3.F.

<sup>36</sup> *Id.* at Annex 3.G.

programs describing standards that have been adopted and those under preparation.<sup>37</sup> Before the adoption of a standard, there must be a period of at least 60 days for interested parties to submit comments, except in special circumstances, and the standardizing body must take such comments into consideration.<sup>38</sup>

### 2.3.3. General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS) is relevant for labels relating to services. The GATS applies to all measures that “affect trade in services,”<sup>39</sup> so it presumably covers both mandatory and voluntary labels. Services consist of a range of activities, including tourism, transportation, and provision of energy, many of which may affect the environment. Labels that provide information on services, service providers, or environmental aspects of service delivery would fall under the GATS. Also, any requirements for service providers to use labeled goods in their provision of services might be considered to “affect trade in services” and, therefore, fall under the GATS.<sup>40</sup>

Like the GATT, the GATS contains principles of non-discrimination, market access, and transparency. Unlike the GATT, though, the GATS utilizes a “hybrid approach” that contains both general obligations applying to all Members and service sectors and specific obligations applying only to the extent individual Members agree to be bound by them. The general obligations of the GATS include most favored nation treatment (Article II) and transparency (Article III). To comply with the transparency obligations, Members must publish all measures of general application that affect the operation of the Agreement.

Market access (Article XVI) and national treatment (Article XVII) are specific obligations. They apply only to those service sectors and modes of delivery that Members, through the course of trade negotiations, agree to bind. Members may place certain conditions and limitations on these commitments to suit their needs. Members are currently negotiating additional commitments along with more detailed rules to ensure that technical regulations do not create unnecessary barriers to trade.<sup>41</sup>

For environmental labels, several provisions appear relevant. First, for bound sectors and modes of delivery, a Member’s eco-labels will have to comply with the non-discrimination provisions, MFN, and national treatment. A labeling requirement must

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<sup>37</sup> *Id.* at Annex 3.J.

<sup>38</sup> *Id.* at Annex 3.L, 3.N.

<sup>39</sup> See GATS, *supra* note 11, at Article I, (“This Agreement applies to measures by Members affecting trade in services.”) In paragraph 2 it then defines what is “trade in services,” and paragraph 3 defines what is a “measure by Members.”

<sup>40</sup> The extremely broad scope of the GATS and how it applies to measures regulating trade in goods has been recognized by several WTO Appellate Body decisions. See WTO Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 217-222, WT/DS27/AB/R (Sept. 9, 1997); WTO Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, Sect. IV, WT/DS31/AB/R (June 30, 1997); WTO Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶¶ 148-167, WT/DS139/AB/R and WT/DS142/AB/R (May 31, 2000).

<sup>41</sup> GATS, *supra* note 11, at Art. VI.4.

not place foreign services and service providers at a disadvantage with respect to domestic or other foreign like services and service providers. There is some uncertainty about what makes services and service providers alike, and the extent to which environmental considerations may be used to discriminate between otherwise similar services and service providers.<sup>42</sup> Second, the extent to which mandatory labels might fall under the GATS market access provision is not clear.<sup>43</sup> Third, eco-labels could be considered technical regulations, placing them under existing and possible future disciplines on domestic regulations.<sup>44</sup> Finally, the GATS refers to international standards, albeit more deferentially than other WTO Agreements.<sup>45</sup>

While the GATS does not appear to create any impediment to eco-labeling or green procurement, many issues have not yet been fully resolved. There is little WTO case law concerning relevant GATS obligations, and much of the GATS legal framework is still being negotiated.

#### **2.3.4. Agreement on the Application of Sanitary and Phytosanitary Measures**

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) may also be relevant for eco-labels. The SPS Agreement applies to all sanitary and phytosanitary measures taken by Members, including packaging and labeling requirements, as long as they are aimed at protecting humans, animals, and plants from risks arising from the spread of pests, diseases, and disease-causing organisms, as well as from additives, contaminants, and toxins or disease-causing organisms in foods, beverages, or feedstuffs.<sup>46</sup>

The SPS and the TBT Agreement are mutually exclusive—that is, they cannot both apply to the same measure—but the line between TBT application and SPS application cannot always be drawn with absolute clarity. The WTO secretariat states that it is “the purpose of the measure which is relevant in determining whether a measure is subject to the SPS Agreement.”<sup>47</sup> According to the secretariat, the SPS Agreement covers all measures whose purpose is to protect human or animal health from food-borne risks, human health from animal- or plant-carried diseases, and animals and plants from pests or diseases.<sup>48</sup>

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<sup>42</sup> For a legal analysis of GATS implications on environmental policy choices see P. FUCHS ET AL., THE GENERAL AGREEMENT ON TRADE IN SERVICES AND FUTURE GATS NEGOTIATIONS – IMPLICATIONS FOR ENVIRONMENTAL POLICY MAKERS, UBA, German Federal Environmental Agency, Berlin.

<sup>43</sup> GATS, *supra* note 11, at Art. XVI.

<sup>44</sup> *Id.* at Art. VI.

<sup>45</sup> *Id.* at Art. V.1.5b.

<sup>46</sup> Members have the right to take sanitary and phytosanitary measures for the protection of human, animal, or plant life or health provided such measures are not inconsistent with other provisions of the agreement. SPS, *supra* note 13, at Art. 2.1. For the definition of a sanitary or phytosanitary measure, *see Id.*, at Annex A, ¶ 1.

<sup>47</sup> World Trade Organization, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm). (May 1998).

<sup>48</sup> *Id.*

If an eco-label is unrelated to food safety, or has as its primary purpose protecting the environment or providing information to consumers, it likely will not fall under the SPS.<sup>49</sup> Under the SPS Agreement, Members must ensure that sanitary or phytosanitary measures are applied only to the extent necessary to protect human, animal, or plant life or health. Measures must also be based on scientific principles and not arbitrarily discriminate between Members or otherwise constitute a disguised trade restriction. However, if sanitary or phytosanitary measures conform to international standards or guidelines, they are deemed to be necessary and presumed to be consistent with other provisions of the Agreement.<sup>50</sup> Members have the right to introduce or maintain measures that result in a higher level of protection than would be achieved through international standards if there is appropriate scientific justification.<sup>51</sup> The SPS Agreement requires that all sanitary and phytosanitary measures be based on a risk assessment.<sup>52</sup> If the scientific evidence is not sufficient to show that international standards are inadequate, a Member may nevertheless adopt more stringent measures on a precautionary basis,<sup>53</sup> but these measures will only be provisional. The Agreement requires that the Member seek additional information within a reasonable time to conduct a more objective assessment of risk.

Like the TBT Agreement, the SPS Agreement contains notification and transparency requirements.<sup>54</sup> For instance, countries must publish all SPS regulations and provide a reasonable interval of time before their entry in force. When a Member has reason to believe that a sanitary or phytosanitary measure introduced or maintained by another Member is not consistent with the Agreement, it may request an explanation of the reasons for the measure. The Member imposing the measure must provide a justification.

## 2.4. Disputes Relevant to Eco-labeling

There have been no WTO disputes about eco-labeling and only one GATT dispute.<sup>55</sup> Several GATT and WTO panels have, however, addressed legal issues that could be important for determining the WTO consistency of eco-labeling schemes. The most relevant disputes for eco-labels arising under the GATT system were *Malt Beverages*, *Auto Taxes*, and the two *Tuna-Dolphin* cases. Since the creation of the WTO, the most

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<sup>49</sup> With respect to food, the secretariat states that “labeling requirements, nutrition claims and concerns, quality and packaging regulations are generally not considered to be sanitary or phytosanitary measures and hence are normally subject to the TBT Agreement. On the other hand, by definition, regulations which address microbiological contamination of food, or set allowable levels of pesticide or veterinary drug residues, or identify permitted food additives, fall under the SPS Agreement. Some packaging and labeling requirements, *if directly related to the safety of the food*, are also subject to the SPS Agreement” (emphasis added). *Id.*

<sup>50</sup> SPS, *supra* note 13, at Art. 3.1.

<sup>51</sup> *Id.* at Art. 3.2.

<sup>52</sup> *Id.* at Art. 5.1.

<sup>53</sup> *Id.* at Art. 5.7.

<sup>54</sup> *Id.* at Art. 7, Annex B.

<sup>55</sup> GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) [hereinafter *Tuna-Dolphin II*]. The panel found that the “dolphin-safe” label did not violate Articles I or XI of the GATT. For a lengthier discussion of this case, see Appendix I.

relevant disputes are *Asbestos*, *Sardines*, and the line of *Shrimp-Turtle* cases.<sup>56</sup> The following section discusses GATT and WTO case law relating to like products, PPMs, GATT Article XX exceptions, voluntary labels, and international standards.

#### 2.4.1. Like Products

In *Measures Affecting Malt Beverages*,<sup>57</sup> the panel considered the policy purpose of the measure as a relevant factor in the like product analysis. It developed the so-called “aims and effects test,” which focused on the reasons for treating two products differently. This approach was taken by the panel in *Auto Taxes* in upholding a regulation that distinguished between automobiles on the basis of fuel economy.<sup>58</sup> Although the GATT Contracting Parties did not adopt this panel report, it is significant because it allowed environmental considerations to be a determining factor in a likeness and discrimination analysis. The 2001 Appellate Body report in *Measures Affecting Asbestos and Asbestos-containing Products* considered the product’s risk for human health. The Appellate Body reversed a panel ruling that took a very narrow view in finding carcinogenic asbestos and non-carcinogenic asbestos substitutes to be like products.

#### 2.4.2. PPMs

In *Tuna-Dolphin I* the United States argued that the Marine Mammal Protection Act, which restricted imports of tuna based on fishing methods, was an internal measure under Article III:4. The panel disagreed and found that the approach taken in the Act was not covered by Article III:4 because that article only covers measures that affect products *per se* (i.e., the characteristics of the product), not measures that affect only their non-product-related process and production methods. It found, instead, that the measure was a quantitative restriction prohibited by Article XI:1.

The PPM issue arose again in *Tuna-Dolphin II* and later in the *Shrimp-Turtle* cases. In these disputes, the United States did not argue that the measures at issue were covered by Article III:4. Nor did it appeal the panels’ rulings that the measures concerned were quantitative restrictions under Article XI. Rather, it argued that these npr PPM measures could be saved by Article XX, the Agreement’s environmental exception. Ultimately, this argument prevailed.

This landmark decision appears to allow npr PPM measures as an environmental or health exception. In order to qualify, however, (1) the measure must be flexible and take into account differing conditions in affected countries; and (2) the country imposing the

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<sup>56</sup> The *Shrimp-Turtle* cases consist of two panel and two Appellate Body reports, one of each addressing the initial dispute (WT/DS58/R and WT/DS58/AB/R) and one of each addressing the implementation (WT/DS58/RW and WT/DS58/AB/RW) of the earlier dispute’s findings.

<sup>57</sup> GATT Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.25-5.26, DS23R-39S/206 (June 19, 1992) [hereinafter *Malt Beverages*].

<sup>58</sup> GATT Panel Report, *United States—Taxes on Automobiles*, ¶ 5.29, DS31/R (Oct. 11, 1994) (unadopted) [hereinafter *Auto Taxes*] (concerning references to the measure’s “aim”).

measure must make a good faith effort at international cooperation. Section 2.4.3.D. (below) addresses this issue in more detail.

### 2.4.3. Environmental and Health Exceptions—Article XX

Environmental measures that are found not to comply with the GATT's obligations may be saved by one of the GATT's environmental exceptions, contained in Articles XX(b) and (g). The following section discusses these exceptions, as well as several issues arising with respect to Article XX in general, including the chapeau requirements and issues related to the measure's extraterritorial application.

#### A. Article XX(b)

Article XX(b) allows WTO Members to take measures that are otherwise inconsistent with the GATT if those measures are “necessary to protect human, animal or plant life or health.” In the 1990 *Thai Cigarettes* case, the panel concluded that “import restrictions imposed by Thailand could be considered ‘necessary’ in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”<sup>59</sup> This *least GATT-inconsistent* test set a high benchmark for environmental measures to be justified under Article XX(b).

More recent cases have adopted a somewhat more flexible approach. In *Asbestos*, for example, the Appellate Body used a “weighing and balancing” test to justify a ban on products containing asbestos. This test considers both the existence of any alternative GATT-consistent measures and the extent to which the alternative measures would contribute to the legitimate objective, i.e., the protection of human health. The more “vital or important” the interests being pursued, the easier it will be for a measure to satisfy the necessity test.

#### B. Article XX(g)

Article XX(g) allows WTO Members to take measures “relating to the conservation of exhaustible resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption.” Several cases have interpreted this provision. Most importantly, the Appellate Body in *Gasoline* clarified that to be related to the conservation of a natural resource, a measure need not be “necessary,” but must exhibit a “substantial relationship” with the conservation of such resources. This appears to be a more environmentally friendly standard than the weighing and balancing approach under Article XX(b). The first *Shrimp-Turtle* appellate decision supports this; the panel held that the U.S. regulation on importation of shrimp was sufficiently related to the goal of protecting sea turtles. This is because the panel found that “Section 609, *cum*

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<sup>59</sup> See GATT Panel Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, BISD 37S/200, DS10/R-37S/200 (adopted Nov. 7, 1990) [hereinafter *Thai Cigarettes*] (interpreting the necessity test).

implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”<sup>60</sup>

### *C. Extraterritorial Application*

Several cases have considered whether Articles XX(b) and (g) may apply to measures designed to protect resources or human, animal, and plant life or health located outside the jurisdiction of the country invoking the exception. The panel in *Tuna-Dolphin I* implied that Article XX(b) could not apply to the protection of animal life outside the jurisdiction of the country taking the measure. While it did not make a clear statement on this issue, the panel noted that extraterritorial application of the GATT’s general exceptions would allow GATT contracting parties to unilaterally determine policies from which other contracting parties could not deviate without jeopardizing their rights under the GATT and would thereby undermine security and predictability, two of the main purposes of the multilateral trading system.<sup>61</sup>

Subsequently, in *Tuna-Dolphin II* the panel took a slightly different approach. First, it stated that it “could see no valid reasons supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.”<sup>62</sup> However, the panel ultimately concluded that “measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed at ... the conservation of an exhaustible natural resource.”<sup>63</sup> It found the U.S. measure to be inconsistent with Article XI and not justified by Article XX(g). In a more recent decision, the Appellate Body in *Shrimp-Turtle* explicitly declined to decide whether Members under Article XX(g) may protect endangered species that never actually swim in U.S. waters.<sup>64</sup>

### *D. Chapeau Requirements*

The introductory paragraph, or chapeau, of Article XX provides that measures, in order to be saved under Article XX, must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”<sup>65</sup> The *Gasoline* and

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<sup>60</sup> WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 138-142, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp I AB*].

<sup>61</sup> *Tuna-Dolphin I*, *supra* note 9, at ¶¶ 5.27, 5.28.

<sup>62</sup> *Tuna-Dolphin II*, *supra* note 55, at ¶ 5.20.

<sup>63</sup> *Id.* at ¶ 5.27.

<sup>64</sup> *Shrimp I AB*, *supra* note 60, at ¶ 133.

<sup>65</sup> With respect to these three requirements, the WTO Appellate Body Report in *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 24, WT/DS2/AB/R (Apr. 19, 1996) [hereinafter *Gasoline AB*], stated that “[a]rbitrary discrimination,’ ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade may, accordingly, be read side-by side; they impart meaning to one another.”



*Shrimp-Turtle* cases analyzed the chapeau in detail and concluded that the purpose of the chapeau is to prevent abuse of the Article XX exceptions.<sup>66</sup>

The Appellate Body in *Gasoline* concluded that the U.S. measure did not satisfy the chapeau requirements. The fact that the United States aimed to alleviate certain costs for domestic but not foreign entities pointed to a “disguised restriction on international trade.” The fact that the United States did not clearly attempt to cooperate with other countries showed that the discrimination was “unjustified.” The Appellate Body also found that there were alternative means of implementing the Clean Air Act that would not treat foreign refineries less favorably than domestic refineries.<sup>67</sup>

In the first pair of *Shrimp-Turtle* reports, the panel and Appellate Body concluded that the U.S. measure did not satisfy the chapeau requirements because the measure effectively required foreign governments to adopt the same policies as the United States. The Appellate Body concluded that the United States did not sufficiently consider the different conditions that may occur in the territories of other Members. The United States also failed to make sufficient efforts to resolve the matter through negotiations and finally “denied basic fairness and due process” to those exporting Members who applied for certification but whose applications were rejected.<sup>68</sup> The Appellate Body emphasized that “rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the [GATT] treaty obligations.”<sup>69</sup>

Subsequently, the United States modified the measure to give countries more flexibility in meeting its requirements and made specific efforts to negotiate international protective measures for sea turtles. A second pair of reports found the United States to be in compliance with the chapeau requirements. In its October 2001 report, the Appellate Body focused on two requirements for a measure to satisfy the Article XX chapeau: (1) the measure must be flexible and take into account differing conditions in affected countries; and (2) the country imposing the measure must make a good faith effort at international cooperation.<sup>70</sup>

### ***E. Voluntary Labels***

*Tuna-Dolphin I* is the only case to have considered an eco-labeling scheme. After addressing the U.S. embargo on the import of tuna, this case reviewed the Dolphin Protection Consumer Information Act (DPCIA). The measure permitted producers to

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<sup>66</sup> In *Shrimp I AB* the Appellate Body stated that “[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith.” *Supra* note 60, at ¶ 158; *See also Gasoline AB, supra* note 65, at 17.

<sup>67</sup> *Gasolina AB, supra* note 65.

<sup>68</sup> *Shrimp I AB, supra* note 60, at ¶ 181.

<sup>69</sup> *Id.*, at ¶ 182.

<sup>70</sup> *Shrimp II AB, supra* note 21, at ¶ 116. *See also Shrimp II panel, supra* note 21, at ¶ 6.1 (concluding that the U.S. measure “is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied”).

market tuna in the United States with a “dolphin-safe” label if they could satisfy U.S. authorities that the tuna was indeed caught in a manner that did not unnecessarily endanger the lives of dolphins. The panel analyzed this essentially voluntary eco-labeling scheme and found that it did not restrict the sale of tuna products in the United States or establish requirements that had to be met to obtain an advantage from the government. Therefore, the only remaining question was whether the provisions governing the right of access to the label met the requirements of Article I:1, the GATT’s most favored nation obligation. The panel found that this was the case and concluded that the label was GATT-consistent.

### *F. International Standards*

Several WTO cases have interpreted provisions related to the use of international standards as a basis for national measures. In *Hormones*, the Appellate Body found that the right under the SPS to adopt higher standards than the relevant international standards was a basic right and not an exception.<sup>71</sup> The *Sardines* case interpreted the international standards requirement under the TBT Agreement. The Appellate Body decision rejected the European Union’s argument that a standard was not a *relevant* standard because it was not adopted by consensus.<sup>72</sup>

## **2.5. WTO Committee Reports and Future Work on Eco-labeling**

WTO Members have discussed issues related to eco-labeling in several WTO Committees, notably the Committee on Trade and the Environment (CTE) and the Committee on Technical Barriers to Trade (CTBT).

The CTE was created in 1994, following the adoption of the 1994 Ministerial Decision on Trade and Environment, to provide a forum for discussion of trade and environment issues. Since then, the committee has had extensive debates about eco-labeling issues. Eco-labeling falls under Item 3 of the CTE’s current work program, which deals with environmental taxes and other requirements for environmental purposes, including labeling. The November 2001 Doha Declaration instructs the CTE to pursue work on eco-labeling and specifically to examine whether there is any need to clarify relevant WTO rules. While this is not an explicit negotiating mandate, it nevertheless places increasing emphasis on the eco-labeling issue and calls upon the CTE to submit a report to the Fifth Ministerial Conference making recommendations about future actions, including the desirability of negotiations.<sup>73</sup>

In its discussions since 1995 the CTE has recognized that eco-labeling programs can be valuable environmental policy instruments, but committee discussions also reflect the concern of WTO members that the use of eco-labeling schemes will reduce market access

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<sup>71</sup> *Hormones*, *supra* note 31, at ¶ 172.

<sup>72</sup> *Sardines AB*, *supra* note 21, at ¶226. *See also Sardines panel*, *supra* note 21, at ¶ 7.90.

<sup>73</sup> *WTO Doha Ministerial Declaration*, ¶ 32(iii), WT/MIN(01)/DEC/W/1 (Nov. 14, 2001).

for some countries. Some Members may lose market opportunities if compliance with labeling requirements is prohibitively expensive or complicated, which is more likely to occur if many systems with varying requirements exist. There are also fears that countries will develop eco-labeling schemes that make compliance easier for domestic suppliers than foreign suppliers, either inadvertently by failing to take the different conditions of other countries into consideration, or intentionally for the purpose of creating disguised restrictions on trade that protect domestic industries. Developing countries are especially concerned about how eco-labeling schemes will affect their ability to compete in foreign markets.

Nevertheless, Members have affirmed the benefits of eco-labeling as a tool of environmental policy, and in that context have pointed out that eco-labeling schemes can be perceived either as a threat or an opportunity to market products at higher prices.<sup>74</sup> Members have also pointed out that even voluntary eco-labeling schemes can cause difficulties by creating market pressure for compliance.<sup>75</sup>

The CTE has conducted studies and encouraged members to share national experiences in order to further discussion of the market access impacts of eco-labeling schemes. Market access issues have arisen most recently in 2001 in a paper submitted by Switzerland and during discussions concerning a proposed eco-labeling scheme of the Nordic Council of Ministers to promote sustainable fishing.

The most controversial issue debated within the CTE and TBT Committees has been the role of npr PPMs in eco-labeling schemes. The use of npr PPMs in eco-labeling schemes allows consumers to determine which products were produced through processes which harm the environment. Some Members argue, however, that the use of npr PPMs allows countries, through their eco-labeling schemes, to impose their environmental standards on other countries, which restricts the ability of countries to make choices on production methods that are appropriate to their level of development and specific environmental conditions.

More specifically, the debate over npr PPMs in the WTO committees has revolved around the question of whether npr PPM eco-labeling schemes are covered by the TBT Agreement. Members have made extensive legal and practical arguments on both sides of the issue. Developing countries generally favor the interpretation that npr PPMs are not covered by the TBT Agreement. The underlying policy consideration behind this legal argument is the concern that TBT coverage would give increased legitimacy under WTO rules to discrimination between products on the basis of npr PPMs. Many developing countries fear that, if allowed, developed countries may use npr PPMs to dictate the internal production methods of developing countries with regard not just to environmental matters, but also to other areas such as labor standards. Members arguing

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<sup>74</sup> See Submission from Switzerland, *supra* note 6, at ¶ 9.

<sup>75</sup> See *e.g.*, Committee on Trade and the Environment, *Report of the Meeting Held on 13-14 February 2001—Note by the Secretariat*, at ¶ 104, WT/CTE/M/26 (Mar. 30, 2001).

in favor of coverage, generally developed countries, emphasize the importance of npr PPMs in furthering environmental policy objectives. They also reason that npr PPM eco-labeling schemes should be covered so that the transparency requirements of the TBT Agreement would apply. They have pointed out that practically speaking, many eco-labeling schemes which use npr PPMs already exist, and these schemes should be subject to a discipline.<sup>76</sup>

The most comprehensive debate over the npr PPM issue took place in 1995-96, after the CTE and TBT Committees jointly released a negotiating history of the TBT Agreement which left unresolved the question of coverage for npr PPMs. The issue continues to be mentioned in committee discussions, although with less frequency and less hope of a timely resolution. Recently, some members, including Switzerland and the EC, have called for a clarification of the TBT Agreement with respect to labeling, but other members feared that clarification would weaken rather than strengthen the TBT Agreement.

Transparency has also arisen as an important issue in the Committees. Members have suggested that transparency in the development of eco-labeling schemes is a way to minimize market access problems and have consistently emphasized the importance of notification and participation in the creation of new programs. Some of the most recent discussions concerning transparency centered around the 2001 proposal of the Nordic fisheries eco-labeling scheme. In that context, Members emphasized the importance of open international discussions in developing standards. The issue of transparency is closely intertwined with the debate surrounding the applicability of the TBT Agreement to npr PPMs, since if there clearly was coverage, then the transparency requirements of the TBT Agreement would apply to npr PPM labeling programs. A 1996 CTE report emphasized the importance of members following the TBT Agreement provisions on transparency “without prejudice” to the views of members concerning coverage of npr PPMs. Urging members to adhere to the transparency rules of the TBT Agreement, even while there is no clarity on whether they are legally required to do so, appears to be a practical attempt to provide some discipline to npr PPM eco-labeling schemes until the issue can be resolved in full.

In addition to strengthened transparency requirements, Members have discussed other solutions to the potential market access problems associated with eco-labeling schemes. Members have frequently (most recently at a 2002 CTE meeting) emphasized the importance of considering the special needs of developing countries, and have sometimes called for capacity building and technical and financial transfer. Another recurring suggestion has been to develop an approach based on equivalency and mutual recognition of standards, whereby countries would develop eco-labeling schemes that recognize the differing conditions and environmental standards of exporting countries for the purpose of granting labels. Finally, a common topic of discussion has been the harmonization of

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<sup>76</sup> See, e.g., Statement of the EC, ¶ 104, contained in WTO Doc. WT/CTE/M/26 (Mar. 30, 2001); Statement by Switzerland, ¶ 84, contained in WTO Doc. G/TBT/M/5.

international labeling standards, perhaps through a standardizing body such as ISO, to facilitate compliance with eco-labeling requirements. This approach, however, may cause difficulties for developing countries because they often do not have the resources to participate adequately in the development of international standards.

Recent committee discussions over eco-labeling have not matched the intensity of the debate that took place in 1996, when eco-labeling issues were especially visible. Though the 2001 Doha Mandate instructs the CTE and TBT committee to give particular attention to eco-labeling, neither body has made significant progress on this subject. The CTE regular session on October 8-9, 2002 focused on eco-labeling, but a Swiss submission encouraging the commencement of systematic work in the CTE on labeling for environmental purposes gathered little support since many Members argued that relevant work should take place in the TBT Committee.<sup>77</sup> There was little discussion on eco-labeling at the October 17, 2002 meeting of the CTBT or at subsequent meetings. During the CTE regular session between Doha and Cancun a pair of new issues were flagged but no conclusions reached. One member encouraged the committee to focus on voluntary life cycle approaches, while another promoted notification as a means to achieving transparency in keeping with the recent history of eco-labels in the WTO. While “most members agreed that voluntary, participatory, market-based and transparent environmentally friendly environmental labeling schemes were potentially *efficient economic instruments* in order to inform consumers about environmentally friendly products,” the committee made no specific recommendations and did not reach a decision to negotiate.<sup>78</sup>

### 3. GOVERNMENT PROCUREMENT: A TRADE LAW OVERVIEW

Government procurement—purchases by governments of goods and services—often accounts for a large portion of a country’s GDP, typically 10 to 25 percent in developed countries.<sup>79</sup> Therefore, governments through their purchasing choices have the potential to exert significant influence in promoting consumption of environment-friendly products and services. Some examples of established government “green” procurement programs include the U.S. Environmental Protection Agency’s Environmentally Preferable Purchasing Program and Japan’s Green Purchasing Network. Government procurement schemes may use a variety of methods, such as price preferences or technical requirements, to achieve environment-friendly procurement policies.

The main objective of government procurement law is to give governments an adequate legal framework for acquiring goods and services for their own use while getting the best possible offers from potential bidders. Government procurement law also gives potential

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<sup>77</sup> See Submission from Switzerland, *Labeling for Environmental Purposes*, WT/CTE/W/219 (Oct. 14, 2002).

<sup>78</sup> Committee on Trade and the Environment, *Report to the 5<sup>th</sup> Session of the WTO Ministerial Conference in Cancún*, WT/CTE/8 (July 11, 2003).

<sup>79</sup> UNEP International Institute for Sustainable Development, *Environment and Trade: A Handbook* 5.9, available at <http://www.iisd.org/trade/handbook/>

bidders assurances of transparency, due process, and equal opportunities for bidding in a particular procurement process. Due to the strong effect that the size of particular procurements can have on the offer of goods and services, governments can use procurement law to achieve “secondary” purposes. These purposes may include some economic objectives like development of national providers, but also non-economic goals such as the elevation of environmental or social standards.

As a general rule, the WTO disciplines on national treatment, MFN, and market access, do not apply to government procurement. On its web site, the WTO Secretariat states that “[r]egulations relating to the procurement of goods and services by a government (through its departments and agencies) for its own use, are outside the scope of the main WTO rules for goods and services.”<sup>80</sup> A caveat to this finding is that World Bank lending is not solely government procurement. World Bank lending falls under both structural and investment loans. Structural lending may be exempt to WTO rules (as asserted in this paper), however, Investment lending is not considered public procurement. Of the agreements we have examined, only the SPS lacks this carve-out, and it likely would apply to a very limited set of eco-labels, if any.<sup>81</sup> Currently, for the broad category of eco-labels that could be used in procurement, WTO disciplines apply only through the plurilateral Government Procurement Agreement, discussed below.

### **3.1. WTO Agreements Applicable to Procurement**

#### **3.1.1. The General Agreement on Tariffs and Trade 1994**

Article III:8 of the GATT creates an exclusion, or “carve out,”<sup>82</sup> from the national treatment obligation for government procurement policies. Article III:8(a) differentiates “procurement by governmental agencies of products purchased for governmental purposes” from procurement “with a view to commercial resale or with a view to use in the production of goods for commercial resale.” The former does not have a commercial objective, as the products (paper, furniture, hospital material, etc.) are consumed by the government in the course of its normal activities. This type of government procurement is exempted from the application of the principle of national treatment.<sup>83</sup> The second type of procurement includes activities with a view to commercial resale, and it remains subject to national treatment. This latter type of procurement is not frequently undertaken by government agencies, but by state trading enterprises. When we refer to government procurement in this paper, we mean the former type of procurement.

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<sup>80</sup> World Trade Organization, *Government Procurement: traditionally a gap in the trading system*, at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpintr\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpintr_e.htm) (last visited on July 15, 2003).

<sup>81</sup> Eco-labels are likely to be covered by the SPS only if they are intended to ensure food safety. A review of existing eco-labels did not reveal any requirements pertaining to food safety.

<sup>82</sup> Carve outs are not exceptions to WTO Agreements; they are legal statements of areas not covered by the treaty.

<sup>83</sup> DAVID VIVAS EUGUI, *NEGOTIATIONS OF WTO ON THE RULES OF THE GATS: THE CASE OF VENEZUELA* 30 (UNCTAD/DITC/TNCD/6, 2001).

The exclusion found in Article III would appear to apply to Article I (MFN) as well. A procurement rule using eco-labels can fall under the disciplines of Article I only by virtue of that Article's incorporation, by reference, of Articles III:2 and III:4.<sup>84</sup> As government procurement is excluded from the operation of Articles III:2 and III:4, it is reasonable to assume that it is also excluded from Article I. The only remaining argument for a GATT-based challenge is that the procurement rule amounts to a quantitative restriction, prohibited under Article XI. This argument also seems without merit, however, because a procurement rule would not limit the amount of a good that may be imported into any Member's territory. Even if a complaint managed to surmount these hurdles, there is a good chance it would be defeated by the environmental exceptions (Article XX).

### 3.1.2. Agreement on Technical Barriers to Trade

Article 1.4 excludes government procurement from all provisions of the TBT agreement.

*Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.*

### 3.1.3. General Agreement on Trade in Services

The GATS contains an exclusion for government procurement of services that is more comprehensive than the GATT exclusion for government procurement of products.

Article XIII of the GATS establishes:

1. *Articles II [on MFN], XVI [on market access] and XVII [on national treatment] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.*
2. *There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.*

Most developed countries view the exclusion of government procurement from MFN, national treatment, and market access requirements as subject to the outcome of the

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<sup>84</sup> GATT, *supra* note 10, at Art. I:1.

negotiations on government procurement of services required by paragraph 2 of Article XIII. Several developing countries, however, believe that the negotiations mentioned in paragraph 2 should not deal with MFN, national treatment, or market access. They argue that the negotiations should be confined to issues such as transparency and exchange of information. This disagreement has not yet been resolved and the same opposing positions are taken in the discussions of the Working Group on GATS Rules.

#### **3.1.4. Agreement on Subsidies and Countervailing Measures**

The Agreement on Subsidies and Countervailing Measures<sup>85</sup> defines the purchase of goods by a government as a subsidy.<sup>86</sup> The mere finding of a subsidy does not imply a violation of WTO rules, however. A subsidy is actionable or prohibited, and potentially subject to countervailing measures, only if it is specific within the meaning of Article 2.<sup>87</sup> To be specific, a subsidy must benefit an “enterprise or industry or group of enterprises or industries...*within the jurisdiction of the granting authority*” (emphasis added).<sup>88</sup> Thus, a procurement rule that does not seek to advantage domestic industries should not be viewed as a specific subsidy.

#### **3.1.5. Agreement on Government Procurement**

The WTO agreement that deals most directly with government procurement is the Agreement on Government Procurement (GPA).<sup>89</sup> Unlike most WTO agreements, the GPA is a plurilateral agreement, meaning that it binds only those Members that have accepted it.<sup>90</sup> The GPA is a market access agreement based on MFN and national treatment clauses. These clauses apply only to governmental “entities” (procurers), products, and services specified by each party to the agreement in “coverage lists” in Appendix I.<sup>91</sup>

When this report was prepared, only developed countries and two emerging countries, Korea and Singapore, were part of the GPA. Several countries with economies in transition and developing countries had indicated they intended to join as part of the general accession process to the WTO. Countries that were in the process of becoming members of the GPA include: Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama, and Chinese Taipei.

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<sup>85</sup> Agreement on Subsidies and Countervailing Measures, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994), in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999).

<sup>86</sup> SCM, Art. 1, ¶ 1.1(a)(1)(iii).

<sup>87</sup> *Id.* at Art. 1, ¶ 1.2.

<sup>88</sup> *Id.* At Art. 2, ¶ 2.1.

<sup>89</sup> Agreement on Government Procurement, Annex 4 to the Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999) [hereinafter GPA].

<sup>90</sup> Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999), Article II(3).

<sup>91</sup> GPA, *supra* note 89, at Art. I.1.



When establishing the technical specifications in their tender documentation, members of the GPA may specify “the characteristics of the products or services to be procured, such as quality, performance, safety, dimensions, symbols, terminology, packaging, marking and labeling *or the processes and methods of production and requirements relating to conformity assessment procedures* prescribed by the procuring entity” (emphasis added).<sup>92</sup> However, technical specifications “shall not be prepared, adopted or applied with the view to, or with the effect of creating, unnecessary obstacles to international trade.”<sup>93</sup>

The GPA permits PPMs to be included in technical specifications and taken into account when the procurement authority decides on the final award of the contract. This should allow for the introduction of environmental or social requirements, not only related to product characteristics, but also to npr PPMs (e.g., a requirement to use only sustainably harvested wood in furniture). It must be noted, however, that World Bank policy covers goods *after* manufacturing – their quality, performance and cost. It does not cover the manufacturing process itself, which it deems to be the responsibility of the manufacturer in accordance with the rules of the country in which its manufacturing facilities are located.

Technical specifications should, “where appropriate,” be in terms of performance rather than design or descriptive characteristics and should be based on international standards, such as ISO.<sup>94</sup> If no relevant international standards exist, technical specifications should be based on national technical regulations or recognized national standards, which might include, for example, national eco-labeling schemes.<sup>95</sup> It is understood that national eco-labeling schemes introduce WTO risk as they may be used to reduce competition from foreign bidders (as examined in 2.1). In addition, a technical specification should not make reference to a particular “trademark or trade name, patent, design or type, specific origin, producer or supplier” unless there is no other sufficient way to describe the requirement.<sup>96</sup>

The GPA places a strong emphasis on accommodating the needs of developing countries. Article V contains provisions on special and differential treatment for developing countries. Notably, many of the provisions of Article V apply to all developing countries, rather than only to those that are parties to the agreement. All Parties are encouraged to “facilitate increased imports from developing countries.”<sup>97</sup> Each developed country must, “upon request, provide all technical assistance which it deems appropriate to developing country Parties in resolving their problems in the field of

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<sup>92</sup> *Id.*, at Art. VI.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at VI:2.

<sup>95</sup> *Id.* at VI:2.

<sup>96</sup> *Id.* at VI:3.

<sup>97</sup> *Id.* at V:2.

government procurement.”<sup>98</sup> Developed countries must assist developing countries in translating documents and solving technical problems relating to the award of contracts or any other problem they mutually agree to address.<sup>99</sup> Developing countries may negotiate exclusions from national treatment rules for their listed entities, products, or services, or may request such exclusions from the Committee on Government Procurement.<sup>100</sup> In addition, Article V provides that special treatment will be extended to least-developed country Parties.<sup>101</sup>

The GPA permits the procurement process to take into account not only technical specifications for the products or services to be procured but also the qualifications of the supplier. This usually refers to requirements needed to ensure the ability of the supplier to fulfill the contract, including technical, financial and commercial capabilities.<sup>102</sup> Qualifications could include the ability of the supplier to meet certain environmental or social criteria (e.g., to provide records of past environmental performance or evidence of environmental management measures routinely taken by the supplier).<sup>103</sup> They may not discriminate *de jure* or *de facto*, however, against products, services, or suppliers based on their country of origin. The requirements must apply equally to suppliers of the procuring country and suppliers from other parties to the GPA.

Article XXIII of the GPA establishes an exception for measures “necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property....” Although it fails to specifically mention the environment, it is the opinion of the author’s of this paper that this exception should be broad enough to cover most, if not all, eco-labeling provisions. It must be borne in mind, however, that WTO tribunals have interpreted exceptions restrictively, particularly with respect to the meaning of “necessary.”

### 3.2. Disputes Concerning Government Procurement

The only WTO case dealing with either government procurement or the GPA is *Korea-Measures Affecting Government Procurement*.<sup>104</sup> This case does not shed any light on the use of “secondary” objectives in government procurement. The case deals mainly with questions related to what the covered “entities” (governmental agencies or state trading enterprises) are and what a government’s general responsibilities (type of governmental activities, such as construction of aqueducts) are for market access purposes. The main issue in the case was whether a particular airport authority was covered in the appendix of the GPA. It may be instructive that, six years after the establishment of the GPA, no

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<sup>98</sup> *Id.* at V:8.

<sup>99</sup> *Id.* at V:9,10.

<sup>100</sup> *Id.* at V:4,5.

<sup>101</sup> *Id.* at V:12,13.

<sup>102</sup> *Id.*, at Art. VIII (a).

<sup>103</sup> See “Green Public Procurement,” available at <http://europa.eu.int/comm/environment/gpp/legal.htm>.

<sup>104</sup> See WTO Panel Report, *Korea- Measures Affecting Government Procurement*, WT/DS163/R (June 19, 2000).

member has complained of another member's use of government procurement to promote secondary policies.

### **3.3. Working Groups on Transparency in Government Procurement and GATS Rules**

In the area of government procurement, two working groups are advancing towards more comprehensive trade obligations on transparency and potentially on market access. These are the Working Group on Transparency in Government Procurement (WGTGP) and the Working Group on GATS rules (WGGR).

As a result of the Singapore Ministerial Conference (1996), a mandate was established to study transparency in government procurement, taking into account national practices, with the aim of identifying the elements to be included in a future agreement.<sup>105</sup> This work is being carried out by the WGTGP. This working group has included both goods and services in its discussions on transparency.

Developed and developing countries have different priorities and interests with respect to future work, and these differences are reflected in the mandate. For developed countries, the important issues are transparency, publication, procurement procedures, due process, remedies, and market access. Developing countries are not in favor of far-reaching new disciplines and are mainly interested in creating a rather limited Agreement, focusing on legal measures to increase transparency in procurement processes, including publication of tenders, record-keeping, and access to information.

The Doha Ministerial Declaration clarifies some of the issues under discussion in the WGTGP, however, it also moves towards a real negotiating mandate, an issue heavily opposed by developing countries. In particular, the Declaration establishes that negotiations will take place after the Fifth Session of the Ministerial Conference “on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.”<sup>106</sup> The exact meaning of this language remains to be determined. However, the Declaration also accommodates certain concerns of developing countries, as it explicitly states that negotiations “shall be limited to the transparency aspects (mostly procedural and publication issues) and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers (market access commitments).”<sup>107</sup>

Since the Doha Ministerial, discussion in the WGTGP has been focused on the scope of a potential agreement on transparency in government procurement. The European Union and Switzerland, supported by the United States, have proposed a broad definition of

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<sup>105</sup> *WTO Singapore Ministerial Declaration*, WT/MIN(96)/DEC (Dec. 18, 1996).

<sup>106</sup> *Doha Declaration*, *supra* note 73, at ¶ 20.

<sup>107</sup> *Id.* at ¶ 26.

government procurement that would include central and sub-regional public entities.<sup>108</sup> This proposal is opposed by Brazil, Honduras, India, Jamaica, Malaysia, and Venezuela.

The Working Group on GATS Rules was established to negotiate several issues left unresolved in the GATS Agreement, including the government procurement related issues as mandated in Article XIII:2 (see above). The Working Group has been discussing whether this mandate covers MFN, national treatment, and market access for services or is restricted to transparency. The European Union has proposed an initial legal framework on procedures, transparency, and MFN, but developing countries have rejected this approach, arguing that the mandate in Article XIII:1 precludes negotiations over MFN, national treatment, and market access.

## 4. CONCLUSIONS

### 4.1. Eco-labeling, Green Procurement and the WTO

There are several ways eco-label standards and criteria could be used by a World Bank borrower to “green” its project procurement. It could, for example, give preference in its project-related purchasing to products and services with environmental and social provisions such as ecolabel standards and criteria. Alternatively, it could develop a list of acceptable or preferred labels, develop or “cut-and-paste” criteria from labels, or even create its own labeling system, taking into consideration relevant international standards and criteria.

For borrowers that are Members of the WTO but are not party to the GPA, and are using funds for government procurement, none of these approaches is likely to create a conflict. The reason, quite simply, is that government procurement is excluded from key provisions of the other relevant agreements.<sup>109</sup> These include national treatment and probably MFN provisions in the GATT; MFN, market access, and national treatment provisions in the GATS; and all provisions of the TBT.<sup>110</sup> Of the agreements we have examined, only the SPS lacks such exclusions, and its coverage is probably limited to labels concerned primarily with food safety.

If the procuring country is a party to the GPA, its procurement rules and practices will be affected by that agreement, but allowing eco-label standards or performance criteria should not create a conflict. The GPA allows parties to specify “the characteristics of the products or services to be procured,” in their tender documentation, so allowing eco-label

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<sup>108</sup> See *Broadening Government Procurement*, WASHINGTON TRADE DAILY, (May 30, 2002).

<sup>109</sup> According to the WTO Secretariat, “[r]egulations relating to the procurement of goods and services by a government (through its departments and agencies) for its own use, are outside the scope of the main WTO rules for goods and services.” [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpintr\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpintr_e.htm).

<sup>110</sup> These exclusions only apply to procurement for “governmental purposes,” in the cases of the GATT and GATS, or to “production or consumption requirements of governmental bodies,” in the case of the TBT.

standards or performance criteria seems to fit squarely within the GPA's framework.<sup>111</sup> This is subject to the proviso that technical specifications may not discriminate based on country of origin or create unnecessary obstacles to international trade. International standards are favored, but not obligatory. The GPA permits the procurement process to take into account the qualifications of the supplier, such as ability to meet certain environmental or social criteria. The GPA also contains an exception for measures "necessary to protect ... safety, human, animal or plant life or health," which the authors of this paper interpret as broad enough to cover eco-labeling standards and criteria.<sup>112</sup> To identify goods that could result in damage, World Bank borrowers could view the use of performance criteria in bid evaluation as "necessary to protect...safety, human, animal or plant life or health." Eco-labels that involve manufacturing processes, however, are not applicable to World Bank financing.<sup>113</sup>

## 4.2. Addressing Developing Country Concerns

While the WTO creates no significant legal impediments to adoption of greener procurement considerations using eco-label standards or performance criteria, discussions in WTO committees suggest that such an approach may raise some concerns for developing countries.<sup>114</sup> Several countries have expressed a fear that the use of eco-labeling schemes will reduce their access to markets.<sup>115</sup> They worry that compliance will be complicated by the existence of numerous systems with varying requirements, or that eco-labeling schemes will favor domestic suppliers. They are especially concerned about the costs of certification, testing, and the acquisition of technology needed to comply with eco-labels or green procurement policies. Committee members have called for capacity building, financial assistance, and technology transfer. While many countries favor harmonization of labeling standards, developing countries may not have the resources to participate in the development of international standards or the ability to meet those standards. A "one-size-fits-all" approach may not accommodate the environmental and economic conditions and needs of all countries; labeling and procurement standards may need to differ from country to country.<sup>116</sup>

Despite these concerns, there are several examples in which developing countries are participating in green procurement and eco-labeling schemes. These examples do not negate the forgoing list of concerns shared by many developing countries. They do, however, demonstrate that developing countries can and do compete successfully in the marketplace while participating in programs designed to promote sustainable development.

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<sup>111</sup> Our review of discussions in WTO committees and working groups has not revealed any concern about the use of npr PPMs in the context of government procurement.

<sup>112</sup> GPA, *supra* note 89, at Art. XXIII:2.

<sup>113</sup> Authors' communication with World Bank staff.

<sup>114</sup> *See, e.g.,* Vitalis.

<sup>115</sup> Not everyone agrees with this assessment. *See, e.g.,* Salmon, *supra* note 7, at 9.

<sup>116</sup> GOODLAND, *supra* note 1, at 10.

Several developing countries have carved a new niche for themselves in the agriculture market due to the increased popularity of organic products. Costa Rica has become a significant supplier of organic products to several countries, including the United States and Japan.<sup>117</sup> It is also the first Latin American country to meet organic labeling requirements for the European Union. Nicaragua and El Salvador, in conjunction with the National Cooperative Business Association and USAID, have participated in projects that demonstrate that farmers can increase their incomes while using environmentally sound practices.<sup>118</sup> Organic products produced by developing countries are not limited to fruits and vegetables; Ecuador has begun producing organically grown flowers exported to the United States.<sup>119</sup>

Businesses from developing countries are also participating in eco-labeling schemes for textiles and sustainable forestry. The Oeko-Tex label identifies textiles that are produced in an ecologically sound manner.<sup>120</sup> Suppliers of these products are located all over the world.<sup>121</sup> Similarly, the Forest Stewardship Council (FSC) certifies forest products produced in a sustainable manner. The popularity of this program in the developing world was evident in a recent Latin American trade fair for FSC certified products held in Brazil.<sup>122</sup>

In addition to participating in these international schemes, developing countries are creating their own programs directed toward environmental protection. Developing and emerging market countries that have adopted their own eco-labeling schemes include, among others, Taiwan (Green Mark) and India (EcoMark).<sup>123</sup> China is currently undertaking several environmentally conscious initiatives, including one plan to increase renewable energy production,<sup>124</sup> and another to improve fuel efficiency standards for

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<sup>117</sup> "Costa Rica becoming an Organic Powerhouse" by Rebecca Kimitch, April 19, 2004, available at <http://www.organicconsumers.org/organic/costarica041904.cfm>.

<sup>118</sup> See *Where We Work*, available at <http://www.ncba.coop/clusa>. NCBA is a national membership association representing cooperatives.

<sup>119</sup> See "Cut Flowers?: Cut the Toxins, Buy Organic" by Brandi D. McNally, February 2003, available at <http://www.consciouschoice.com/issues/cc1602/organicflowers1602.html>. Biogarden La Pampa, the company growing these organic flowers, is discussed further at <http://www.organicbouquet.com>.

<sup>120</sup> The Oeko-Tex labels are voluntary privately sponsored eco-labels that recognize textiles which pose no risk to human health, and are manufactured in an environmentally friendly manner. See "Mood and Answer" available at <http://www.oeko-tex.com/en/main.html>.

<sup>121</sup> See [oeko-tex.com](http://www.oeko-tex.com) for companies participating in the labeling scheme.

<sup>122</sup> See News Notes, "A Big Success: Certified Brazil Trade Fair." April 30, 2004 available at [www.fsc.org](http://www.fsc.org).

<sup>123</sup> See the UNEP/IAPSO Product Criteria Database, available at [http://www.unep.org/pc/sustain/design/green\\_find.asp](http://www.unep.org/pc/sustain/design/green_find.asp). Additional developing countries with eco-labeling schemes include Singapore (Green Label), Panama (Autoridad Nacional del Ambiente), and Thailand (Green Label Scheme).

<sup>124</sup> Terra Daily, "China the start in pledges for renewable energy," June 4, 2004, available at <http://terradaily.com/2004/040604140908.pv77u2.html>.

vehicles.<sup>125</sup> At least one developing country, Indonesia, has begun considering implementing its own green procurement policy to address environmental concerns.<sup>126</sup>

## 5. RECOMMENDATIONS

The World Bank could help developing countries adjust to the growing demand for environmentally friendly products and services by encouraging its borrowers to green their procurement practices while it continues to provide financial assistance and capacity building to developing countries seeking to meet the demand for greener products and services. This would be consistent with the objective of facilitating imports from developing countries, stated in the GPA and other WTO agreements, as well as with the World Bank's own commitment to sustainable development. Because procurement rules are excluded from the main body of WTO rules, it is all the more important for the World Bank to acknowledge potential political and economic sensitivities of borrower countries and address their concerns.

Developing country concerns about market access fall within two broad categories: concerns about cost and concerns about capacity. To address cost concerns, the World Bank could:

- Continue to expand developing countries' access to financing to make the transition to cleaner products, services, processes and production methods;
- Help defray the costs to developing countries of testing, conformity assessments, and certification;
- Help defray the incremental costs to developing countries of procuring green goods and services;
- Provide financial assistance to enable developing countries to participate in international standard setting processes.

To address concerns about capacity, the World Bank could:

- Sponsor additional workshops on eco-labeling, standards and criteria setting, and green procurement;<sup>127</sup>
- Provide information and analysis on green market trends;
- Help developing countries create pilot projects for selected products;

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<sup>125</sup> "Will China lead the Way to Fuel Efficiency?" by Matt Petersen, available at [http://www.greencar.com/will\\_china\\_lead\\_efficiency.cfm](http://www.greencar.com/will_china_lead_efficiency.cfm).

<sup>126</sup> See "Green Procurement in Indonesia" by Liana Bratasida (Ministry for Environment, Indonesia), Lynn Johansson (E2 Management Corporation, Canada) and Hendayani T. Adishesha (Indonesian Society of Environmental Professionals), available at <http://www.un.org/esa/sustdev/sdissues/consumption/HendayaniAdisheshapaper.pdf>.

<sup>127</sup> The World Bank and WTO recently co-sponsored a workshop on government procurement in Dar es Salaam, Tanzania, 14-17 January 2003. The workshop did not cover environmental issues, however. See the WTO web site at [http://www.wto.org/english/tratop\\_e/gproc\\_e/wkshop\\_tanz\\_jan03/wkshop\\_tanz\\_jan03\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/wkshop_tanz_jan03_e.htm)

- Ensure that key documents are translated into relevant languages and are easily accessible to companies in developing countries;
- Assist developing countries in creating and promoting their own labeling standards and criteria setting schemes, for example by helping them develop conformity assessment procedures and establish testing facilities;
- Consult with developing countries to better understand their approaches to managing and solving environmental problems and developing environment-friendly processes, products and services.

By providing support in the form of financial assistance and capacity building to developing countries, the World Bank could help allay their fears about an inevitable shift in developed country procurement policies and labeling requirements. With adequate support and assistance, it is possible that developing countries could become leaders in providing the world with environmentally sound products and services.



## APPENDIX

### SOME RELEVANT GATT AND WTO CASES

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#### **Thai Cigarettes (1990)**<sup>128</sup>

This dispute between the United States and Thailand concerned a Thai regulation limiting the sale of foreign cigarettes—allegedly on human health grounds. It was one of the first cases to apply the GATT's exception for human health.

The Royal Thai Government enacted restrictions on imports of and internal taxes on cigarettes, under which all imports required a license. No license had been granted within the decade preceding the dispute. Domestic cigarettes continued to be for sale. Thailand justified its import restrictions on grounds of public health, noting that the restrictions were to protect the public from harmful ingredients in imported cigarettes and to reduce the consumption of cigarettes in Thailand. The United States contended that the import ban was in fact a protectionist measure directed to promoting local tobacco companies, in violation of GATT Article XI:1.

The panel agreed and in its Article XX analysis noted that a nondiscriminatory regulation requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative that would be consistent with the GATT.<sup>129</sup>

In another important aspect of the case, the panel suggested that a ban on advertising of all cigarettes, both domestic and imported, would be consistent with the GATT. The United States tobacco companies contended that a ban on advertising would make it much more difficult for new, foreign suppliers to sell cigarettes within the country, even if imports were permitted. The panel noted that even if this argument were accepted, “such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b), because additional advertising rights would risk stimulating demand for cigarettes.”<sup>130</sup>

#### **Tuna-Dolphin I (1991)**<sup>131</sup>

This GATT dispute between Mexico and the United States concerned the Marine Mammal Protection Act (MMPA) and its accompanying measures, including the Dolphin

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<sup>128</sup> *Thai Cigarettes*, *supra* note 59. This summary is taken from EDITH BROWN WEISS ET. AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, 1044-45 (1998) [hereinafter BROWN WEISS].

<sup>129</sup> *Id.* at ¶ 77.

<sup>130</sup> *Id.* at ¶ 78.

<sup>131</sup> *Tuna-Dolphin I*, *supra* note 9. This summary is adapted directly from DENNIS STICKLEY, REG/STUDY ON ECO-LABELING PRACTICES AND IMPLICATIONS FOR TRADE COMPETITIVENESS AND ENVIRONMENTAL MANAGEMENT IN SELECTED DEVELOPING COUNTRIES 3 (prepared for Asian Development Bank) (1998) [hereinafter STICKLEY] (some omissions and a few minor additions and alterations).

Consumer Information Act (DPCIA). The panel decision was the first to consider the PPM issue and took a restrictive approach to the concept of likeness and the scope of application of the GATT's national treatment provision (Article III).

The MMPA required the Secretary of Commerce to certify that the marine mammal kill rates of countries exporting tuna to the United States did not exceed, by a certain margin, the taking rate of the U.S. fleet. It also contained a primary and secondary nation embargo for tuna not meeting the certification requirements.

Especially relevant to eco-labeling, the DPCIA provided that producers, importers, exporters, distributors, or sellers of tuna products could attach a "dolphin safe" label only if the tuna were harvested in a manner that was not harmful to dolphins. Consequently, tuna either caught by vessels using the purse seine method in the Eastern Tropical Pacific Ocean, or taken on the high seas by drift net fishing could not be labeled as "dolphin safe." However, bearing the label was no pre-requisite to entering the U.S. market.

When the GATT panel examined the MMPA and resulting U.S. embargo on imports of Mexican tuna, it also considered npr PPMs. The panel took a restrictive approach towards the concept of likeness and towards the scope of application of the GATT's national treatment provision (Article III). In particular, the panel stated, "Article III:A calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of tuna could not possibly affect tuna as a product."<sup>132</sup> The panel then determined that the U.S. embargo of Mexican tuna was a quantitative restriction and therefore a violation of Article XI. The panel rejected arguments that the measures could be justified under the environmental exceptions of Article XX(b) or Article XX(g) and found that the measures were neither "necessary"<sup>133</sup> nor "primarily aimed at"<sup>134</sup> the relevant environmental policy goal.

The panel, however, upheld the DPCIA. The decision noted that the DPCIA was not a quantitative restriction. Tuna products could be sold freely both with and without the "dolphin safe" label. There is no provision in the DPCIA for obtaining any advantage from the government. The label merely gave the consumer the freedom of choice to give preference to tuna carrying the "dolphin safe" label. Further, the "dolphin safe" label did not violate Article I of the GATT because its provisions regulating access to the label did not discriminate against any country. Although the panel's finding in this case has not been adopted by the GATT Council, and therefore its weight in GATT jurisprudence is limited, the case may provide some insight into the GATT approach to eco-labeling.

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<sup>132</sup> DAVID HUNTER ET. AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1160 (2002).

<sup>133</sup> *Tuna-Dolphin I*, *supra* note 9, at ¶ 5.28.

<sup>134</sup> *Id.*, at ¶ 5.33.

**Malt Beverages (1992)**<sup>135</sup>

This 1992 GATT panel decision, settling a dispute between Canada and the United States appeared to broaden the approach for analyzing like products, by moving away from the traditional four criteria for determining likeness.<sup>136</sup>

Canada had brought a complaint under Article III against the United States arguing that state and federal taxation measures and numerous other requirements relating to alcoholic issues treated imported products less favorably than domestic products. The panel included the policy purpose of the measure affecting the imported product in the like product and discrimination analysis. It reasoned that Article III was not meant to prevent importing countries from using taxes and regulations for purposes other than to afford protection to domestic production.<sup>137</sup> In particular it concluded that “for the purposes of its examination under Article III, and in the context of the state legislation at issue..., the Panel considered that low alcohol content beer and high alcohol content beer need not be considered as like products in terms of Article III.4.”<sup>138</sup>

**Tuna-Dolphin II (1994)**<sup>139</sup>

After Mexico refused to grant approval of the panel decision in *Tuna-Dolphin I*, the European Community brought its own challenge against the U.S. MMPA.

The *Tuna-Dolphin II* panel found that both the primary and the secondary tuna embargo measures were in violation of GATT Article XI.<sup>140</sup> The panel then proceeded to examine whether the measures could be saved under the GATT’s environmental exceptions and found that the use of trade measures by the United States to force other countries to adopt its own domestic environmental or other policies cannot be saved under the GATT’s environmental exceptions.

First, the panel analyzed whether the measure could be justified under GATT Article XX(g), the provision covering measures “relating to the protection of natural resources.” However, it “concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g).”<sup>141</sup> Next, the panel analyzed whether the measure could be saved under GATT Article XX(b), the provision covering measures “necessary to protect human, animal or

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<sup>135</sup> *Malt Beverages*, *supra* note 57.

<sup>136</sup> STICKLEY, *supra* note 62, at 3.

<sup>137</sup> *Id.*

<sup>138</sup> *Malt Beverages*, *supra* note 62, at ¶ 5.75.

<sup>139</sup> *Tuna-Dolphin II*, *supra* note 60.

<sup>140</sup> Thus, the panel did not analyze the measures under Article III, the GATT’s non-discrimination provision.

<sup>141</sup> *Tuna-Dolphin II*, *supra* note 60, at ¶ 5.27.

plant life or health.” Similarly to above, the panel stated that “measures taken so as to force other countries to change their policies and that were effective only if such changes occurred, could not be considered ‘necessary’ for the protection of animal life or health in the sense of Article XX(b).”<sup>142</sup>

Despite these rather restrictive findings, the *Tuna-Dolphin II* panel also made some statements which could be viewed as more sensitive from an environmental point of view. In particular, it reverted to the earlier *Tuna-Dolphin I* panel’s view that Article XX(g) and (b) could only be applied to measures to protect the domestic environment. Specifically, the panel “could not see valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.”<sup>143</sup>

### **Auto Taxes (1994)**<sup>144</sup>

In *Auto Taxes*, the European Community challenged, under Article III of the GATT, three measures maintained by the United States: the luxury tax on automobiles, the gas guzzler tax on automobiles, and the Corporate Average Fuel Economy (CAFE) regulations applied to cars. The Panel found that both the luxury tax (which applied to cars sold for over \$30,000) and the gas guzzler tax (which applied to the sale of automobiles attaining less than 22.5 miles per gallon) were consistent with Article III:2 of GATT, but that the CAFE regulation was inconsistent with GATT Article III:4.

The EC argued that the gas guzzler tax, aimed at reducing air pollution caused by automobile emissions, violated the national treatment requirement by being a distinction based on non-physical characteristics of a product (in this case fuel economy). However, the Panel stated that “Article III serves only to prohibit regulatory distinctions between products applied so as to afford protection to domestic production. Its purpose is not to prohibit fiscal and regulatory distinctions applied so as to achieve other policy goals.”<sup>145</sup> The Panel found no evidence that the aim or effect of the regulatory distinctions was to change conditions of competition affording protection to the production of automobiles in the United States and held that because the distinction had a legitimate non-protectionist objective, the conservation of fossil fuels, it was consistent with GATT as long as it was based on objective criteria.

The panel adopted a similar line of argumentation regarding the luxury tax. In the same context, it found that the regulatory distinction did not have the aim or the effect of

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<sup>142</sup> *Id.*, at ¶ 5.39.

<sup>143</sup> *Id.*, at ¶ 5.20.

<sup>144</sup> *Auto Taxes*, *supra* note 63. This summary is adapted from, MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 412 (1999).

<sup>145</sup> *Id.*, at ¶ 5.20.

affording protection to the domestic production of automobiles, and consequently was consistent with the U.S. obligations under the GATT.

However, the Panel came to a different conclusion with respect to the CAFE regulation. First, it concluded that CAFE accorded less favorable conditions of competition to cars and car parts of foreign origin in a manner inconsistent with Article III:4. Subsequently, it did not consider the regulation to be primarily aimed at the conservation of natural resources, and found that the CAFE regulation was not justified under Article XX(g).

### **Reformulated Gasoline (1996)<sup>146</sup>**

This 1996 Appellate Body decision was the first ruling by the WTO Appellate Body. The ruling decided a dispute between the United States and Venezuela/Brazil concerning the implementation of the U.S. Clean Air Act. The dispute had begun in 1990 when Congress amended the Clean Air Act to instruct the U.S. Environmental Protection Agency (EPA) to issue regulations reducing vehicle emissions caused by gasoline. The EPA subsequently promulgated regulations in December 1993 that tied gasoline emissions to the emission levels in effect in 1990.

The problem in this case arose over how to determine the baselines for the reduction in air pollutants for reformulated gas. Domestic refineries that were in existence prior to 1990 could use one of several methods to determine their baseline, including an “individual baseline” derived from refinery-specific data. In contrast, U.S. refineries built after 1990 and all foreign refineries were required to use a statutory baseline. The statutory baseline in some circumstances was more disadvantageous than the baselines used by domestic refineries. The EPA justified this discriminatory treatment of foreign refineries by arguing that there might be insufficient reliable information to determine the baseline for individual foreign refineries.

In 1995, Venezuela brought an action in the WTO. Venezuela’s main allegation was that the EPA regulation violated Article III:4, the GATT’s national treatment obligation.<sup>147</sup> The panel found that imported gas and domestic gas were like products and that by not giving foreign refineries the chance to use an individual baseline, the EPA regulation accords importers treatment less favorably than domestic producers, and hence violated Article III:4 of GATT.

The panel rejected U.S. defenses based on Article XX(b) and (g) exceptions. The panel agreed that the Clean Air Act fit within the general scope of Article XX(b) but said that the United States had not established that there were no “reasonably available” alternative measures that were consistent with GATT rules or less inconsistent with

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<sup>146</sup> WTO Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996); *Gasoline AB*, *supra* note 65. This summary is adapted, with some omissions, from BROWN WEISS, *supra* note 128, at 1045-47.

<sup>147</sup> More specifically, GATT Article III states that imported products “shall be accorded treatment no less favorable than that accorded to like products of national origin.”

GATT rules. The panel also rejected the U.S. defense based on Article XX(g). Though the panel positively recognized that clean air was an exhaustible natural resource within the meaning of Article XX(g) it turned more restrictive, by seeming to incorporate a “necessity” test into the requirements established by Article XX(g). Also, when determining whether the EPA regulation was “primarily aimed” at conservation, the panel did not examine the intent behind the whole statute but seemed to ask whether the “precise aspects” of the parts of the Act that violated Article III were necessary to achieve conservation. The panel determined that since the EPA could have implemented equivalent measures in a form that would have been consistent with Article III, the conditions for a measure to be saved under Article XX(g) were not fulfilled. On appeal the Appellate Body upheld the panel’s conclusion that the U.S. measure could not be saved by Article XX(g), but also made several statements of crucial importance to future trade and environment cases in the WTO.<sup>148</sup>

First, the Appellate Body stated that WTO Agreements must not be interpreted in “clinical isolation” from public international law, which may also include international environmental law.<sup>149</sup> Next, the Appellate Body established the two-step approach to analyzing Article XX: first, provisional justification under one of the provision’s sub-headings; then, further assessment of the measure under the chapeau.<sup>150</sup> In that context, the Appellate Body also reversed two of the panel’s statements. First, the Appellate Body found that not only the measure’s discriminatory aspect, but the measure as a whole must be assessed under Article XX.<sup>151</sup> Second, the Appellate Body clarified the meaning of “relating to” in Article XX(g), essentially rejected the panel’s statement that Article XX(g) contains a “necessity test.”<sup>152</sup>

### **Beef Hormones (1997)**<sup>153</sup>

In this 1996 WTO case, the United States and Canada challenged a ban imposed by the European Community (EC) on importation of meat and meat products from cattle to which growth hormones had been administered. The panel agreed that a country is entitled under the SPS Agreement to adopt higher levels of protection than those set by international standards if there is scientific justification, but found that the scientific basis in this case was not sufficient to support use of the exception.

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<sup>148</sup> The following is based on Gabrielle Marceau, *A Call for Coherence in International Law: Praises of the Prohibition. Against Clinical Isolation*, in WTO DISPUTE SETTLEMENT: ISSUES AND PROPOSALS FOR TRADE AND ENVIRONMENT DISPUTES.

<sup>149</sup> *Gasoline AB*, *supra* note 65, at 17.

<sup>150</sup> *Id.*, at 22.

<sup>151</sup> *Id.*, at 19.

<sup>152</sup> *Id.*, at 21.

<sup>153</sup> WTO Panel Report, *European Community—Measure Concerning Meat and Meat Products*, WT/DS26/R/USA, WT/DS48/R/CAN (Aug. 18, 1997); *Hormones*, *supra* note 70. This summary is taken from BROWN WEISS, *supra* note 128, at 1044-45.

On appeal, the Appellate Body reversed some of the panel's findings but ultimately found in favor of the United States. Most importantly, the Appellate Body said that the right of a party (in this case the EC) to establish a higher standard was an autonomous right, not an exception. Moreover, although the Appellate Body confirmed the idea that higher standards had to be based on a risk assessment, it defined the term "based on" as only requiring a rational relationship between the risk assessment and the measure, not absolute conformity. While the *Hormones* case has been widely criticized by critics of the multilateral trading system, the reports potentially provide WTO Member governments with some latitude to adopt environmental measures that may be more environmentally protective than relevant international standards.

### **Shrimp-Turtle (1998)<sup>154</sup>**

This 1998 decision involved a U.S. ban on imports of shrimp harvested with gear that traps and suffocates endangered sea turtles. A 1989 U.S. amendment to the Endangered Species Act, referred to as Section 609, requires—as a prerequisite for access to the U.S. market—foreign nations to certify that their shrimp fisheries do not threaten endangered sea turtles. In practice, the law effectively requires foreign fishing fleets to equip their trawling gear with "turtle excluder devices" (TEDs). TEDs are simple metal cages with a trapdoor to allow turtles to escape without any significant loss of shrimp.

Concerned about the use of unilateral trade measures by the United States, India, Pakistan, Malaysia, and Thailand challenged Section 609 and its implementing guidelines,<sup>155</sup> arguing that trade bans undertaken pursuant to the U.S. legislation were inconsistent with U.S. obligations under the GATT. The complainants were successful in challenging the measure at the panel level, and the United States responded by appealing the case, in particular the panel's findings with respect to Article XX. The Appellate Body ultimately determined that the measure was inconsistent with the "chapeau" provision of Article XX.

But before doing so, the Appellate Body considered the measure under Article XX(g). In examining whether the U.S. measure was sufficiently "related to" the goal of protecting sea turtles, the Appellate Body stated that "[t]he means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one."

In *Shrimp-Turtle*, the Appellate Body also examined the complainants' argument that the United States was not permitted to use trade measures to protect resources located outside its jurisdiction. The Appellate Body considered this in the context of Article XX(g) and noted that the sea turtle species in question could sometimes be found within waters

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<sup>154</sup> WTO Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); *Shrimp I AB*, *supra* note 60. This summary is adapted from HUNTER, *supra* note 132, at 1168-69, 1171-73, with some omissions.

<sup>155</sup> Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, United States Department of State, 61 Federal Register 17342, 19 April 1996.

subject to U.S. jurisdiction. The Appellate Body stated that it did “not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation” but noted only that in the specific circumstances presented, there was a “sufficient nexus” between the sea turtle populations involved and the United States for purposes of Article XX(g).<sup>156</sup> Whereas previous GATT panels had implied that Article XX(b) and (g) exceptions included a jurisdictional limitation which prevented trade related measures from being used to protect resources located outside their jurisdiction, the Appellate Body explicitly declined to rule on this issue in Article XX(g).

### **Shrimp-Turtle (2001)**<sup>157</sup>

In this 2001 dispute, Malaysia challenged U.S. compliance with the Appellate Body ruling in its first *Shrimp-Turtle* decision. Malaysia claimed that the revised turtle protection guidelines<sup>158</sup> for Section 609 of the Endangered Species Act were still inconsistent with U.S. obligations under GATT Articles XI and XX. In its defense, the United States again raised the GATT Article XX(g) environmental exception, arguing that its measure “related to” the “conservation of a natural resource” and that revisions to the Section 609 implementing guidelines had rendered it compliant with the Article XX *chapeau*.

Before concluding that the U.S. measure indeed met the requirements of Article XX(g), the panel assessed U.S. efforts to remedy what the Appellate Body had found to be “arbitrary and unjustifiable discrimination” under the *chapeau*. The panel focused its analysis on U.S. compliance with previously unsatisfied requirements under the Article XX *chapeau*, such as a failure to negotiate toward international sea turtle protections prior to implementation of an import ban, and a lack of flexibility in the U.S. import certification program.

The panel found that the United States had met its obligation under Article XX to engage in good faith negotiations toward an international agreement for the protection of sea turtles. Successful conclusion of such an agreement was not required, as Malaysia claimed in its challenge, as long as serious and ongoing efforts to achieve a multilateral solution had been undertaken. The Appellate Body upheld the panel’s findings, agreeing that the United States, in its revision and application of the implementing guidelines for Section 609, had met its obligation to exercise ongoing good faith efforts in pursuit of international sea turtle protections.

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<sup>156</sup> *Shrimp*, *supra* note 65, at ¶ 133. Subsequently, in ¶ 134, the Appellate Body found that “sea turtles here involved constitute ‘exhaustible natural resources’ for purposes of Article XX(g) of the GATT 1994.”

<sup>157</sup> WTO Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001); *Shrimp I AB*, *supra* note 60.

<sup>158</sup> Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, United States Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946 – 36952.



The panel and Appellate Body also agreed that when the United States revised its Section 609 implementing guidelines it achieved sufficient flexibility to eliminate arbitrary discrimination under the Article XX chapeau. The new guidelines allowed certification of importer programs that protected sea turtles using means other than turtle excluder devices (TEDs), so long as they were comparably effective in preventing turtle mortality. Furthermore, under the new guidelines even shrimp trawlers operating in uncertified countries could get around the U.S. import ban through use of TEDs. Importantly, the U.S. measure, as approved by the panel and Appellate Body, required declarations for all shrimp imports attesting to their harvest in a turtle-safe manner or under the jurisdiction of an import certified country.

### **Asbestos (2001)**<sup>159</sup>

In this case, Canada claimed that a French ban on the use, production and import of asbestos—a deadly carcinogen—violated France’s WTO obligations. Both the panel and the Appellate Body ruled in favor of France, though for different reasons. After a much criticized panel ruling, the Appellate Body report refined the interpretation of central norms and principles of WTO law. Three of these issues are of particular importance for eco-labels: likeness, TBT applicability and the necessity test in Article XX.

With respect to like products, the Appellate Body first clarified that a likeness analysis under III:4 may take into account evidence of non-economic aspects, such as a product’s risk for human health. While the Appellate Body did not make human health a new, separate criterion to be analysed in the determination of likeness, its relative openness towards the consideration of health suggests a broadening of the likeness discussion. In that context, some argue that the Appellate Body’s interpretation opens the door wider to npr PPMs. If that is the case, it has important implications for environmental labeling, and substantially reduces the potential for challenges of eco-labels based upon npr PPMs.

With respect to TBT issues, though the parties had invoked several claims, neither the panel nor the Appellate Body report dealt with the substantive provisions of the TBT Agreement. Some argue that this is a sign of the reluctance of WTO tribunals to interpret the TBT Agreement. In the past, the TBT had been much criticized and subject to political debate, thus politicizing panel and Appellate Body rulings and interpretations. Nevertheless, the Appellate Body report in *Asbestos* addressed issues relating to the scope and applicability of the TBT Agreement. Most importantly, the Appellate Body report established that the TBT covers measures which include both positively formulated market access conditions and clear-cut import or marketing prohibitions. It also established that a technical regulation does not have to explicitly list or name the covered products, but merely needs to make the products “identifiable.” Again, these interpretations would most likely also apply to eco-labels.

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<sup>159</sup> *Asbestos panel*, *supra* note 21; *Asbestos AB*, *supra* note 14.

Finally, the *Asbestos* Appellate Body report is relevant for the interpretation of the GATT's general exceptions, in particular the necessity test in Article XX(b). This Appellate Body report confirmed that the necessity test involved a certain "weighing and balancing" test, almost amounting to a proportionality test. The analysis undertaken in *Asbestos* builds on a previous interpretation of necessity as set out in *Korea-Beef*. There the Appellate Body had stated that when assessing the necessity of a measure, a treaty interpreter "may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect ... the extent to which the measure contributes to the realization of the end pursued [and] ... the extent to which the compliance measure produces restrictive effects on international commerce."<sup>160</sup>

In *Asbestos*, the Appellate Body referred to this test and the previous statement that the more "vital or important" the common interests being pursued, the easier it will be for a measure to satisfy the necessity test. The Appellate Body then emphasized that in *Asbestos*, the objective pursued is the preservation of human life and health, and that "the value pursued is both vital and important in the highest degree."<sup>161</sup>

While in the *Asbestos* case, this "weighing and balancing" test *saved* the French import ban, there are concerns that this approach may prove detrimental in the future. In particular, it remains to be seen how WTO tribunals will value the importance of environmental or conservation goals as opposed to the importance of preserving human health. The fact that the Appellate Body in *Asbestos* placed increasing emphasis on the *importance* of the legitimate objective raises the question of whether a WTO tribunal should engage in the sort of value judgment about domestic policy objectives.

### **Sardines (2002)**<sup>162</sup>

In this case, Peru challenged a European labeling scheme for sardines. The EC regulation provided that only products prepared from a certain species of sardines could be marketed as preserved sardines. The panel ruled in favor of Peru; the EC subsequently appealed the case. The panel ruling may be important for eco-labeling in several ways. First, the panel clarified the scope of the TBT Agreement. In particular, it stated that the EC regulation is a technical regulation "as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory."<sup>163</sup> The panel also made important statements on the positive or negative nature of the label, stating that "a document may prescribe or impose product characteristics in either a positive or negative form—that is, by inclusion or by exclusion." Thus, regulations which require that a certain label must not be used for certain products are also covered by the TBT Agreement.

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<sup>160</sup> WTO Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 162, WT/DS161/AB/R (Dec. 11, 2000).

<sup>161</sup> *Asbestos AB*, *supra* note 14, at ¶ 172.

<sup>162</sup> *Sardines panel*, *supra* note 19; *Sardines AB*, *id.*

<sup>163</sup> *Sardines panel*, *supra* note 19, at ¶ 7.35.

Next, the decision pointed out several issues with respect to international standards. First, it clarified what the TBT Agreement considers to be *relevant* international standards. It rejected the EC Argument that the Codex Stan 94 is not a relevant international standard because it was not adopted by consensus. The panel then found that Codex Stan 94 was not used *as a basis for* the EC regulation and finally, that Codex Stan 94 is not *ineffective or inappropriate* to fulfill the legitimate objective pursued by the EC Regulation.