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**Trade and Climate Change – Tracing the Conflict between Trade and  
Climate Change Reform and Plotting a Mutually Supportive Route  
Forward**

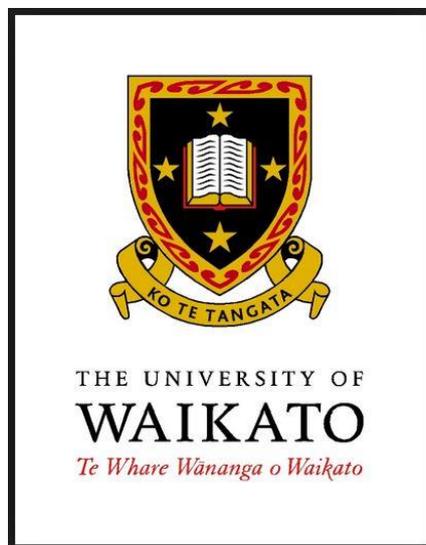
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## ***Abstract***

This thesis looks at the individual importance of trade and climate change reform, the relationship between these two areas, and then identifies some of the trigger points that may cause conflict between trade law and climate change measures. Once those areas of tension have been identified, this thesis plots a way forward in attempting to resolve those selected conflicts, ultimately suggesting that the Appellate Body should take mutually supportive interpretations when finding themselves dealing with a conflict between WTO law and climate change reform measures.

## *Acknowledgements*

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## ***Chapter I – Introduction***

Trade and the environment have long been seen as coming into conflict, and this is no different when considering trade law, enforced by the Appellate Body of the World Trade Organization, and specific environmental measures designed to combat climate change. However, if the global community is going to continue to enjoy economic growth while combating climate change, then resolving these conflicts becomes a crucial task. This thesis attempts to offer a way forward.

Chapter I sets down the foundation of this paper, by discussing the facts surrounding trade, the environment and climate change, and the intersection between the two areas. Chapter II then explains what is meant by “conflict” when saying that trade law and climate change reform can sometimes come into conflict. Chapter III identifies the potential areas of conflict, drawing on environmental measures, trade law, and academic literature. Chapter IV is an attempt to incorporate the concept of mutual supportiveness as a legitimate interpretative tool for the Appellate Body when deciding on trade disputes. Chapter V then applies mutually supportive interpretations to the areas previously identified by Chapter III, offering potential ways for the Appellate Body to resolve these trade-environment conflicts. Finally, Chapter VI provides this thesis’ conclusion.

## ***Trade***

The international trading system of today had its genesis in the aftermath of the Second World War, when the Western states met at Bretton Woods to plan a modern, post-war international economy.<sup>1</sup> While also establishing the International Monetary Fund and the World Bank, a decision was made to pursue an international organisation dedicated to trade.<sup>2</sup> The first attempt was the International Trade Organization, which was aborted due to domestic US political pressure from protectionists in Congress.<sup>3</sup>

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<sup>1</sup> Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn *The World Trade Organization: Law, Practice, and Policy* (3<sup>rd</sup> ed, Oxford University Press, Oxford, 2015) at 1.

<sup>2</sup> David Hunter, James Salzman and Durwood Zaelke *International Environmental Law and Policy – Second Edition* (2<sup>nd</sup> ed, Foundation Press, New York, 2002) at 1146.

<sup>3</sup> Roger B. Porter 'The World Trade Organization at Twenty' (2015) 21(2) BJWA 104 at 105.

However, in the build up to forming the International Trade Organization, the proposed member states adopted the General Agreement on Tariffs and Trade ('GATT'), which came into effect on 1 January, 1948.<sup>4</sup> The GATT became crucial to the development of international trade law, becoming the de facto international institution that evolved to oversee the reduction of trade barriers.<sup>5</sup> States that contracted into the GATT had certain obligations they had to meet, such as reducing tariffs to a set amount and observing the principles that a nation's domestic laws should not be used to "afford protection to domestic production".<sup>6</sup> The GATT became a crucial forum, with negotiation rounds (at least one every decade) reducing barriers to trade.<sup>7</sup> Out of one of these negotiation rounds, the Uruguay Round, was born the World Trade Organization.<sup>8</sup>

The WTO created a more formal, structured regime for international trade to follow. It annexed a host of international agreements, updated the GATT, and importantly, set up an "Understanding on Rules and Procedures Governing Settlement of Disputes", more commonly known as the Dispute Settlement Understanding ('DSU').<sup>9</sup> It allowed member states to settle trade disputes, where one party alleges that the other is breaking the rules set out in one of the "covered agreements".<sup>10</sup> The covered agreements are those, such as the GATT, which are annexed to the Agreement Establishing the World Trade Organisation.<sup>11</sup>

Member states of the WTO, through international agreements like the GATT and its sister agreement the General Agreement on Trade in Services ('GATS'), have various obligations they have to uphold. These obligations are "almost entirely negative; in order to liberalize trade they prescribe the scope of national regulatory discretion, rather than requiring governments to positively enact

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<sup>4</sup> Matsushita, above n 1, at 2.

<sup>5</sup> Hunter, Salzman and Zaelke, above n 2, at 1147.

<sup>6</sup> General Agreement on Tariffs and Trade 55 UNTS 194 (signed 30 October 1947, entered into force 1 January 1948), art III(1).

<sup>7</sup> Matsushita, above n 1, at 9.

<sup>8</sup> Matsushita, above n 1, at 9.

<sup>9</sup> Agreement Establishing the World Trade Organization 1867 UNTS 14 (signed 15 April 1994, entered into force 1 January 1995), Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes.

<sup>10</sup> Dispute Settlement Understanding, above n 9, art 1(1).

<sup>11</sup> Dispute Settlement Understanding, above n 9, art 1(1) and Appendix 1.

regulations.”<sup>12</sup> Chief among them is the principle of removing discriminatory treatment of goods and services in trade.<sup>13</sup> This ideal is expressed in two main ways: the principle of most favoured nation, and the principle of national treatment.<sup>14</sup> The former asserts that states should not discriminate between like products on the basis of where they originated from.<sup>15</sup> For instance, similar mobile phones from the United States and Japan should be treated the same by New Zealand laws. The principle of national treatment requires member states to treat a foreign product or service in the same way they would treat a domestic version.<sup>16</sup> Therefore, New Zealand lamb and British lamb must be treated the same by the laws of New Zealand. While there are many other facets to international trade law, the above two principles are the foundation of WTO law.

These principles are not absolute and without exemptions. Article XX of the GATT, and Article XIV of the GATS, provides general exceptions to these principles.<sup>17</sup> Meanwhile, the Enabling Clause allows countries to provide certain preferential treatment to developing countries.<sup>18</sup> This is evident through the Generalized System of Preferences schemes, which are utilised by member states such as the European Union and Australia, which give developing countries preferential tariff treatment under certain conditions.<sup>19</sup> However, in general, member states of the WTO have an obligation to uphold the laws and principles of the WTO and its various treaties.

Since its creation in 1994, the WTO has experienced difficulties, though. The Doha Rounds have stalled to a near standstill, with developing and developed countries holding differing opinions about how further trade liberalisation should proceed. In the face of this lack of movement, countries are sidestepping the WTO completely to conduct bilateral and multilateral trade agreements outside of the

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<sup>12</sup> Hunter, Salzman, Zaelke, above n 2, at 1147.

<sup>13</sup> Matsushita, above n 1, at 155.

<sup>14</sup> Matsushita, above n 1, at 155.

<sup>15</sup> GATT, above n 6, art I.

<sup>16</sup> GATT, above n 6, art III.

<sup>17</sup> GATT, above n 6, art XX; General Agreement on Trade in Services 1869 UNTS 183 (entered into force 1 January 1995), art XIV.

<sup>18</sup> Peter Van den Bossche & Denise Prevost, *Essentials of WTO Law* (Cambridge University Press, United Kingdom, 2016) at 137.

<sup>19</sup> Van den Bossche, above n 18, at 138.

WTO's umbrella, whether it is through the use of large trading blocs like the South Asian Free Trade Area, or smaller bilateral deals like between New Zealand and China.

Despite this breakdown in WTO-led trade liberalisation, one of the “most fundamental and perhaps fateful innovations” of the WTO is the DSU that has allowed WTO members to “negotiate and adjudicate trade disputes”.<sup>20</sup> In the first twenty years of the WTO, 491 cases have been heard, averaging 24 to 25 cases a year.<sup>21</sup> The DSU is a multi-tiered system, with panels and an Appellate Body hearing and ruling on cases with such efficiency that it is now the busiest international dispute settlement mechanism.<sup>22</sup>

The DSU created a quasi-judicial element to the world of international trade. It was a move away from the ethos of diplomats to the ethos of lawyers, incorporating the rule of law into trade disputes in a search for legitimacy.<sup>23</sup> However, that is not to say that the DSU mechanism is a wholly legal entity now. Pauwelyn suggests that the WTO managed what Weiler regarded to be impossible: having the rule of law without the rule of lawyers.<sup>24</sup> Panels are still largely diplomats, without legal experience, who have still managed to create a respected legal jurisprudence.<sup>25</sup> However, on top of the panels is now a “judicial power”, the Appellate Body, which is independent from the WTO political organs and has “a standing corpus of expert jurists”.<sup>26</sup> The Appellate Body has seven members, “three of whom shall serve on any one case”,<sup>27</sup> and those members must have expertise in law, international trade and be unaffiliated with any government.<sup>28</sup> This judicial tribunal operates independently in a culture still “dominated by the

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<sup>20</sup> Robert Howse 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power' in Thomas Cottier et al (ed) *Studies in International Economics: The Role of the Judge in International Trade Regulations: Experiences and Lessons for the WTO* (University of Michigan Press, US, 2009) at 11.

<sup>21</sup> Porter, above n 3, at 109.

<sup>22</sup> Matsushita, above n 1, at 19.

<sup>23</sup> J.H.H Weiler 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35(2) *JWT* 191 at 196.

<sup>24</sup> Joost Pauwelyn 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109(4) *AJIL* 761 at 763.

<sup>25</sup> Pauwelyn, above n 24, at 763.

<sup>26</sup> Howse, above n 20, at 11.

<sup>27</sup> Dispute Settlement Understanding, above n 9, at Article 17(1).

<sup>28</sup> Dispute Settlement Understanding, above n 9, at Article 17(3).

values of bureaucracy and diplomacy, not those of the law.”<sup>29</sup>

In light of this mixing between diplomats and lawyers, the description of a quasi-judicial element seems appropriate. Regardless, the DSU mechanism is a crucial factor of international trade law. It has brought a stream of positives from providing a fair, legitimate forum to settle disputes to ensuring that member states take their international trade commitments seriously.<sup>30</sup> Its body of jurisprudence has become a crucial part of international trade law,<sup>31</sup> and is a major factor when considering any environmental reforms that a member state may wish to undertake.

It has been remarked that the circumstantial evidence of the economic benefits of international trade is “overwhelming”.<sup>32</sup> Butler Eamonn writes that the “one thing economists agree on is the benefits of free trade” and it has been “universally accepted” by economists.<sup>33</sup> Business magazines run articles with the headlines “Actually, Everyone Benefits from Free Trade”.<sup>34</sup> International trade is good for countries because it allows them to become more efficient and it improves their position in the export market, while consumers benefit by purchasing goods and services in a more competitive market.<sup>35</sup> Indeed, “the voice of the consumers” was a factor that Milton Friedman considered heavily when coming down on the side of free trade.<sup>36</sup>

The WTO itself states that the economic case for an open trading system is based “on commercial common sense.”<sup>37</sup> The World Bank showed that in a group of countries that doubled their ratio of exports, their GDP per capita rose by 5% over

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<sup>29</sup> Howse, above n 20, at 11.

<sup>30</sup> Porter, above n 3, at 110.

<sup>31</sup> Matsushita, above n 1, at 19.

<sup>32</sup> Timothy Taylor 'The Truth about Globalization' (2002) 147 Public Interest 24 at 28.

<sup>33</sup> Butler Eamonn *Milton Friedman – A Concise Guide to the Ideas and Influence of the Free-Market Economists* (Harriman House, 2011) at 72.

<sup>34</sup> Adam Ozimek “Actually, Everyone Benefits from Free Trade” (17 October 2015) Forbes <<http://www.forbes.com/sites/modeledbehavior/2015/10/17/actually-everyone-benefits-from-free-trade/#37f5db491221>>.

<sup>35</sup> Richard Epstein 'Free Trade and Free Immigration: Why Domestic Competitive Injury Should Never Influence Government Policy' (2013) 80(1) U.Chi.L.Rev 201 at 207-208.

<sup>36</sup> Eamonn, above n 33, at 73.

<sup>37</sup> World Trade Organization, 'The case for open trade' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm)>.

the 1990s whereas a similar populated group of countries that saw trade fall, saw their GDP per capita drop by 1% for a year during the same period.<sup>38</sup> The WTO agrees, stating that there is “a definite statistical link between freer trade and economic growth” and that it benefits all countries, “including the poorest”.<sup>39</sup> For instance, for proponents of free trade in Latin America, it is said to help accelerate the ongoing socio-economic and political development of the region.<sup>40</sup> Friedman argued that free trade could lead to “harmonious relations between nations” as they traded freely.<sup>41</sup> It is therefore widely taken as a given that free trade is good and therefore the role of the WTO is incredibly important in continuing to achieve the gains of global economic growth from international trade.

However, such a viewpoint ignores a groundswell of anti-free trade sentiment that is growing around the globe. Richard Epstein goes so far to say that international trade, along with immigration, are “two of the hot button issues of our time”.<sup>42</sup> This protectionist surge is most readily noted by the British decision to leave the European Union, and likely the Single Market, and the election of Donald Trump, who campaigned on policies to drop the Trans-Pacific Partnership and renegotiate NAFTA, two considerable free trade agreements. If the economic benefits of international trade are “overwhelming” then the question that is begging to be asked is why there is such a backlash against it.

There are various reasons people have taken a view against free trade and globalisation. First, some argue that the stated economic benefits of international trade are actually “ambiguous”, often identifying causality where there might not be any.<sup>43</sup> The UN Development Programme's study into global trade showed “little relation between trade liberalisation and growth.”<sup>44</sup> Even if there are trade benefits, it can often be uneven with one study showing that though trade to GDP ratios rose 1.2% a year across ninety-three countries, forty-four of those states

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<sup>38</sup> Taylor, above n 32, at 28.

<sup>39</sup> World Trade Organization, above n 37.

<sup>40</sup> John D. Theodore 'The Process of Globalization in Latin America' (2015) 14(1) *International Business & Economics Research Journal* 193 at 196.

<sup>41</sup> Eamonn, above n 33, at 76.

<sup>42</sup> Epstein, above n 35, at 201.

<sup>43</sup> Joseph Stiglitz 'Trade agreements and health in developing countries' (2009) 373 *The Lancet* 363 at 363.

<sup>44</sup> Stiglitz, above n 43, at 363.

actually suffered a fall and the majority of the gains were pocketed by only ten countries.<sup>45</sup> Therefore, the argument goes countries are opening up their doors while receiving nothing in return. In fact, it may deprive developing countries of needed revenue from tariffs.<sup>46</sup> Another argument against free trade and globalisation is that it is a threat against marginalised groups, such as women who bear an unfair share of the burden,<sup>47</sup> and limit governments from achieving certain social goals, such as promoting the family farmer.<sup>48</sup> A third reason may be the effects of free trade on climate change, which will be discussed later in this paper.

This paper does not seek to get to the bottom of this dispute between advocates and detractors of free trade. It works off the assumption that free trade, and therefore the WTO, are, on the whole, a benefit to the world through increase economic growth, which leads to rising living standards and a reduction in poverty. However, it is important to note that the value of free trade's utility is not unchallenged and therefore it may not be deserved to be treated as a sacred value when considering how to deal with its conflict with environmental action and climate change reform.

### *The Environment and Climate Change*

While the notion of protecting the environment is a relatively old idea, its intersection with trade law did not really become a discussed area until the 1970s.<sup>49</sup> Even then, it was mostly concerned with the preservation of endangered species.<sup>50</sup> However, the main environmental factor of today, climate change, has an older history. In 1896, Arrhenius recognised the connection between the climate, CO<sub>2</sub> emissions, the burning of coal in industry, and the importance of polar ice and water levels.<sup>51</sup>

As L.D Danny Harvey points out, this means that “many key features of our

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<sup>45</sup> Julian Kunnie *The Cost of Globalization: Dangers to the Earth and its People* (McFarland & Company Inc., Publishers, North Carolina, 2015) at 22.

<sup>46</sup> Stiglitz, above n 43, at 363.

<sup>47</sup> Kunnie, above n 45, at 109.

<sup>48</sup> Hunter, Salzman, Zaelke, above n 2, at 1132.

<sup>49</sup> Bradley J. Condon *Environmental Sovereignty and the WTO* (Transnational Publishers, New York, 2006) at 1.

<sup>50</sup> Condon, above n 49, at 1.

<sup>51</sup> L.D Danny Harvey 'An overview of the climate change science in 1977 marking the publication of Volume 100 of Climate Change' in (2010) 100 Climate Change 15 at 15.

present understanding of how the climate reacts to increasing atmospheric CO<sub>2</sub> were identified over 100 years ago.”<sup>52</sup> As early as 1977:<sup>53</sup>

the basic outline of the “CO<sub>2</sub> problem” was well established: humans were unquestionably increasing the CO<sub>2</sub> concentration in the atmosphere, the concentration would double within a century under reasonable business-as-usual scenarios of increasing emissions, this increase would be irreversible on human time scales and would trap infrared radiation based on well-establishment and non-controversial radiation physics, and this heat trapping would exert a warming effect on the climate. The magnitude of the warming effect at the time was uncertain but it was realized then that it was likely to be nontrivial and possibly catastrophic, with the only available estimates at that time based on admittedly simple and crude calculations using computer models. However, the potential consequences of a CO<sub>2</sub> doubling were grave, particularly with regard to drying of soils and sea level rise.

Since the 1970s, climate change has become more of a problem. In fact, it is now “probably the most relevant problem to be tackled by the contemporary world”.<sup>54</sup> Since 1990, the “global mean temperatures have probably been higher than at any previous time during the last 1000 years.”<sup>55</sup> By 2001, the average temperature increase had reached 0.6 degree Celsius and was projected to increase by anywhere from 1.4 to 5.8 degrees Celsius by 2100.<sup>56</sup> The Intergovernmental Panel

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<sup>52</sup> Danny Harvey, above n 51, at 15.

<sup>53</sup> Danny Harvey, above n 51, at 18.

<sup>54</sup> Paolo Davide Farah & Elena Cima 'WTO and Renewable Energy: Lessons from the Case Law' (2015) 49(6) *JWT* 1103 at 1104.

<sup>55</sup> Heinz Warner et al, 'Mid- to late Holocene climate change: an overview' in (2008) 27 *Quaternary Science Reviews* 1791 at 1792.

<sup>56</sup> Hunter, Salzman and Zaelke, above n 2, at 2-3.

on Climate Change (IPCC) noted that the “warming of the climate system is unequivocal” and that it is “very likely” anthropogenic greenhouse gases are the cause of such warming, which is an upgrade in certainty from an earlier report.<sup>57</sup> Such an increase in temperature, and an associated rise in sea levels, could lead to: increased and more severe weather events, population displacement, a rise in heat associated deaths, an increase in disease such as malaria and dengue fever, food shortages, and the inundation of small island states and coastal urban areas.<sup>58</sup>

Even then, despite the potential catastrophic effects, a global response to climate change has been slow. It was only in the early 1990s that work began on the United Nations Framework Convention on Climate Change ('UNFCCC'),<sup>59</sup> nearly twenty years after it became self-evident that the planet was facing a large problem. The UNFCCC, though, required parties to make concerted efforts at adopting measures that attempt to stabilise greenhouse gases and prevent anthropogenic interference in the global climate.<sup>60</sup> However, progress has been slow. Domestic politics and global issues, such as the philosophy around differing obligations for developed and developing countries, have meant that often negotiations have stalled. The Kyoto Protocol of 1997, which until two years ago was the leading climate agreement, is now described as an “embattled treaty” which has been “superseded by circumstances”.<sup>61</sup> The United States was never a party to the Kyoto Protocol, and most countries no longer have obligations under the text.

However, after high profiles failure to combat the problem of climate change, such as the failed negotiations at Copenhagen, the global community surprisingly finalised a climate agreement in Paris on 12 December 2015. The Paris Agreement is the first major, globalised agreement on climate change since the Kyoto Protocol.<sup>62</sup> For the first time in international law, it sets down a target of limiting

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<sup>57</sup> Thomas Cottier, Olga Nartova & Anirudh Shingal 'The Potential of Tariff Policy for Climate Change Mitigation: Legal and Economic Analysis' (2014) 48(5) *JWT* 1007 at 1010-1011.

<sup>58</sup> Hunter, Salzman and Zaelke, above n 2, at 3.

<sup>59</sup> United Nation Framework Convention on Climate Change 1771 UNTS 107 (opened for signing 4 June 1992, entered into force 21 March 1994).

<sup>60</sup> United Nation Framework Convention on Climate Change, above n 59, art 2.

<sup>61</sup> Annalisa Savaresi 'The Paris Agreement: An Early Assessment' (2016) 46(1) *Environmental Pol'y & L.* 14 at 16.

<sup>62</sup> Savaresi, n 61, at 15.

global warming to 2 degrees Celsius, with a more aspirational target set at 1.5 degrees.<sup>63</sup> It requires parties to aim to reach “global peaking of greenhouse gas emissions as soon as possible” and to then “undertake rapid reductions thereafter.”<sup>64</sup> Further, while the Paris Agreement continues the theory that developed countries should provide assistance to developing countries,<sup>65</sup> it also breaks down the distinction between developing and developed countries, by requiring all parties to make efforts to reduce their emissions.<sup>66</sup>

The Paris Agreement has a mixture of unequivocal obligations, and obligations which are expressed in far less strident terms.<sup>67</sup> One of the central cogs to the Paris Agreement is the idea of Nationally Determined Contributions ('NDCs'), where each member details the climate action it intends to take.<sup>68</sup> A NDC needs to be submitted every five years.<sup>69</sup> The principle builds on the increasingly acceptable idea that climate governance should exist under a “pledge and review” approach.<sup>70</sup> The Paris Agreement lays down the foundation of a system that can work toward a global goal while also measuring and checking the contribution being made by each country.<sup>71</sup> Other provisions in the Agreement includes cooperation to increase “climate change education, training, public awareness, public participation and public access to information”<sup>72</sup> and taking cooperative action on “technology development.”<sup>73</sup> The Agreement also has provisions which are more recommendations rather than legal obligations,<sup>74</sup> such as: recognising that adapting to climate change is a “global challenge”,<sup>75</sup> recommending parties should report on climate change impacts,<sup>76</sup> and recognising the need for

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<sup>63</sup> Paris Agreement (opened for signing 22 April 2016, entered into force 4 November 2016), art 2(1)(a).

<sup>64</sup> Paris Agreement, above n 63, art 4(1).

<sup>65</sup> Paris Agreement, above n 63, art 9(1).

<sup>66</sup> Paris Agreement, above n 63, art 4(4).

<sup>67</sup> Savaresi, n 61, at 15.

<sup>68</sup> Paris Agreement, above n 63, art 4(2).

<sup>69</sup> Paris Agreement, above n 63, art 4(9).

<sup>70</sup> Annalisa Savaresi 'The Paris Agreement: a new beginning?' (2016) 34(1) J.E.R.L 16 at 21.

<sup>71</sup> Savaresi, n 70, at 21.

<sup>72</sup> Paris Agreement, above n 63, art 12.

<sup>73</sup> Paris Agreement, above n 63, art 10(2).

<sup>74</sup> Daniel Bodansky 'The Legal Character of the Paris Agreement' (2016) 25(2) RECIEL 142 at 147.

<sup>75</sup> Paris Agreement, above n 63, art 7(2).

<sup>76</sup> Paris Agreement, above n 63, art 13(8).

encouraging innovation to tackle climate change.<sup>77</sup>

The exact legal nature of the Paris Agreement is relatively fluid. There has been the suggestion that because the Paris Agreement does not have enforceable rules or sanctions for parties that fail to comply, then it cannot be considered law but more a “a statement of good intentions.”<sup>78</sup> Savaresi states there can be no doubt, though, that the agreement is a treaty, and like most treaties it is formally binding on its parties.<sup>79</sup> It is a point agreed with by Daniel Bodansky who writes that “the Paris Agreement is a treaty within the definition of the Vienna Convention on the Law of Treaties, but not every provision of the agreement creates a legal obligation.”<sup>80</sup> Bodansky’s conclusion arises because the Agreement creates some legal obligations, compliance is not voluntary and it has clauses that only make sense in the context of it being a treaty, such as expressing content to be bound and the minimum requirements for the Agreement to come into force.<sup>81</sup>

The legally binding obligations of the Paris Agreement are largely focussed on merely the communicating and updating of each state's NDC, whereas the actual content of the NDCs are not binding.<sup>82</sup> Each party is granted “ample leeway” on deciding how to fulfil their obligations and which climate actions should be taken.<sup>83</sup> The Agreement can perhaps be largely considered as having “strong procedural obligations” while having “relatively few legal obligations” on the subject of implementation.<sup>84</sup> However, Article 15 does establish a mechanism, through committee, to promote compliance with the Agreement.<sup>85</sup> While the provision had been significantly cut down from earlier texts, the fact that any compliance provision at all made it into the Agreement is a “significant achievement, as there was long-standing opposition to any compliance

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<sup>77</sup> Paris Agreement, above n 63, art 10(5).

<sup>78</sup> Anne-Marie Slaughter, 'The Paris Approach to Global Governance' *Project-Syndicate* (28 December 2015) <<https://www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12>>.

<sup>79</sup> Savaresi, n 61, at 15.

<sup>80</sup> Bodansky, n 74, at 150.

<sup>81</sup> Bodansky, n 74, at 142, 145.

<sup>82</sup> Christina Voigt in 'The Compliance and Implementation Mechanism of the Paris Agreement' (2016) 25(2) *RECIEL* 161 at 161.

<sup>83</sup> Savaresi, n 61, at 15.

<sup>84</sup> Bodansky, n 74, at 146-147.

<sup>85</sup> Paris Agreement, above n 63, at Article 15.

arrangement.”<sup>86</sup>

An important question is if “a national pledge, once officially submitted without qualifications and conditions, is binding on a party.”<sup>87</sup> The answer is likely not with the Paris Agreement's power resting more on “economic, social and political obligations” that may lead to states taking action simply to protect their reputation.<sup>88</sup> It would appear that the legal obligation of the Paris Agreement is to set targets and plans, not necessarily to meet those targets. Therefore, until the agreement begins to be implemented and interpreted, the Paris Agreement's exact form remains in flux.<sup>89</sup> It must also be noted, though, that early research has suggested that the Paris Agreement may only have a “negligible effect”,<sup>90</sup> and therefore if it is to truly combat climate change, parties will likely need to be aggressive with their actions under the agreement.

Therefore, when talking about the environment and climate change, it is noticeable that the science behind the issues has been recognised for at least a century. Since the 1970s, the world has known of the potential dangers of climate change. It is now “the world’s most difficult and complex collective action problem.”<sup>91</sup> Yet steps taken to combat the dangers have been slow coming. The Paris Agreement is now a new way forward, hoping to see countries across the world take environmental actions to limit global emissions and ensure that the planet does not descend into serious harm.

### *Intersection Between Trade and the Environment*

The relationship between international trade and environmental issues can appear to be a fraught one. Often, the link between trade and environment is regarded as one of opposition.<sup>92</sup> In terms of the environment, the WTO has been said to undermine “existing local, national and international environmental and

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<sup>86</sup> Voigt, above n 82, at 164.

<sup>87</sup> Lucas Bergkamp 'The Paris Agreement on Climate Change: A Risk Regulation Perspective' 2016 1 EJRR 35 at 37.

<sup>88</sup> Jennifer Jacquet and Dale Jamieson 'Soft but significant power in the Paris Agreement' (2016) 6 Nature Climate Change 643 at 645.

<sup>89</sup> Savaresi, n 61, at 15.

<sup>90</sup> Bergkamp, above n 87, at 35.

<sup>91</sup> Jacquet and Jamieson, above n 88, at 643.

<sup>92</sup> Matsushita, above n 1, at 716.

conservation policy”.<sup>93</sup> This is a view shared not just by the general public, but also by specialists.<sup>94</sup>

At its most simplest, the argument of the main threat to the environment is that free trade increases the economic activity that has already proven to be environmentally destructive.<sup>95</sup> Simply put, more trade means more emissions, which means an even higher increase in temperature. Meanwhile, increased economic activity from China to France has seen a decrease in air quality.<sup>96</sup> With increasing trade liberalisation driven by the WTO, there is the possibility that environmental protections will fall as countries engage in a “race to the bottom” to remain competitive.<sup>97</sup>

However, when further analysis is considered, many writers argue that trade does not have to be an enemy of the environment. In fact, trade relies on environmental health to continue to provide economic gains. In the event of unchecked global warming, climate change could cause havoc to the world economy and international trade. Mark Carney, the current Governor of the Bank of England, has remarked that “once climate change becomes a defining issue for financial stability, it may already be too late”.<sup>98</sup> Overall, at a global cost, reports have suggested that by the second half of this century the average cost of climate change could reach 5% of GDP, and that by 2100 onward there could be an annual loss of 20% of per capita consumption.<sup>99</sup> However, if more risks are incorporated into a review, the annual cost could rise to 20% of global GDP each year.<sup>100</sup> At a more local level, the British economy, according to one study, would face an increase of 150% in economic damage from flooding alone due to the effects of climate change.<sup>101</sup> The cost to Africa over the next 50 years could be a loss of 2 to

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<sup>93</sup> Lori Wallach *Whose Trade Organization? – A Comprehensive Guide to the WTO* (New Press, New York, 2004) at 20.

<sup>94</sup> Matsushita, above n 1, at 716.

<sup>95</sup> Hunter, Salzman and Zaelke, above n 2, at 1131.

<sup>96</sup> Kunnie, above n 45, at 232.

<sup>97</sup> Hunter, Salzman and Zaelke, above n 2, at 1133.

<sup>98</sup> Mark Carney, Governor of the Bank of England “Breaking the tragedy of the horizon: Climate Change and Financial Stability” (Speech given at Lloyd's of London, 29 September 2015) <[www.bankofengland.co.uk/publications/pages/speeches/2015/844.aspx](http://www.bankofengland.co.uk/publications/pages/speeches/2015/844.aspx)>.

<sup>99</sup> Peter Bartelmus, ‘How bad is climate change?’ 2015 14 *Environmental Development* 53 at 58.

<sup>100</sup> Cottier, Nartova & Shingal, above n 57, at 1013.

<sup>101</sup> P.B Sayers et al *Climate Change Risk Assessment 2017: Projections of Future Flood Risk in the*

4% of its GDP and up to \$30 billion a year in adaptation costs.<sup>102</sup> The cost of droughts in Europe over the past three decades amount to \$100 billion.<sup>103</sup> Further, it is suggested that the “inconvenient truth” is that “we do not know how bad” the cost of climate change will be.<sup>104</sup> For international trade and economic growth not to be threatened, the welfare of the environment is a critical consideration.

Further, international trade can be beneficial to the environment. Unless there is a paradigm shift in how much energy people use, the world cannot combat climate change by merely reducing the production of non-renewable energy without a replacement. There needs to be renewable energy to replace the less efficient, more damaging industries.<sup>105</sup> International trade can help spread the benefits of new technology. In the trade dispute of *India – Certain Measures Relating to Solar Cells and Solar Modules*,<sup>106</sup> the Indian government was trying to build a domestic solar industry. That may be a worthy goal. However, through international trade, solar cells and modules could be provided from overseas, possibly at a lower cost. Therefore, international trade could prove to be a real benefit in helping India turn to solar power.

To turn to the WTO in particular, Matsushita and his co-authors note that there are three main reasons to suggest that the WTO is not incompatible with addressing environmental concerns. First, often the values of international trade and the protection of the environment do not conflict and in fact should be mutually supportive.<sup>107</sup> Secondly, taking environmental action is beyond the scope of the WTO since it deals only with trade law; it is not its role to apply measures to protect the environment.<sup>108</sup> Finally, the WTO does not give the principle of free trade priority over environmental protection.<sup>109</sup> In fact, the Preamble to the WTO

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UK' Report Prepared for the Committee on Climate Change (UK, London, 2015).

<sup>102</sup> Alemu Mekonnen 'Economic Costs of Climate Change and Climate Finance with a Focus on Africa' (2014) 23 *Journal of African Economies* 50 at 74.

<sup>103</sup> Kunnie, above n 45, at 222.

<sup>104</sup> Bartelmus, above n 94, at 60.

<sup>105</sup> Rolf H. Weber & Rika Koch 'International Trade Law Challenges by Subsidies for Renewable Energy' (2015) 49(5) *JWT* 757 at 757.

<sup>106</sup> *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, 14 October 2016 (Report of the Appellate Body).

<sup>107</sup> Matsushita, above n 1, at 716.

<sup>108</sup> Matsushita, above n 1, at 716.

<sup>109</sup> Matsushita, above n 1, at 716.

Agreement states that trade must allow for:<sup>110</sup>

the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Therefore, the main issue when considering international trade and environmental concern is not one of either or but rather one of balance since both protecting the environment and trade are essential and beneficial to society.<sup>111</sup> However, there are times where international trade and environmental concerns do come into conflict.

### ***Chapter II – Defining Conflict***

Before assessing the field of literature around conflicts between trade and the environment, it is crucial to first actually define the concept of conflict. The Appellate Body of the WTO has provided a definition of conflict in *Guatemala – Cement I* as “a situation where adherence to the one provision will lead to a violation of the other provision.”<sup>112</sup> It is a definition that has similarities with the historical definition of conflict in international law, such as the one provided by Wilfred Jenks who defined treaties as being in conflict when a party “cannot simultaneously comply with its obligations under both treaties.”<sup>113</sup> More recently, Marceau has largely agreed with this definition.<sup>114</sup>

This is a reasonably strict definition.<sup>115</sup> However, it possibly exists because

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<sup>110</sup> Agreement Establishing the World Trade Organization 1867 UNTS 14 (signed 15 April 1994, entered into force 1 January 1995), Preamble.

<sup>111</sup> Matsushita, above n 1, at 717.

<sup>112</sup> *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, 25 November 1998 (Report of the Appellate Body) at [65].

<sup>113</sup> Wilfred Jenks 'The Conflict of Law-Making Treaties' (1953) 30 BYIL 401 at 426.

<sup>114</sup> Gabrielle Marceau 'Conflicts of Norms and Conflict of Jurisdictions – The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) 1081.

<sup>115</sup> International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' A/CN.4/L.682, 13 April 2006 at 24.

international law favours a presumption against conflict when discussing two contradicting rules under international law.<sup>116</sup> This presumption exists because, in theory, when states come together to form new treaties, they are doing so in the context of pre-existing rules and obligations that they will seek to continue to follow and therefore, there is an assumption that the new rule will build upon the old treaty.<sup>117</sup> In such a world, potential conflicts are not conflicts at all because they can be “interpreted away”.<sup>118</sup> Therefore, it is only when an interpretation cannot be found which allows both rules to exist does a legal conflict arise, which means “genuine legal conflicts should be rather scarce.”<sup>119</sup>

There are problems with such a definition which could be regarded as too strict.<sup>120</sup> For example, it ignores the tension between an obligation and an explicit right.<sup>121</sup> This was seen in *Indonesia – Autos* where the panel refused to recognise a conflict between the national treatment prescription and permission to maintain certain subsidies under the SCM.<sup>122</sup> This was because a conflict only occurs where there are “obligations which cannot be complied with simultaneously”.<sup>123</sup> This flow on effect of the narrow definition is a particularly pressing concern when considering environmental concerns. Pauwelyn suggests there could be a WTO rule that imposes an obligation not to restrict trade, and an environmental convention which provides states with permission to restrict trade to protect the environment.<sup>124</sup> Under the above definition of conflict, favoured by the Appellate Body, there would be no conflict in this situation.<sup>125</sup> However, there are “looser understandings on conflict as well.”<sup>126</sup>

Under the narrower definition, any conflicts rules would not be triggered because,

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<sup>116</sup> Joost Pauwelyn 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 AJIL 535 at 550.

<sup>117</sup> Pauwelyn, above n 116, at 550.

<sup>118</sup> Pauwelyn, above n 116, at 550.

<sup>119</sup> Pauwelyn, above n 116, at 551.

<sup>120</sup> Erich Vranes 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 EIJL 17 395 at 395-396.

<sup>121</sup> Pauwelyn, above n 116, at 551.

<sup>122</sup> Vranes, above n 120, at 400-401.

<sup>123</sup> *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 23 July 1998 (Report of the Panel) at footnote 649.

<sup>124</sup> Pauwelyn, above n 116, at 551.

<sup>125</sup> Pauwelyn, above n 116 at 551.

<sup>126</sup> International Law Commission, above n 115, at 24.

under a strict definition, there is no conflict.<sup>127</sup> However, this fails to recognise that if the environmental measure is to have any impact, then that right to restrict trade may need to be utilised.<sup>128</sup> As the International Law Commission noted, “a treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions.”<sup>129</sup> As such, under the Pauwelyn example, there is a conflict between the obligation of the WTO and the right to take steps to protect the environment.<sup>130</sup>

In order to resolve that conflict, Vranes proposes a new definition based more on prevailing legal theory, that there “is a conflict between two norms, *one of which may be permissive*, if in obeying or applying one norm, the other one is necessarily or possibly violated.”<sup>131</sup> It is a similar definition of conflict that was adopted by the International Law Commission, who defined conflict as “a situation where two rules or principles suggest different ways of dealing with a problem.”<sup>132</sup>

In this paper, when seeking out potential conflicts between environmental measures combating climate change and WTO law, I propose to use a definition far closer to the broader definition sought by the International Law Commission, Vranes and Pauwelyn than the more traditional narrow definition. A conflict, for the purposes of this paper, is *a situation where an environmental measure is hindered or in some way limited due to a WTO obligation, or will cause a party to breach their WTO obligations if undertaken*. It is a broad definition designed to assess how much freedom is there for the international community to adequately tackle the threat of climate change while ensuring the continued respect for WTO law. With this definition in mind, a literature review of the areas of potential conflict between trade and the environment can be properly undertaken.

### ***Chapter III – Reviewing the Field – Potential Conflicts between***

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<sup>127</sup> Vranes, above n 120, at 398.

<sup>128</sup> Pauwelyn, above n 116, at 551.

<sup>129</sup> International Law Commission, above n 115, at 24.

<sup>130</sup> Pauwelyn, above n 116, at 551.

<sup>131</sup> Vranes, above n 120, at 415.

<sup>132</sup> International Law Commission, above n 115, at 25.

### *Trade & Climate Change Reform*

The literature review has been guided foremost by actual climate change policies that could possibly be enacted. Measures have been identified and then it has been considered what area of WTO law could possibly be in conflict with such policies. From there, the initial focus has been on the actual treaties and case law from the WTO, panels and the Appellate Body. Finally, the academic literature from this area has been read and discussed. It is hoped that such an approach ensures that a wide expanse of literature is read while still remaining firmly focussed on practical climate change policies and actual areas of potential conflict.

### *Measures Tackling Efficiency and the Principle of National Treatment*

Rather than reinventing the wheel, one of the more low-hanging fruits of climate change reform is to make our current technology more efficient. The less energy a product uses, the less impact it has on the climate. An example of this can be seen through the lens of fuel efficiency schemes.<sup>133</sup> Reducing the environmental effects of the transport sector will need to be a central part of any plan to combat climate change.<sup>134</sup> In 2004, the transport sector was responsible for 23% of all global energy-related emissions.<sup>135</sup> Even in Texas, which is the oil production capital of the United States, vehicle-related emissions still clock in at 21% of the state's total emissions.<sup>136</sup> Meanwhile, in the United States, transport-emissions amount to 30% of the country's total emissions.<sup>137</sup> Further, as developing countries continue to industrialise, their share of transport-related emissions will only increase.<sup>138</sup> If the United States could increase fuel efficiency requirements for cars by 8.5km per litre, this would reduce CO<sub>2</sub> emissions by around 400 million tonnes per year.<sup>139</sup> Therefore, fuel efficiency standards could be an important weapon in the arsenal of countries trying to combat global emissions. The same can be said for various products and industries, from factories to energy-efficient light bulbs.

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<sup>133</sup> Nathalie Bernasconi-Osterwalder and Johannes Norpoth 'Is World Trade Law a Barrier to Saving Our Climate' (September 2009), Center for International Environmental Law <[http://www.ciel.org/wp-content/uploads/2014/11/ClimateTradeReport\\_foee-ciel\\_sep09.pdf](http://www.ciel.org/wp-content/uploads/2014/11/ClimateTradeReport_foee-ciel_sep09.pdf)> at 15.

<sup>134</sup> Norpoth, above n 133, at 15.

<sup>135</sup> Norpoth, above n 133, at 15.

<sup>136</sup> Kunnie, above n 45, at 240.

<sup>137</sup> Kunnie, above n 45, at 226.

<sup>138</sup> Norpoth, above n 133, at 15.

<sup>139</sup> Norpoth, above n 133, at 15.

However, it is possible that such measures could come into conflict with the non-discrimination principles of WTO law, namely Article III of the GATT and the principle of National Treatment. These environmental measures described above would differentiate between products that are, on the surface, similar but through some background factor have different environmental implications.<sup>140</sup> Depending on how Article III is interpreted, it could either provide flexibility for countries to implement environmental measures or restrict them from doing so.<sup>141</sup>

### *Current Legal Position*

Article III:1 sets down the central principle that domestic laws and taxes should not be applied in such a way “so as to afford protection to domestic production”.<sup>142</sup> Article III:2 and Article III:4 then sets down the more specific laws that member states agreed to be governed by:<sup>143</sup>

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

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provision of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport

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<sup>140</sup> Nathalie Bernasconi-Osterwalder et al *Environment and Trade – A Guide to WTO Jurisprudence* (Earthscan, London, 2006) at 9.

<sup>141</sup> Bernasconi-Osterwalder, above n 140, at 10.

<sup>142</sup> GATT, above n 6, art III:1.

<sup>143</sup> GATT, above n 6, art III:2 and art III:4.

and not on the nationality of the product.

An *ad* to Article III:2 notes that the second sentence involves situation where the two products are “directly competitive or substitutable.”<sup>144</sup> Both Article III:2 and Article III:4 use in some form the expression “like products”, though Article III:2’s use of “like product” is narrower because of that provision’s *ad* adding another factor of “directly competitive or substitutable” products.<sup>145</sup> It is a crucial question for environmental measures. Article III can only defeat an environmental measure if it is treating “like products” differently. The definition of “like products” is therefore critical in deciding if there is a conflict between trade law and potential environmental measures.<sup>146</sup>

“Like products” is a term that has been considered in numerous panel and Appellate Body reports.<sup>147</sup> A clear summary of the term, though, is found in the Appellate Body report of *EC – Asbestos*.<sup>148</sup> First of all, the Appellate Body noted an earlier observation of theirs in *Japan – Alcoholic Beverages II* when they remarked that “there can be no precise and absolute definition of what is like” but rather that likeness is an accordion that can be stretched and squeezed depending on what provision of a WTO Agreement is being applied.<sup>149</sup>

The Appellate Body noted that an ordinary meaning of “like” meant products that “share a number of identical or similar characteristics or qualities.”<sup>150</sup> Further, the use of “similar” was consistent with the French and Spanish versions of Article III:4, which used “produits similaires” and “productos similares” respectively.<sup>151</sup> However, the Appellate Body noted that an ordinary meaning of the word leaves

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<sup>144</sup> GATT, above n 6, *Ad* to art III:2.

<sup>145</sup> Henrik Horn and Joseph H. H. Weiler 'EC – Asbestos European Communities – Measures Affecting Asbestos and Asbestos-Containing Products' (2004) 3(1) WTR 129 at 136.

<sup>146</sup> Bernasconi-Osterwalder, above n 140, at 9.

<sup>147</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996 (Report of the Appellate Body) *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996 (Report of the Appellate Body).

<sup>148</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001 (Report of the Appellate Body).

<sup>149</sup> *Japan – Alcoholic Beverages*, above n 147, at p 21.

<sup>150</sup> *EC – Asbestos*, above n 148, at [91].

<sup>151</sup> *EC – Asbestos*, above n 148, at [91].

many questions left unanswered.<sup>152</sup> Instead, the Appellant Body noted that the “general principle” of Article III:1 “informs” the interpretation of the other parts of Article III, including “like products”.<sup>153</sup>

Article III:1’s general principle is that internal measures should “not be applied to imported and domestic products so as to afford protection to domestic production”. The Appellate Body had previously considered such a term as meaning that member states must provide “equality of competitive conditions for imported products in relation to domestic products”.<sup>154</sup> Therefore, when considering “like products” specifically under Article III:4, the Appellate Body remarked that the word “like... is to be interpreted to apply to products that are in such a competitive relationship”.<sup>155</sup> Further, they noted that the Report of the Working Party on *Border Tax Adjustments* outlined an approach for considering “likeness” and that such an approach had been confirmed and built on by Panel and Appellate Body decisions.<sup>156</sup> *Japan – Alcoholic Beverages II* confirm that the *Border Tax Adjustment* approach also applies to Article III:2.<sup>157</sup> It involved four general criteria:<sup>158</sup>

- (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification the products.

The Appellate Body noted that these criteria essentially set down four “characteristics” that the products may share:<sup>159</sup>

- (i) the physical properties of the product; (ii) the extent to which the products are capable of serving the same or similar end-

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<sup>152</sup> *EC – Asbestos*, above n 148, at [92].

<sup>153</sup> *EC – Asbestos*, above n 148, at [98].

<sup>154</sup> *Japan – Alcoholic Beverages*, above n 147, at p 16.

<sup>155</sup> *EC – Asbestos*, above n 148, at [99].

<sup>156</sup> *EC – Asbestos*, above n 148, at [101].

<sup>157</sup> *Japan – Alcoholic Beverages*, above n 147, at p 21.

<sup>158</sup> *EC – Asbestos*, above n 148, at [101].

<sup>159</sup> *EC – Asbestos*, above n 148, at [101].

uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular function in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purpose.

The Appellate Body was quick to write that the above criteria were only “a framework for analyzing the “likeness” of particular products on a case-by-case basis.”<sup>160</sup> The criteria were neither “treaty-mandated nor a closed list” that would determine whether products were alike; they are merely “simple tools to assist in the task of sorting and examining the relevant evidence.”<sup>161</sup> Emily Lydgate, when writing about *EC – Seal Products*, notes that the “status quo” of the Appellate Body's position on analysing “like products” is still in place.<sup>162</sup>

The question of “likeness” is only the first step that a panel or the Appellate Body will look at when considering an Article III breach. Article III has two distinct provisions; Article III:2, which is concerned with internal taxes or charges, and Article III:4 which is concerned with treatment under domestic laws and regulations. Both of them require “likeness”, but Article III:2 has the second step of ensuring that the imported like product does not face a charge “in excess of” domestic products.<sup>163</sup> Article III:4's second step is to ensure that the imported like product is “accorded treatment no less favourable” than the domestic product.<sup>164</sup> While being different tests, with different terms, they are both informed by the guiding principle that a member state should not use their internal taxes or laws “so as to afford protection to domestic production”.<sup>165</sup>

Reinhard Quick and Christian Lau attempt to tackle the distinction regarding likeness between Article III:2 and Article III:4. They note that it might be tempted to suggest Article III:2 is broader because it imposes obligations “with respect to

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<sup>160</sup> *EC – Asbestos*, above n 148, at [101].

<sup>161</sup> *EC – Asbestos*, above n 148, at [101].

<sup>162</sup> Emily Lydgate 'Sorting Out Mixed Messages under the WTO National Treatment Principle: A Proposed Approach' (2016) 15(3) WTR 423 at 428.

<sup>163</sup> GATT, above n 6, art III:2.

<sup>164</sup> GATT, above n 6, art III:4.

<sup>165</sup> GATT, above n 6, art III:1.

directly competitive and substitutable products”.<sup>166</sup> However, if one provision of Article III is broader than the other, it could end up frustrating “the general principle of GATT Article III:1”.<sup>167</sup> It seems to be a point that the Appellate Body is conscious of. In *Japan – Alcohol Beverages II* they state that Article III:1 assists in the understanding of all paragraphs in Article III.<sup>168</sup> In *EC – Asbestos*, the Appellate Body went further, saying:<sup>169</sup>

we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994.

Quick and Lau considers the jurisprudence of the Appellate Body on this issue and concludes that the Appellate Body interprets “like product” in Article III:4 in an identical fashion to how they interpret “directly competitive or substitutable products” in Article III:2, therefore meaning “that notwithstanding their different wording, the product scope of both provisions is identical.”<sup>170</sup> James Flett seeks to reconcile the situation by arguing that the first sentence of Article III:2, with a narrower definition of “like product”, refers specifically to *de jure* breaches of the National Treatment principle.<sup>171</sup> The second sentence, concerned with “directly competitive or substitutable”, is focussed on *de facto* breaches.<sup>172</sup>

Flett also makes the argument that “like products” and “directly competitive or substitutable” have been erroneously interpreted as “different degrees of the same concept”.<sup>173</sup> Instead, he argues, “like product” refers to a horizontal comparison,

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<sup>166</sup> Reinhard Quick and Christian Lau 'Environmentally Motivated Tax Distinctions and WTO Law – The European's Commission Green Paper on Integrated Product Policy in Light of the 'Like Product' and 'PPM- Debates' (2003) 6(2) J Intl Econ L 419 at 425.

<sup>167</sup> Quick and Lau, above n 166, at 426.

<sup>168</sup> *Japan – Alcoholic Beverages*, above n 147, at p 18.

<sup>169</sup> *EC – Asbestos*, above n 148, at [99].

<sup>170</sup> Quick and Lau, above n 166, at 428-429.

<sup>171</sup> James Flett 'WTO Space for National Regulation: Requiem for a Diagonal Vector Test' (2013) 16(1) J Intl Econ L 37 at 58. At page 51 Flett defines *de jure* breaches as where a member states takes an action that “explicitly discriminates exclusively based on origin.”

<sup>172</sup> Flett, above n 171, at 58.

<sup>173</sup> Flett, above n 171, at 58.

while “directly competitive or substitutable” is a vertical relationship.<sup>174</sup> It would not appear to be a line of argument forcefully taken up by other academics. Indeed, Lydgate writes herself that any attempt to differentiate the two provisions would be missing “the forest for the trees” because it would be implying that “taxation measures should be treated less strictly than regulatory measures, when Article III:1, the chapeau, equally informs the interpretation of all of Article III.”<sup>175</sup>

The Appellate Body considered the term of “so as to afford protection” in the case of *Japan – Alcoholic Beverages II*, where they rejected an intent analysis in favour of an objective examination of the measure and whether it protected the domestic product.<sup>176</sup> The Appellate Body said:<sup>177</sup>

It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure.

Likewise, the term of according “treatment no less favourable” is treated with a similar analytical eye, rather than a subjective interpretation. The Panel in *US – Gasoline* noted that less favourable treatment would exist if an imported product had fewer equal competitive opportunities than the domestic like product.<sup>178</sup> Since the United States did not challenge the ruling made with regard to Article III, the Appellate Body did not discuss that matter.<sup>179</sup> However, the Appellate Body has recently reaffirmed the sentiment in the panel decision of *US - Gasoline* in the

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<sup>174</sup> Flett, above n 171, at 58.

<sup>175</sup> Lydgate, above n 162, at 441.

<sup>176</sup> *Japan – Alcoholic Beverages*, above n 147, at p 29.

<sup>177</sup> *Japan – Alcoholic Beverages*, above n 147, at p 27-28.

<sup>178</sup> *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/R, 20 May 1996 (Report of the Panel) at [6.10].

<sup>179</sup> *US – Gasoline*, above n 148, at p 9.

case of *EC – Seal Products*.<sup>180</sup> In that decision, the Appellate Body said that “the term “treatment no less favourable” requires effective equality of opportunities for imported products to compete with like domestic products”.<sup>181</sup> The result of such a definition means:<sup>182</sup>

Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products. Hence, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like products.

The current law around National Treatment and Article III is therefore analytical and objective. Like products are defined by shared characteristics, and terms such as “so as to afford domestic product” and “treatment no less favourable” are interpreted in an objective way, without normally considering things such as legislative intent.

#### *Discussion on Interpretation*

Both Emily Lydgate and the pair of Aaron Cosbey and Petros C. Mavroidis have noted that the current interpretation of Article III has not always been the case.<sup>183</sup> Cosbey and Mavroidis write that the last report of the GATT era concerned with Article III was the Panel report of *US – Taxes on Automobiles*.<sup>184</sup> Rather like the fuel efficiency standard example used above by Bernasconi-Osterwalder and Norpoth, the United States wanted to set a tax scheme that was partly based on a larger tax for companies which had a fleet of “gas guzzlers” cars.<sup>185</sup> The Panel implemented an “aims and effects” test:<sup>186</sup>

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<sup>180</sup> *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, 18 June 2014 (Report of the Appellate Body).

<sup>181</sup> *EC – Seal Products*, above n 180, at [5.101].

<sup>182</sup> *EC – Seal Products*, above n 180, at [5.116].

<sup>183</sup> Lydgate, above n 162, 437-438; Aaron Cosbey & Petros C. Mavroidis 'Heavy Fuel: Trade and Environment in the GATT/WTO Case Law' (2014) 23(3) *RECIEL* 23(3) 288 at 291.

<sup>184</sup> *United States – Taxes on Automobiles*, DS31/R, 11 October 1994 (Report of the Panel).

<sup>185</sup> Cosbey & Mavroidis, above n 183, at 291.

<sup>186</sup> *US – Taxes on Automobiles*, above n 184, at 5.10.

The Panel noted that the term “so as to” suggested both aim and effect. Thus the phrase “so as to afford protection” called for an analysis of elements including the aim of the measure and the resulting effect. A measure could be said to have the aim of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequences of the pursuit of a legitimate policy goal. A measure could be said to have the effect of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products. The effect of a measure in terms of trade flow was not relevant for the purposes of Article III, since a change in the volume or proportion of imports could be due to many factors other than government measures.

Mavroidis and Cosbey describe this “aims and effect” test as one concerned with “the regulatory aims pursued by the intervening government” and not the prevailing perceptions in the marketplace.<sup>187</sup> Lydgate agrees with this interpretation of *US – Taxes on Automobile*, noting that the aim part of the “aims and effect” test was really just “a synonym for 'intent'”.<sup>188</sup> When attempting to explain the motive of the Panel, Mavroidis and Cosbey write that the Panel were trying to create “the necessary device to understand likeness as originally designed: a term giving flesh to the obligation not to discriminate, and not a term condoning de-regulation.”<sup>189</sup>

Regardless of any merit in this argument, the first decision in the WTO era on Article III, *Japan – Alcoholic Beverages II*, expressly rejected the “aims and effects” test.<sup>190</sup> Lydgate states that the reasoning for this rejection by the Appellate

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<sup>187</sup> Cosbey & Mavroidis, above n 183, at 291.

<sup>188</sup> Lydgate, above n 162, at 438.

<sup>189</sup> Cosbey & Mavroidis, above n 183, at 291.

<sup>190</sup> *Japan – Alcoholic Beverages*, above n 147, at p 27-29.

Body was twofold: first, it failed to consider the key principle of protectionism, and secondly that the idea of “government intent was too subjective.”<sup>191</sup> The latter of the two points was confirmed in *Chile – Taxes on Alcoholic Beverages* when the Appellate Body said the “subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters.”<sup>192</sup>

Lydgate notes that the Appellate Body has consistently reaffirmed that “likeness” is a “market-based, not a policy-based, concept.”<sup>193</sup> Henrik Horn and Joseph Weiler agree, noting that *EC – Asbestos* was an example of the 'objective' methodology.<sup>194</sup> They define that objective methodology as being one where taxation and regulation may not be applied in a way that *results* in protection being afforded to domestic production, regardless of its intent.<sup>195</sup> David Wirth notes that while health considerations were considered:<sup>196</sup>

only one of the three Appellate Body members hearing the appeal thought that health considerations alone would be sufficient to support the conclusion that asbestos and alternatives to it are not “like”.

Because of this situation, Wirth believes that it “may be difficult for national governments to apply product regulations with any confidence as to the outcome in cases in which risks are less clearly established.”<sup>197</sup> Such a conclusion would tend to suggest that policy considerations are still largely off-limit for member states to argue. Lydgate's paper would seem to confirm such a conclusion, while being ultimately dismissive of such an interpretative stance.

She notes that there is “a kind of double consciousness” where the Appellate Body

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<sup>191</sup> Lydgate, above n 162, at 438.

<sup>192</sup> *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, 12 January 2000 (Report of the Appellate Body) at [62].

<sup>193</sup> Lydgate, above n 162, at 438.

<sup>194</sup> Horn and Weiler, above n 145, at 141.

<sup>195</sup> Horn and Weiler, above n 145, at 133-134.

<sup>196</sup> David A. Wirth 'European Communities – Measures Affecting Asbestos and Asbestos-Containing Products' (2002) 96(2) AJIL 435 at 438.

<sup>197</sup> Wirth, above n 196, at 438.

refuses to recognise subjective intent while still concluding that “a measure's purposes are relevant to whether it is applied so as to afford protection to domestic products”.<sup>198</sup> Horn and Weiler noted such a fact, pointing out that *Chile – Taxes on Alcoholic Beverages* used language that would appear to affirm some sort of “intent” test.<sup>199</sup> Matsushita and his co-authors also write that the “aims and effects” test's demise has been less complete than one would think when reading the pertinent Appellate Body report.”<sup>200</sup>

In fact, Lydgate notes that the evolving jurisprudence of Agreement on Technical Barriers to Trade (‘TBT’) Article 2.1 and the comment in *Dominican Republic – Import and Sale of Cigarettes* that a negative impact “explained by factors or circumstances unrelated to the foreign origin of the product” does not necessarily mean there is less favourable treatment occurring,<sup>201</sup> led the European Union in *EC – Seal Product* to argue that a “legitimate regulatory distinction” could exist in Article III.<sup>202</sup>

While not directly addressing the point, the Appellate Body reasserted itself that “less favourable treatment” is an assessment of competitive condition, effectively shutting down any line of jurisprudence that could be built from the comments in *Dominican Republic - Cigarettes*. The Appellate Body stated that:<sup>203</sup>

a determination of whether imported products are treated less favourably than like domestic products involve an assessment of the implications of the contested measures for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is 'less favourable' within the meaning of Article III:4.

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<sup>198</sup> Lydgate, above n 162, at 439.

<sup>199</sup> Horn and Weiler, above n 145, at 141.

<sup>200</sup> Matsushita, above n 1, at 186.

<sup>201</sup> *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, 19 May 2005 (Report of the Appellate Body) at [93].

<sup>202</sup> Lydgate, above n 162, at 439.

<sup>203</sup> *EC – Seal Products*, above n 180, at [5.116].

Several academics have suggested that the current interpretative path should not be stuck to. Robert Howse and Donald Regan have argued that the “aims and effect” test should be returned and that the Appellate Body should look into the regulatory intent of the measure in question.<sup>204</sup> Grossman and his colleagues in a chapter in *Legal and Economic Principles of World Trade Law* argue that the “aims and effect” test in *US – Taxes on Automobile* while ultimately incorrect, still had the right instinct.<sup>205</sup> They argue that Article III is a prohibition on protectionist measures and protectionist measures only. Therefore, it is necessary to interpret “like products” as having both a market dimension and a policy dimension, which both must be met before Article III can be violated.<sup>206</sup> Cosbey and Mavroidis continue this argument by noting that:<sup>207</sup>

products are policy ‘unlike’ when it would be desirable from an international efficiency point of view to treat them differently. Typically, the reason why there is a need to treat them differently is that buyers do *not* make the desire distinction – that is, market likeness is often part of the reason why products are *not* policy like.

However, they do note that “market likeness” is still an important criterion to keep separate.<sup>208</sup> Cosbey and Mavroidis gives the example of a possibility where diesel trucks and coffee cups should have the same production tax for policy reasons, therefore making coffee cups and diesel trucks “like products” in a policy dimension.<sup>209</sup> A “market like” criteria therefore ensures that Article III would not be violated when the level of taxation of trucks and cups are at a different level.<sup>210</sup>

Horn and Weiler provides two alternatives to the 'objective' methodology

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<sup>204</sup> Robert Howse & Donald Regan 'The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’ (2000) 11(2) EJIL 249 at 257.

<sup>205</sup> G.M Grossman, H. Horn and P.C Mavroidis 'Domestic Instruments' in H. Horn and P.C Mavroidis, *Legal and Economic Principles of World Trade Law* (Cambridge University Press, USA, 2013) at 205.

<sup>206</sup> Grossman, above n 205, at 205.

<sup>207</sup> Cosbey & Mavroidis, above n 183, at 294.

<sup>208</sup> Cosbey & Mavroidis, above n 183, at 294.

<sup>209</sup> Cosbey & Mavroidis, above n 183, at 294.

<sup>210</sup> Cosbey & Mavroidis, above n 183, at 294.

currently favoured by the Appellate Body. The first is an affirmation of the position adopted by other academic like Howse and Grossman, which they call the 'Effect and Purpose' approach.<sup>211</sup> The 'Effect and Purpose' requires there to be a *mens rea*, an “intent – actual or constructed” of protectionism.<sup>212</sup> Meanwhile, a further pushing out of the boat would be their 'Alternative Comparators' approach, which challenges the very way the two “like products” are compared.<sup>213</sup> In such a system, instead of considering market likeness, the regulating state would choose how the two products might be considered like, such as their ecological efficiency.<sup>214</sup>

Lydgate provides a slight difference in approach when proposing a three-step assessment to National Treatment, but it still has the underlying principle of the methods proposed by Howse, Grossman, and others. Lydgate sets out her three-step approach as followed:<sup>215</sup>

The first two steps are the same as those the Appellate Body has affirmed in *EC – Seal Products*: discerning whether the products in dispute are in a competitive relationship, and whether there is an impact on the conditions of competition to the detriment of the imported product. There should then however be a third step of considering whether the detrimental impact can be explained based upon a non-protectionist regulatory rationale.

Lydgate’s reasoning for this interpretation is not based solely on policy reasoning, such as environmental need. She notes that under the current situation confirmed by *EC – Seal Products*, the proper functioning of certain WTO provisions have been threatened.<sup>216</sup> The TBT Agreement, despite being the newer provision is now marginalised because it is an easier test to pass due to its “legitimate regulatory

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<sup>211</sup> Horn and Weiler, above n 145, at 137.

<sup>212</sup> Horn and Weiler, above n 145, at 138.

<sup>213</sup> Horn and Weiler, above n 145, at 139.

<sup>214</sup> Horn and Weiler, above n 145, at 140.

<sup>215</sup> Lydgate, above n 162, at 425.

<sup>216</sup> Lydgate, above n 162, at 426.

distinction” factor.<sup>217</sup> This factor comes from Article 2.2 of the TBT which notes that technical regulations can have a “legitimate objective”.<sup>218</sup> It provides space to go deeper into the design and structure of the measure in question to consider if it is a legitimate regulatory distinction to serve a regulatory goal.<sup>219</sup>

Flett wrote before *EC – Seals Product* that the TBT Agreement’s Article 2.1 and its “legitimate regulatory distinction” test was guiding a way forward for Article III, “heralding a further improvement in the previously unsettled balance between the trade interest and national regulatory autonomy.”<sup>220</sup> However, *EC – Seals Product* slammed the door on such an interpretation of Article III, stating that there are contextual differences between the TBT and Article III, and further that Article III can rely on Article XX for policy concerns in a way that the TBT cannot.<sup>221</sup> Lydgate is strongly against there being a justification for a divergence between Article III of the GATT and Article 2.1 of the TBT Agreement.<sup>222</sup> Further, because Article 2.1 is seen as an easier test to meet, there is now an incentive to only bring claims under the GATT despite the TBT being the newer agreement; Lydgate notes that Norway did just that in *EC – Seals Product*.<sup>223</sup> By relying solely on the GATT, a complaining member state can avoid having to argue against a “legitimate regulatory distinction” test, which could save environmental measures. The GATT therefore becomes a more effective tool at shutting down certain measures than the TBT Agreement.

Gabrielle Marceau seems hesitant to come to a similar conclusion, while still retaining many questions arising from the Appellate Body’s decision in *EC – Seals Product*.<sup>224</sup> She writes that it “remains to be seen” whether the differences between the GATT and TBT will have a substantive impact as proposed by the EU (which are largely the same concerns detailed by Lydgate above).<sup>225</sup> Instead, she

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<sup>217</sup> Lydgate, above n 162, at 426.

<sup>218</sup> Agreement on Technical Barriers to Trade 1868 UNTS 120 (entered into force 1 January 1995), art 2.2.

<sup>219</sup> Lydgate, above n 162, at 443.

<sup>220</sup> Flett, above n 171, at 39.

<sup>221</sup> *EC – Seals Product*, above n 180, at [5.125].

<sup>222</sup> Lydgate, above n 162, at 443.

<sup>223</sup> Lydgate, above n 162, at 443.

<sup>224</sup> Gabrielle Marceau ‘A Comment on the Appellate Body Report in *EC – Seal Product*’ in the Context of the Trade and Environment Debate’ (2014) 23(3) RECIEL 318.

<sup>225</sup> Marceau, above n 224, at 325.

notes that “these clarifications are important in the context of trade and the environment” and can show how environmental concerns can be reflected through the GATT and TBT.<sup>226</sup>

It has to be noted that a considerable amount of the literature suggesting that the interpretation of Article III requires an “intent” element came between the two Appellate Body decisions of *EC – Asbestos* and *EC – Seal Product*. Yet, the Appellate Body remained indifferent in the latter, reaffirming the objective, market-based approach. The question of their motive to sticking to such a view becomes important when considering how the environment might be better accommodated.

Horn and Weiler speculate on two potential motives for their “reluctance to move away from” the strictly market-based approach.<sup>227</sup> First, it may be a question of legitimacy and not overstepping their jurisdiction.<sup>228</sup> Secondly, it might just be the case that the Appellate Body feels that Article XX is the better arena for this issue because it reflects “the multilateral dimension of the WTO”.<sup>229</sup> Yet Matsushita and his co-authors speculate that the rejection of any “intent” based system may be motivated.<sup>230</sup>

more by the wish to avoid intrusive inquiries into the inner workings of the decision-making procedures in the heterogeneous membership – which includes absolute monarchies, communist dictatorships, military governments, one-party regimes, and Western-style democracies.

Currently, the Appellate Body's interpretation of Article III could be unfriendly to environmental measures that might be taken to combat climate change. Measures that government might want to take to increase efficiency and decrease emissions, such as promoting fuel efficiency, might fall afoul of Article III and the principle of National Treatment. The current interpretation of “like products”, based on the

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<sup>226</sup> Marceau, above n 224, at 325.

<sup>227</sup> Horn and Weiler, above n 145, at 143.

<sup>228</sup> Horn and Weiler, above n 145, at 143.

<sup>229</sup> Horn and Weiler, above n 145, at 143.

<sup>230</sup> Matsushita, above n 1, at 188.

product itself, might either stop these measures dead or, at least, provide uncertainty about their WTO consistency and therefore cause governments not to act.

In light of this, several academics have agreed that the interpretation of Article III should change. Most suggestions are based on reviving the old “aims and effect” test, but with various changes to make it better suited for WTO law. Such a change would allow policy considerations to be factored into Article III, therefore meaning that member states would no longer have to rely on Article XX to bring about environmentally friendly measures that might have the side effect of restricting trade in some way. Before considering the relevancy of Article XX, though, it is appropriate to also look at the issue of processing and production methods.

#### *Processing and Production Methods*

There is an additional dimension when talking about National Treatment and potential environmental actions that might be taken to combat climate change: production and processes method (PPMs).<sup>231</sup> It has been remarked by Hunter, Salzman and Zaelke that “clarifying the PPM issue is one of the most important and difficult challenges in the trade and environment debate.”<sup>232</sup> The reason for this is that if countries cannot distinguish goods on the basis of the environmental impact of their production, then countries without rigorous environmental standards gain a competitive advantage.<sup>233</sup> Yet:<sup>234</sup>

GATT jurisprudence with respect to Article III has been characterized by the near complete refusal to allow a product's conditions of production (notably the social, labour, and environmental conditions of production) per se as a criterion for determining “likeness” or, rather, “unlikeness”.

The academic debate around PPMs is split with writers taking diametrically opposed views about whether the way a product is processed or produced can be a

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<sup>231</sup> Bernasconi-Osterwalder, above n 140, at 203.

<sup>232</sup> Hunter, Salzman and Zaelke, above n 2, at 1274-1275.

<sup>233</sup> Hunter, Salzman and Zaelke, above n 2, at 1274-1275.

<sup>234</sup> Matsushita, above n 1, at 190.

factor in determining what is a “like product”. Joost Pauwelyn goes so far as to say that people who argue that PPMs cannot be considered in the “like product” assessment do so in a way that “defy understanding”.<sup>235</sup> He characterises the opinion against PPMs as being founded on “two unadopted GATT panel reports”, which are “not even public documents” and that “the value of these two GATT reports is almost nil”.<sup>236</sup> The two panel reports in question are the two cases involving the United States and tuna, *US – Tuna (Mexico)* and *US – Tuna-Dolphin II*. In *US – Tuna (Mexico)*, the panel declared that production processes did not factor into a “like product” interpretation.<sup>237</sup>

Bradley Condon agrees with Pauwelyn that “as an unadopted GATT report, *US – Tuna (Mexico)* has no normative value.”<sup>238</sup> This statement finds support in *Japan – Alcoholic Beverages II*. The Appellate Body noted that “adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels”<sup>239</sup> However, “unadopted panel reports “have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members”.<sup>240</sup> Unlike Pauwelyn, though, Condon still believes that the report might have some value since “a panel may find useful orientation in its reasoning”.<sup>241</sup> Again, this statement finds support, since the Appellate Body has said that “we agree that “a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant”.<sup>242</sup>

The issue around PPMs stems from how “like products” are interpreted, as detailed above with the four main criteria: physical properties, end uses, consumers' preference and tariff classification.<sup>243</sup> A product-based methodology, such as Article III, is therefore inconsistent with an assessment of how the product

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<sup>235</sup> Joost Pauwelyn 'Recent Books on Trade and Environment: Gatt Phantoms Still Haunt the WTO' (2004) 15 EJIL 575 at 585.

<sup>236</sup> Pauwelyn, above n 235, at 585.

<sup>237</sup> *US – Tuna (Mexico)* DS21/R, 3 September 1991 (Report of the Panel) at [41].

<sup>238</sup> Bradley J. Condon 'Climate Change and Unresolved Issues in WTO Law' (2009) 12(4) J Intl Econ L 895 at 908.

<sup>239</sup> *Japan – Alcoholic Beverages*, above n 147, at p 14.

<sup>240</sup> *Japan – Alcoholic Beverages*, above n 147, at p 14-15.

<sup>241</sup> Condon, above n 238, at 908.

<sup>242</sup> *Japan – Alcoholic Beverages*, above n 147, at p 15.

<sup>243</sup> *EC – Asbestos*, above n 148, at [101].

was made or processed.<sup>244</sup> Quick and Lau note that a PPM distinction would have to rely on the consumers' preference factor to successfully argue the products are unlike.<sup>245</sup> This is because for a PPM distinction, the physical properties, end uses and tariff classification of the two products are likely to all be the same.<sup>246</sup> Both Howse and Pauwelyn use this consumer-based argument to suggest that PPMs can be considered during an Article III dispute,<sup>247</sup> as do Matsushita and his co-writers.<sup>248</sup> Indeed, Pauwelyn write that it is “essentially the market place of consumers that decides whether products are like/DCS [directly competitive or substitutable]”.<sup>249</sup> Therefore:<sup>250</sup>

*if* consumers do make sufficient difference between 'green' and other electricity (or between 'natural' and GMO food) so can the government, the logic being that any governmental intervention (say a lower tax on green electricity or a label on GMO food) will then not alter the conditions of competition between green and non-green electricity or between 'natural' and GMO food since consumers do not regard them as sufficiently substitutable in the first place.

However, this view is challenged by other academics. The book written by Nathalie Bernasconi-Osterwalder *et al* suggests that the “aims and effect” test might need to be revived before the PPMs can truly be factored in Article III.<sup>251</sup> Quick and Lau submits that consumers' taste and habits cannot make two identical products unlike.<sup>252</sup> Marceau and Trachtman notes that “it is difficult to envision a circumstance where the effect would be great enough to render physically similar products unlike”.<sup>253</sup> The main concern is that governments can lean on their

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<sup>244</sup> Robert Read 'Like Products, Health & Environmental Exceptions: The Interpretation of PPMs in Recent WTO Trade Dispute Cases' (2004) 5(2) *The Estey Center Journal of International Law and Trade Policy* 123 at 127.

<sup>245</sup> Quick and Lau, above n 166, at 431.

<sup>246</sup> Quick and Lau, above n 166, at 431.

<sup>247</sup> Robert Howse 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27(2) *Colum.J.Envntl.L* 491 at 515; Pauwelyn, above n 235, at 586.

<sup>248</sup> Matsushita, above n 1, at 191.

<sup>249</sup> Pauwelyn, above n 235, at 586.

<sup>250</sup> Pauwelyn, above n 235, at 586.

<sup>251</sup> Bernasconi-Osterwalder, above n 140, at 210.

<sup>252</sup> Quick and Lau, above n 166, at 432.

<sup>253</sup> Gabrielle Marceau and Joel Trachtman 'The Technical Barriers to Trade Agreement, the

consumers' perception of certain products and therefore shape consumers' preference for the purpose of protectionism.<sup>254</sup> Quick and Lau therefore proposes that consumers' preference can only be decisive in rare situations where consumers have made their own mind up without any government intervention, noting that Marceau and Trachtman suggest this is very rare to happen.<sup>255</sup>

Condon also agrees that the Howse and Pauwelyn approach of relying on consumers' preference is problematic, distinguishing *EC – Asbestos* from other potential PPM measures.<sup>256</sup> Condon writes that Howse's argument overlooks the fact that the health effects of asbestos are still related to the product itself, and is not a factor about how it is produced.<sup>257</sup> When coupled with the panel report of *US – Tuna (Mexico)* and its principle that the a “like product” should only look at the product itself and not its production processes, then Condon concludes that Article III is not the right forum for this debate.<sup>258</sup>

Despite this conclusion, Condon looks at another option for tackling processing and production method under the assessment of “like products”, suggesting it may be possible to consider the “carbon content” of a product in a way similar to alcohol content.<sup>259</sup> The Panel Report of *US – Malt Beverages* decided that low alcohol beer and high alcohol beer were not “like products” under Article III:4 and that the differentiation in treatment between the two did not afford protection to domestic production.<sup>260</sup> Such an approach might allow products with a high carbon content to be different products to those with a low carbon content.<sup>261</sup> However, such an interpretation would be tempered by the decision of the Appellate Body in *Chile – Alcoholic Beverages*. In that decision, the Appellate Body found the differentiation in taxation between low and high alcohol beer did amount to a Article III:2 breach because the products were in a competitive

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Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulations of Goods' (2002) 36 *JWT* 811 at 859.

<sup>254</sup> Quick and Lau, above n 166, at 432-433.

<sup>255</sup> Quick and Lau, above n 166, at 433.

<sup>256</sup> Condon, above n 238, at 907.

<sup>257</sup> Condon, above n 238, at 907.

<sup>258</sup> Condon, above n 238, at 907.

<sup>259</sup> Condon, above n 238, at 909.

<sup>260</sup> *US - Malt Beverages* DS23/R-39S/206, 19 June 1992 (Report of the Panel) at [5.71]-[5.73].

<sup>261</sup> Condon, above n 238, at 909.

relationship and the measures did give protection to domestic products.<sup>262</sup> Further, it still struggles with the fact that a high alcohol content is a part of the product itself, whereas a carbon content is not related to the product, but rather its production method.<sup>263</sup>

When considering the motive of the Appellate Body's refusal to consider PPMs within Article III, Matsushita and his co-authors speculate that it may be “influenced in equal parts by principle and pragmatism”.<sup>264</sup> The GATT's strength is its efficiency for a place for international trade to be regulated, via only economic factors, and by bringing in non-economic concerns (such as the environment and climate change), it may upset the equilibrium that member states are happy with.<sup>265</sup>

Instead of considering PPMs measures under the “like product” assessment of Article III of the GATT, various academics have suggested that Article XX and its exceptions is where PPMs measures should be considered.<sup>266</sup> Even Pauwelyn suggests that a PPMs measure that violates the GATT can still be salvaged by Article XX on the basis of being a PPMs measure.<sup>267</sup> This would seem to be the only clear area of consensus on the matter and as such it would seem appropriate to turn our attention to Article XX.

### *Article XX*

Strictly speaking, Article XX is not an area that is a source of conflict between trade and the environment. However, it is crucial to the field. Article XX provides exceptions to the GATT rules, which might salvage a host of environmental-based measures. Therefore it is necessary to consider Article XX, its case law, and the academic literature around it. Article XX(b) and (g), in particular, are the crucial provisions when considering measures related to the environment.<sup>268</sup>

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<sup>262</sup> *Chile – Taxes on Alcoholic Beverages*, above n 192.

<sup>263</sup> Condon, above n 238, at 909-910.

<sup>264</sup> Matsushita, above n 1, at 190.

<sup>265</sup> Matsushita, above n 1, at 190.

<sup>266</sup> Quick and Lau, above n 166, at 433; Condon, above n 238, at 908; Marceau, above n 224, at 326.

<sup>267</sup> Pauwelyn, above n 235, at 586.

<sup>268</sup> Condon, above n 238, at 911.

Article XX is said to be “one of the most well-established safety valves”, which allows WTO members to still pursue public policy goals while sticking to the free trade ideals of the WTO.<sup>269</sup> The reason for this largely comes from how Article XX has been interpreted. While the accepted principle of interpretation suggests that exceptions should be interpreted narrowly, the Appellate Body has not done this.<sup>270</sup> Instead, it has considered that the general exceptions are more a balancing act between the substantive obligations of the GATT and Article XX.<sup>271</sup> This was expressed by the Appellate Body in *US – Gasoline* when they remarked:<sup>272</sup>

The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Article I, III and XI; conversely, the context of Article I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g. Article I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.

As Van den Bossche and Zdouc conclude, the Appellate Body is striking “a *balance* between, on the one hand, trade liberalisation, market access, non-

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<sup>269</sup> Wenwei Guan ‘How General Should the GATT General Exceptions Be?: A Critique of the ‘Common Intention’ Approach of Treaty Interpretation’ (2014) 48(2) JWT 219 at 220.

<sup>270</sup> Peter Van den Bossche and Werner Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Material* (3<sup>rd</sup> ed, Cambridge University Press, Cambridge, 2013) at 547.

<sup>271</sup> Reinhard Quick ‘Do We Need Trade and Environment Negotiations or Has the Appellate Body Done the Job?’ (2013) 47(5) JWT 957 at 968.

<sup>272</sup> *US – Gasoline*, above n 147, at 18.

discrimination rules and, on the other hand, other societal values and interests.”<sup>273</sup> This is a crucial approach when considering the environment, since it essentially places its importance on equal footing with the goal of free trade.

Article XX is a two-tier test.<sup>274</sup> According to *US – Shrimp*, this is “not inadvertence or random choice, but rather the fundamental structure and logic of Article XX of the GATT 1994.”<sup>275</sup> The two-tiered analysis has most recently been stated in *India – Solar Cells*, where it was described as being:<sup>276</sup>

in which a measure must first be provisionally justified under one of the paragraphs of Article XX, and then shown to be consistent with the requirements of the chapeau of Article XX.

#### *Article XX(g)*

Article XX(g) is concerned with measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption”.<sup>277</sup> Van den Bossche and Zdouc writes that Article XX(g) is essentially a three-step test, which requires a measure to:<sup>278</sup>

1. relate to the 'conservation of exhaustible natural resources';
2. 'relate to' the conservation of exhaustible natural resources; and
3. be 'made effective in conjunction with' restrictions on domestic production or consumption.

At first glance, the first two steps appear to be identical. However, there is a difference. The first step is that there is a 'conservation of exhaustible natural resources'. That is to say that the first stage of the test is ensuring that the natural

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<sup>273</sup> Van den Bossche, above n 270, at 547.

<sup>274</sup> Van den Bossche, above n 270, at 552.

<sup>275</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998 (Report of the Appellate Body) at [119].

<sup>276</sup> *India – Solar Cells*, above n 106, at [5.56].

<sup>277</sup> GATT, above n 6, art XX(g).

<sup>278</sup> Van den Bossche, above n 270, at 565.

resource is in fact one that is exhaustible and is capable of being conserved.<sup>279</sup> The second step of the test is then the causal connection between the measure and the exhaustible natural resource; that the measure “must be *reasonably* related to the end pursued, i.e. the conservation of an exhaustible natural resource.”<sup>280</sup> As the Appellate Body expressed in *China – Raw Materials*, “for a measure to relate to conservation in the sense of Article XX(g), there must be ‘a close and genuine relationship of ends and means.’”<sup>281</sup>

Therefore, when considering climate change measures, the important question is whether the world's climate is an “exhaustible natural resource.”<sup>282</sup> However, it is first worthwhile to note that the Appellate Body in *US – Gasoline* opened the door to broadening the definition for the term “measure”. The Appellate Body noted that “measure” for Article XX interpretations had been consistently focussed on the provisions of the measure that was found inconsistent with the GATT.<sup>283</sup> In other words, panels did not view the measure as a whole, but rather concentrated on whether the section of the measure that had been found inconsistent fell within Article XX. They did not assess provisions that had not been found inconsistent.<sup>284</sup>

This was not a live issue in *US – Gasoline*, since no one had argued that “measure” should be interpreted broadly to include the entire conservation measure in issue.<sup>285</sup> However, when assessing the measure, the Appellate Body noted that the inconsistent part of the measure, the baseline rules, could “scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions.”<sup>286</sup> Therefore:<sup>287</sup>

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<sup>279</sup> Van den Bossche, n 270, at 565.

<sup>280</sup> Van den Bossche, n 270, at 567.

<sup>281</sup> *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, 22 February 2012 (Report of the Appellate Body) at [355].

<sup>282</sup> Condon, above n 238, at 911.

<sup>283</sup> *US – Gasoline*, above n 147, at p 13-14.

<sup>284</sup> *US – Gasoline*, above n 147, at p 14.

<sup>285</sup> *US – Gasoline*, above n 147, at p 14.

<sup>286</sup> *US – Gasoline*, above n 147, at p 19.

<sup>287</sup> *US – Gasoline*, above n 147, at p 19.

The relationship between the baseline establishment rules and the "non-degradation" requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4.

In effect, the Appellate Body was suggesting that “measure” should apply to the entire conservation measure in issue, and not just the parts of it that offended GATT principles.<sup>288</sup> Bernasconi-Osterwalder and her co-authors note that this was an important victory for environmental consideration, broadening the scope of paragraph (g).<sup>289</sup> A measure is far more likely to meet paragraph (g) if a panel or Appellate Body is looking at the measure in its totality, rather than observing a provision of the measure without its full context.

With this in mind, we can now turn our attention back to whether climate could be an “exhaustible natural resource.” In *US – Shrimp*, the Appellate Body considered both living and non-living natural resources as being capable of being “exhaustible natural resources.”<sup>290</sup> Their interpretation of the term carried many important branches in understanding its breadth. They noted that “exhaustible” and “renewable” were not “mutually exclusive.”<sup>291</sup> Further, while noting the sustainable development principle within the WTO Agreement, the Appellate Body also said that the term “natural resources” was “by definition, evolutionary.”<sup>292</sup> Manjiao Chi notes that such a conclusion will be “far reaching” for future environmentally-sensitive disputes.<sup>293</sup>

Beyond this broad definition, various subjects have been found to be “exhaustible natural resources”: clean air in *US - Gasoline*,<sup>294</sup> sea turtles in *US – Shrimp*,<sup>295</sup> salmon and herring in *Canada – Salmon and Herring*,<sup>296</sup> and dolphins in *US –*

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<sup>288</sup> Bernasconi-Osterwalder, above n 140, at 78.

<sup>289</sup> Bernasconi-Osterwalder, above n 140, at 78.

<sup>290</sup> *US – Shrimp*, above n 275, at [128]-[131].

<sup>291</sup> *US – Shrimp*, above n 275, at [128].

<sup>292</sup> *US – Shrimp*, above n 275, at [129].

<sup>293</sup> Manjiao Chi 'Exhaustible Natural Resources' in WTO Law: GATT Article XX(g) Disputes and Their Implications' (2014) 48(5) JWT 939 at 957.

<sup>294</sup> *US – Gasoline*, above n 147, at 14, confirming the panel's conclusion at *US – Gasoline* (Panel Report), above n 178, at [6.37].

<sup>295</sup> *US – Shrimp*, above n 275, at [128]-[131].

<sup>296</sup> *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/116, 22

*Tuna/Dolphin II*.<sup>297</sup> When considering climate change, Condon notes that *US – Gasoline*, which considered clean air to be an exhaustible natural resource, potentially provides a way forward in holding the global climate as falling under Article XX(g).<sup>298</sup> When deciding that clean air was an “exhaustible natural resource”, the Panel noted that clean air was a resource with value, it was natural, and it could be depleted.<sup>299</sup>

Felicity Deane noted that this reasoning could justify “the application of this exception [(g)] to measures implemented to mitigate climate change.”<sup>300</sup> Deane suggests it could be phrased as “conservation of the atmosphere.”<sup>301</sup> Condon writes that the existence of multilateral environmental agreements could be used as an indication that the global climate is an exhaustible natural resource.<sup>302</sup> The Paris Agreement, for instance, could be as evidence to show that the global climate is at threat and greenhouse gas emissions need to be reduced to keep temperature rises to within 2 degree Celsius. In the end, Matsushita and his co-authors believes that under the expansive interpretation of the Appellate Body “virtually any living or non-living resource, particularly those addressed by multilateral environmental agreements, would qualify.”<sup>303</sup>

Condon also suspects that the requirement for there to be sufficient jurisdictional nexus (for instance, sea turtles spent some of their life cycle in American waters), will not be a problem because the effects of climate change will be experienced globally and as such a sufficient jurisdictional nexus is likely to be met.<sup>304</sup> Meinhard Doelle agrees, writing that:<sup>305</sup>

given the threat to human health, forests, agriculture and

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March 1988 at [4.4].

<sup>297</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 13 June 2012 (Report of the Appellate Body) at [5.13].

<sup>298</sup> Condon, above n 238, at 911.

<sup>299</sup> *US – Gasoline* (Panel Report), above n 178, at [6.37].

<sup>300</sup> Felicity Deane 'The WTO, the National Security Exception and Climate Change' (2012) 2 CCLR 149 at 154.

<sup>301</sup> Deane, above n 301, at 154.

<sup>302</sup> Condon, above n 238, at 912.

<sup>303</sup> Matsushita, above n 1, at 725.

<sup>304</sup> Condon, above n 238, at 912.

<sup>305</sup> Meinhard Doelle 'Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change through the World Trade Organization' (2004) 13(1) RECIEL 98.

biodiversity more generally, it must be considered likely that any measure to reduce GHG emissions will be found to be provisionally consistent with Article XX(b) and (g) of the GATT 1994.

The next question is if the measure is “relating to” combating climate change. This has widely been considered to mean that the measure must be “primarily aimed at”.<sup>306</sup> However, it is not quite as simple as that since the “primarily aimed at” test no longer seems to be compulsory.<sup>307</sup> The Appellate Body in *US – Gasoline*, while not expressly rejecting the “primarily aimed at” test, noted that the term was “not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).”<sup>308</sup> The Appellate Body in *US – Shrimp* went further saying that “relating to” requires a “close and genuine relationship of ends and means”.<sup>309</sup> Bernasconi-Osterwalder and her co-authors note that the *US – Shrimp* essentially sets a test of whether the relationship between the measure and the legitimate policy of conserving the exhaustible natural resources “plays a decisive role”.<sup>310</sup> Van den Bossche and Zdouc states that the test is essentially whether the measure is “reasonably related to the end pursued”.<sup>311</sup> Again, Condon suggests that multilateral environmental agreements could be used to show that measures aiming to limit and reduce greenhouse gas emissions are related to the conservation of the global climate.<sup>312</sup>

The final factor in considering Article XX(g) is that the trade measure needs to be in conjunction with “restrictions on domestic production or consumption”.<sup>313</sup> The Appellate Body in *US – Gasoline* considered this to mean a government measure that was “in force” or having “come into effect.”<sup>314</sup> It does not have to be identical treatment between domestic and imported products, but it does require a certain

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<sup>306</sup> *Canada – Herring & Salmon*, above n 296, at [4.6]; Deane, above n 300, at 154; Condon, above n 238, at 912.

<sup>307</sup> Ulrike Will 'The Extra-Jurisdictional Effects of Environmental Measures in the WTO Law Balancing Process' (2016) 50(4) *JWT* 611 at 623.

<sup>308</sup> *US – Gasoline*, above n 147, at p 19.

<sup>309</sup> *US – Shrimp*, above n 275, at [141].

<sup>310</sup> Bernasconi-Osterwalder, above n 140, at 80.

<sup>311</sup> Van den Bossche, above n 270, at 567.

<sup>312</sup> Condon, above n 238, at 912.

<sup>313</sup> GATT, above n 6, art XX(g).

<sup>314</sup> *US – Gasoline*, above n 147, at p 20-21.

even-handedness for Article XX(g) to be met.<sup>315</sup>

Article XX(g) is therefore likely to be favourable to any measure seeking to combat climate change, with Philip Joseph Wells believing that its interpretation is “wide and expansive.”<sup>316</sup> Chi challenges the idea that the interpretation is “expansive”, suggesting it is “premature” to come to such a conclusion.<sup>317</sup> However, he does acknowledge that the interpretation is “friendly” and “flexible” to environmental concerns, and that it will be utilised by countries when taking environmental action in the future.<sup>318</sup> Will concludes that as long as a measure is efficient, it is likely to meet (g) since the test does not question the regulatory autonomy of a WTO member.<sup>319</sup> As Niccolo Pietro Castagno writes about Article XX(g):<sup>320</sup>

It is not difficult to understand that this second exception bears more importance for the purposes of permitting member states to enact sound environmental policies that are in violation of their WTO communities. In particular, this is because of the wider reach of the exception resulting from the explained “Related to test” and from the broad interpretation that case law has given to the concept of “exhaustible natural resources”.

#### *Article XX(b)*

Article XX(b) is designed to protect measures “necessary to protect human, animal or plant life or health”.<sup>321</sup> It is a two tier test: the first step being that the measure's policy objective is the protection of the life or health of humans, animals or plants, and secondly that the measure is necessary to meet that goal.<sup>322</sup> Such a provision, in the panel report of *Brazil – Retreated Tyres*, was accepted to include measures which aimed to protect the environment, where they remarked

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<sup>315</sup> *US – Gasoline*, above n 147, at p 20-21.

<sup>316</sup> Philip Joseph Wells 'Unilateralism and Protectionism in the World Trade Organization: the interpretation of the chapeau within Article XX' (2014) 13(3) J.I.T.L. & P. 221 at 224.

<sup>317</sup> Chi, above n 293, at 963-964.

<sup>318</sup> Chi, above n 293, at 964-965.

<sup>319</sup> Will, above n 307, at 623.

<sup>320</sup> Niccolo Pietro Castagno, 'Sustainable Development and the International Trade Law Paradigm – A Relationship to be Denounced?' (2014) 13(2) J.I.T.L. & P. 136 at 147.

<sup>321</sup> GATT, above n 6, art XX(b).

<sup>322</sup> Van den Bossche, above n 270, at 554.

that “few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important.”<sup>323</sup> This finding was agreed with by the Appellate Body.<sup>324</sup>

When addressing the first part of the test, Van den Bossche and Zdouc have noted that it has not caused any “major interpretative problems.”<sup>325</sup> While the Appellate Body will examine the measure the question, in reality, they have given “a significant degree of deference in accepting that the policy objectives of a measure was to protect life or health of humans, animals or plants.”<sup>326</sup>

The important, more complex issue in Article XX(b) is the test of whether the measure is “necessary” to secure the measure’s stated policy goal.<sup>327</sup> The key early decision on “necessary” is the Appellate Body’s decision in *Korea – Various Measures on Beef*, which noted that “the word 'necessary' is not limited to that which is 'indispensable'.”<sup>328</sup> While measures which are indispensable or an absolute necessity will obviously meet the requirement, there are “degrees of necessity.”<sup>329</sup> However, “necessary” is “significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to.”<sup>330</sup> In the end, making the assessment of if something is “necessary” involves:<sup>331</sup>

a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

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<sup>323</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007 (Report of the Panel) at [7.108].

<sup>324</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 17 December 2007 (Report of the Appellate Body) at [179].

<sup>325</sup> Van den Bossche, above n 270, at 554.

<sup>326</sup> Van den Bossche, above n 270, at 554.

<sup>327</sup> Van den Bossche, above n 270, at 554.

<sup>328</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 (Report of the Appellate Body) at [161].

<sup>329</sup> *Korea – Various Measures on Beef*, above n 328, at [161].

<sup>330</sup> *Korea – Various Measures on Beef*, above n 328, at [161].

<sup>331</sup> *Korea – Various Measures on Beef*, above n 328, at [164].

It must be said that not all academics consider that the Appellate Body was clear in its stance. Donald Regan believes this “weigh and balance” test is a misunderstanding.<sup>332</sup> He writes that “a standard cost-benefit balancing test is inconsistent with allowing the Member to choose its own level of protection.”<sup>333</sup> However, he also notes that while Appellate Body decisions note the balancing test, none of them “actually involves standard cost-benefit balancing, and none depends on a weighing of the underlying benefit.”<sup>334</sup> Shortly after Regan's article was published, the Appellate Body again clarified the “weigh and balance” approach in *Brazil – Retreaded Tyres* by saying that:<sup>335</sup>

The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement.

In that decision, the Appellate Body noted that when a measure leads to restrictive effects on international trade, then it would be necessary for that measure to “make a material contribution to the achievement of its objective.”<sup>336</sup> The Appellate Body did acknowledge that when measures are “adopted in order to attenuate global warming and climate change” then any contribution “can only be evaluated with the benefit of time.”<sup>337</sup> Therefore, it appears that the Appellate Body will, at least in part, “accept the measure if it is capable of making a future contribution.”<sup>338</sup> A side issue to this is noted by Condon, who points out that if the contribution of a measure is weighed by the measure’s part of a “comprehensive regulatory strategy” then it seems only likely that the impact on trade will be measured in the same way.<sup>339</sup> Any “comprehensive” strategy to combat climate change is therefore much more likely to restrict trade in a significant way.<sup>340</sup>

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<sup>332</sup> Donald H. Regan 'The meaning of 'necessity' in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing' (2007) 6(3) WTR 347 at 347.

<sup>333</sup> Regan, above n 332, at 348.

<sup>334</sup> Regan, above n 332, at 350.

<sup>335</sup> *Brazil – Retreaded Tyres*, above n 324, at [182].

<sup>336</sup> *Brazil – Retreaded Tyres*, above n 324, at [150].

<sup>337</sup> *Brazil – Retreaded Tyres*, above n 324, at [150].

<sup>338</sup> Will, above n 307, at 620.

<sup>339</sup> Condon, above n 238, at 915.

<sup>340</sup> Condon, above n 238, at 915.

However, in earlier decisions, the Appellate Body noted that “the more vital or important [the] common interests or values” pursued, the easier it would be to accept as “necessary” measures designed achieve those ends”.<sup>341</sup> Ultimately, the Appellate Body reiterated the “weighing and balancing” approach in *EC – Seal Products*. The Appellate Body said that the “weighing and balancing” approach involves “a series of factors, including the trade importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.”<sup>342</sup> Therefore, the contribution of a measure is “only one component of the necessity calculus”. The “nature, quantity and quality of evidence” on the measure is also important.<sup>343</sup> The Appellate Body concluded that due to the “weighing and balancing exercise” a measure which is “highly trade-restrictive in nature” could still be capable of being found “necessary” depending on the specific circumstances of the situation.<sup>344</sup> When considering the information we now know about climate change, and the threat it caused to human, animal and plant life, these comments from *EC – Asbestos* and later *EC – Seal Products* seem to make Article XX(b) more hospitable to climate change related measures.

If a panel determines that a measure appears to be necessary, then before it confirms that conclusion it must compare “the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.”<sup>345</sup> There are important factors to note about the issue of possible alternatives.

First, the Appellate Body made clear in *EC – Asbestos* that it is up to member states to select their desired level of protection.<sup>346</sup> As Van den Bossche and Zdouc write, other countries cannot question the level of protection chosen but rather “they can only argue that the measure at issue is not ‘necessary’ to achieve that level of protection”.<sup>347</sup> In other words, if a country wants to protect the human life by protecting the climate at a high level, member states cannot argue against that

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<sup>341</sup> *EC – Asbestos*, above n 148, at [172].

<sup>342</sup> *EC – Seal Products*, above n 180, at [5.214].

<sup>343</sup> *EC – Seal Products*, above n 180, at [5.215].

<sup>344</sup> *EC – Seal Products*, above n 180, at [5.215].

<sup>345</sup> *Brazil – Retreaded Tyres*, above n 324, at [156].

<sup>346</sup> *EC – Asbestos*, above n 148, at [168].

<sup>347</sup> Van den Bossche, above n 270, at 558.

level of protection. Their only option is to suggest that the measure in question, maybe higher tariffs for gas guzzling cars, is not necessary to achieve that protection. Therefore, for something to be a “possible alternative”, the Appellate Body noted that the alternative must match the “desire level of protection” sought by the member state.<sup>348</sup>

Secondly, Van den Bossche and Zdouc note that the Appellate Body in *Brazil – Retreaded Tyres* also reiterated comments from *US – Gambling*.<sup>349</sup> In *US – Gambling*, the Appellate Body ruled that an alternative measure is not reasonably available if it is “merely theoretical in nature”, the member state in question is “not capable of taking it”, or it “imposes an undue burden”.<sup>350</sup> Therefore, the Appellate Body ruled that if the alternative measure is not “reasonably available” or does not match the desire level of protection, then “the measure at issue is necessary.”<sup>351</sup>

The final part of the “alternative measure” puzzle is the question of where the burden of proof falls. Here again, Van den Bossche and Zdouc note, the Appellate Body in *Brazil – Retreaded Tyres* drew on the decision of *US – Gasoline*.<sup>352</sup> The Appellate Body ruled that:<sup>353</sup>

It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to ‘show, in the first instance, that there are no reasonably available alternatives to achieve its objectives’.”

Considering the difficulties in ascertaining the effect of an environmental

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<sup>348</sup> *Brazil – Retreaded Tyres*, above n 324, at [156].

<sup>349</sup> Van den Bossche, above n 270, at 558.

<sup>350</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 20 April 2005 (Report of the Appellate Body) at [308].

<sup>351</sup> *Brazil – Retreaded Tyres*, above n 324, at [156].

<sup>352</sup> Van den Bossche, above n 270, at 559.

<sup>353</sup> *Brazil – Retreaded Tyres*, above n 324, at [156].

measure, Condon wonders how an alternate measure can be proposed.<sup>354</sup> Essentially, the issue is how the Appellate Body can decide if an alternate measure is as effective as the one in question if the Appellate Body cannot quantify such a thing. However, Ulrike Will, while noting this problem, gives the impression of being reasonably unconcerned about it. He writes that while there “might not always be a clear result” when seeing which measure is least restrictive, the issue of determining the “exact effectiveness of a measure is not as important as a well-justified comparison with alternative measures considering both the contribution to the desired level of protection and the restrictiveness.”<sup>355</sup>

In a similar vein, the question of the level of scientific evidence necessary will also have to be addressed.<sup>356</sup> In that regard, the Appellate Body has said that evidence may be made “by resorting to evidence or data, pertaining to the past or the present” that the measure makes a material contribution.<sup>357</sup> However, the evidence may also take the form of “quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”<sup>358</sup> Therefore, the Appellate Body has shown a tendency to be reasonably flexible when dealing with Article XX(b).

Despite any concern Condon may have over Article XX(b), Wells writes that “necessary” can now be considered to be “an unusually lenient interpretation.”<sup>359</sup> Pietro Castagno agrees, noting that there has been “a relative relaxation of the “necessity test””.<sup>360</sup> It must be noted that Quick believes that, “at times”, Article XX(b) can be “quite difficult to meet”.<sup>361</sup> *Korea – Beef* provides evidence in favour of Quick’s assessment over Wells’s, where the Appellate Body ruled that the necessary test had not been met because Korea had “reasonably available” alternatives to their measure.<sup>362</sup> Therefore, meeting the necessary test of Article XX(b) is not a foregone conclusion. Overall, though, it seems hard to argue

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<sup>354</sup> Condon, above n 238, at 915.

<sup>355</sup> Will, above n 307, at 621-622.

<sup>356</sup> Condon, above n 238, at 915.

<sup>357</sup> *Brazil – Retreaded Tyres*, above n 324, at [151].

<sup>358</sup> *Brazil – Retreaded Tyres*, above n 324, at [151].

<sup>359</sup> Wells, above n 316, at 225.

<sup>360</sup> Pietro Castagno, above n 320, at 146.

<sup>361</sup> Quick, above n 271, at 971.

<sup>362</sup> *Korea – Beef*, above n 328, at [182].

against Doelle's statement that "it must be considered likely that any measure to reduce GHG emissions will be found to be provisionally consistent with Article XX(b)".<sup>363</sup>

### *Chapeau*

The chapeau of Article XX reads that the paragraph exceptions are:<sup>364</sup>

subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...

As noted above, the Appellate Body has said that if a measure does meet one of the Article XX paragraph exceptions, it is then necessary to see if it "shown to be consistent with the requirements of the chapeau of Article XX."<sup>365</sup> It is an important step in the Article XX test. Van den Bossche and Zdouc note that the chapeau has been the critical issue in "several of the most controversial decisions by panels and the Appellate Body".<sup>366</sup>

The object and purpose of the chapeau have been expressed by the Appellate Body in the cases of *US – Gasoline* and *US – Shrimp*.<sup>367</sup> In *US – Gasoline*, the Appellate Body said that the chapeau was concerned with not the content of the measure in question "but rather the manner in which that measure is applied."<sup>368</sup> This is because the general exceptions "should not be applied as to frustrate or defeat the legal obligations" of the General Agreement.<sup>369</sup> Therefore, "the fundamental theme" of the chapeau "is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available

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<sup>363</sup> Doelle, above n 305, at 98.

<sup>364</sup> GATT, above n 6, art XX.

<sup>365</sup> *India – Solar Cells*, above n 106, at 5.56.

<sup>366</sup> Van den Bossche, above n 270, at 572.

<sup>367</sup> Van den Bossche, above n 270, at 572-573.

<sup>368</sup> *US – Gasoline*, above n 147, at p 22.

<sup>369</sup> *US – Gasoline*, above n 147, at p 22.

in Article XX.”<sup>370</sup> The Appellate Body said much the same thing in *US – Shrimp*, noting that Article XX is a balancing act and therefore if it is “abused or misused” then the balancing act will go astray.<sup>371</sup> As such, the object and purpose of the chapeau can be considered to be ensuring that Article XX is not misused or abused and ensuring that a balance is struck between “the *right* of a Member to invoke an exception under Article XX and the substantive rights of the other Members under the GATT 1994.”<sup>372</sup> Essentially, the chapeau is “an expression of the principle of good faith.”<sup>373</sup> Will sets down that the purpose of the chapeau is to be “the gatekeeper”.<sup>374</sup>

An important factor of the chapeau and how it is interpreted, though, is that the Appellate Body has placed the burden of proving that the chapeau of Article XX has not been breached on “the party invoking the exception.”<sup>375</sup> They have acknowledged that this is “a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.”<sup>376</sup> The Appellate Body confirmed this burden again in *US – Shrimp*, noting that:<sup>377</sup>

On the other hand, it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau.

In *US – Shrimp*, the Appellate Body explained that the chapeau consists of three separate standards:<sup>378</sup>

first, there must be no “arbitrary” discrimination between countries where the same conditions prevail; second, there must be no “unjustifiable” discrimination between countries where the same conditions prevail; and, third, there must be no

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<sup>370</sup> *US – Gasoline*, above n 147, at p 25.

<sup>371</sup> *US – Shrimp*, above n 275, at 156.

<sup>372</sup> Van den Bossche, above n 270, at 573.

<sup>373</sup> Van den Bossche, above n 270, at 573.

<sup>374</sup> Will, above n 307, at 624.

<sup>375</sup> *US – Gasoline*, above n 147, at p 22-23.

<sup>376</sup> *US – Gasoline*, above n 147, at p 23.

<sup>377</sup> *US – Shrimp*, above n 275, at [149].

<sup>378</sup> *US – Shrimp*, above n 275, at [118].

"disguised restriction on international trade".

The Appellate Body has already commented that the concept of sustainable development is important when interpreting the chapeau.<sup>379</sup> However, despite this, there are some academic concerns about the chapeau and what it could mean for climate change measures. Deane has noted that the interpretation of the chapeau “may be a concern for climate change mitigation measures.”<sup>380</sup> This is because many climate change reforms might require discrimination, for instance some countries might be domestically pricing carbon emissions but others are not and therefore requires a border tax adjustment.<sup>381</sup> Doelle agree, stating that the chapeau of Article XX is “the only real issue” for environmental measures.<sup>382</sup> It is not a universal position, though. Pietro Castagno, while recognising that the chapeau receives its fair share of criticism, does not agree that the chapeau is “an unnecessary barrier to the enactment of environmental sound national policies.”<sup>383</sup> To better understand where this disagreement comes from, it is prudent to see how the chapeau has been interpreted.

The issue here is that, despite his support for the interpretation of the chapeau, Pietro Castagno acknowledges that the Appellate Body has “struggled to find a univocal approach to their application” for the chapeau.<sup>384</sup> The Appellate Body from as early as 1996 in *US – Gasoline* acknowledged that the chapeau was “not without ambiguity.”<sup>385</sup> However, they considered that “the fundamental theme” of the chapeau “is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”<sup>386</sup> Due to this, the Appellate Body considered that the three heads of the chapeau: arbitrary discrimination, unjustifiable discrimination, and disguised restrictions on trade could be read “side-by side” since they imparted meaning to one another.<sup>387</sup>

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<sup>379</sup> *US – Shrimp*, above n 275, at [152].

<sup>380</sup> Deane, above n 300, at 155.

<sup>381</sup> Deane, above n 300, at 155.

<sup>382</sup> Doelle, above n 305, at 98.

<sup>383</sup> Pietro Castagno, above n 320, at 150.

<sup>384</sup> Pietro Castagno, above n 320, at 148.

<sup>385</sup> *US – Gasoline*, above n 147, at p 23.

<sup>386</sup> *US – Gasoline*, above n 147, at p 25.

<sup>387</sup> *US – Gasoline*, above n 147, at p 25.

Or, in another way:<sup>388</sup>

the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade.

On the subject of discrimination itself, the Appellate Body makes the point that the chapeau does not refer to all discrimination, or the discrimination found in other parts of the GATT, such as Article III:4, but rather arbitrary and unjustifiable discrimination.<sup>389</sup> As Van den Bossche and Zdouc put it, the “discrimination at issue in the chapeau of Article XX must necessarily be different from the discrimination addressed in other provisions of the GATT 1994.”<sup>390</sup>

Despite the Appellate Body’s comments of reading the three separate heads of the chapeau “side by side”, Pietro Castagno notes that in *US – Shrimp*, the Appellate Body took arbitrary and unjustifiable discrimination as distinct headings and did not address disguised restrictions at all.<sup>391</sup> Further, in that decision, the Appellate Body stated that when considering arbitrary or unjustifiable discrimination, there are three elements that must exist:<sup>392</sup>

First, the application of the measure must result in *discrimination*... Second, the discrimination must be *arbitrary or unjustifiable* in character... Third, this discrimination must occur *between countries where the same conditions prevail*.

As an example of unjustifiable discrimination, the Appellate Body noted that the United States measure specified other member states to adopt a regulatory programme that was “essentially the same” of the United States, rather than

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<sup>388</sup> *US – Gasoline*, above n 147, at p 25.

<sup>389</sup> *US – Gasoline*, above n 147, at p 23.

<sup>390</sup> Van den Bossche, above n 270, at 574.

<sup>391</sup> Pietro Castagno, above n 320, at 148.

<sup>392</sup> *US – Shrimp*, above n 275, at [150].

something which was just “comparable.”<sup>393</sup> Going further, they noted that:<sup>394</sup>

We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

The Appellate Body was also concerned with negotiation when considering unjustified discrimination. They said that the United States' failure to negotiate with some states, but not others, was “plainly discrimination and, in our view, unjustifiable.”<sup>395</sup> Meanwhile, when considering “arbitrary discrimination”, the Appellate Body said that the measure was “a single, rigid and unbending requirement” and that this rigidity and inflexibility was “arbitrary discrimination within the meaning of the chapeau.”<sup>396</sup> As Quick points out, once the United States allowed more flexibility and began to “negotiate in good faith” with Asian countries, the Appellate Body found the United States’ measure compatible with WTO law.<sup>397</sup>

In *Brazil – Retreaded Tyres*, the Appellate Body again took a slightly different approach by grouping together “arbitrary and unjustifiable discrimination” as one combined requirement, with the disguised restriction on trade as the second requirement.<sup>398</sup> Further, the Appellate Body decided when looking at if arbitrary or unjustifiable discrimination had occurred, the assessment “should be made in the light of the objective of the measure”.<sup>399</sup> Therefore, discrimination is unjustifiable or discriminatory if:<sup>400</sup>

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<sup>393</sup> *US – Shrimp*, above n 275, at [163].

<sup>394</sup> *US – Shrimp*, above n 275, at [165].

<sup>395</sup> *US – Shrimp*, above n 275, at [172].

<sup>396</sup> *US – Shrimp*, above n 275, at [177].

<sup>397</sup> Quick, above n 271, at 973; *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, 21 November 2001 (Report of the Appellate Body) at [144]

<sup>398</sup> *Brazil – Retreaded Tyres*, above n 324, at [215].

<sup>399</sup> *Brazil – Retreaded Tyres*, above n 324, at [227].

<sup>400</sup> *Brazil – Retreaded Tyres*, above n 324, at [227].

the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.

Therefore, while the chapeau might not have historically been interpreted consistently, the general theme espoused in *US – Gasoline* still holds true, that the chapeau is about stopping abuse or illegitimate use of the Article XX provision. Pietro Castagno also makes that point, stating the chapeau's purpose is “to prevent member states to enact legislation in an abusive manner.”<sup>401</sup> Philip Joseph Wells agrees, noting that the chapeau is a “bottleneck” which ensures states “cannot abuse their rights and exercise the exceptions to their obligations in Article XX in bad faith for an improper purpose.”<sup>402</sup> Van den Bossche and Zdouc consider the interpretation of the chapeau as finding:<sup>403</sup>

the appropriate *line of equilibrium* between, on the one hand, the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values or interests and, on the other hand, the right of other Members to trade.

Considering the relative broadness of Article XX, the chapeau is likely to be the tipping point for many climate change measures. As previously noted, Deane writes that the chapeau is likely to be “a concern for mitigation measures”,<sup>404</sup> and Doelle suspects that for measures to meet the chapeau they will need clear environmental objectives and also be as flexible as possible.<sup>405</sup> This idea that the chapeau may prove to be the biggest issue is shared by Wells, who writes that the chapeau's current interpretation is “strict and limiting” and proving that “a measure is consistent with the chapeau is a difficult endeavour”.<sup>406</sup> Pietro Castagno also notes that:<sup>407</sup>

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<sup>401</sup> Pietro Castagno, above n 320, at 148.

<sup>402</sup> Wells, above n 316, at 227.

<sup>403</sup> Van den Bossche, above n 270, at 574.

<sup>404</sup> Deane, above n 300, at 155.

<sup>405</sup> Doelle, above n 305, at 99.

<sup>406</sup> Wells, above n 316, at 227.

<sup>407</sup> Pietro Castagno, above n 320, at 150.

there is some criticism with regard to the interpretation of the chapeau, which has been deemed to constitute an unnecessary barrier to the enactment of environmental sound national policies.

Despite this, not all academics agree that this is necessarily a bad thing. Both Wells and Pietro Castagno defend the interpretation of chapeau with varying levels of strength. Pietro Castagno writes that the chapeau is “a necessary fence against the misuse of Article XX exceptions in a manner that resemble the *abuse de droit*.”<sup>408</sup> Further, the chapeau's focus on negotiation and good faith therefore allows Article XX exceptions to avoid the spectre of unilateralism and ensures measures are “consistent with the multilateral cooperative approach.”<sup>409</sup>

Wells is even more full-throated in his defence of the current interpretation of the chapeau. The chapeau's interpretation allows it to remain “a suitable gatekeeper.”<sup>410</sup> Any dilution of the chapeau would allow member states “to frequently pursue protectionist measures.”<sup>411</sup> He suggests that while the chapeau sets a high standard, that is a good thing because:<sup>412</sup>

those measures that do reach the chapeau's rightly restrictive requirement often do so because the panel has extensively screened them for the unilateral and protectionist features it is adamant to avoid.

Van den Bossche and Zdouc note that the public perception of the Appellate Body has been unsympathetic due to some of its decisions surrounding the chapeau.<sup>413</sup> Yet they point out that the Appellate Body had expressed its own defence of its decision in *US – Shrimp*.<sup>414</sup> In that case, the Appellate Body noted what it had not decided during its decision, namely that the environment was not worth protecting or that WTO members cannot take adopt effective measures to protect endangered

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<sup>408</sup> Pietro Castagno, above n 320, at 151.

<sup>409</sup> Pietro Castagno, above n 320, at 151.

<sup>410</sup> Wells, above n 316, at 228.

<sup>411</sup> Wells, above n 316, at 228.

<sup>412</sup> Wells, above n 316, at 228.

<sup>413</sup> Van den Bossche, above n 270, at 581.

<sup>414</sup> Van den Bossche, above n 270, at 582.

species.<sup>415</sup> Rather, the Appellate Body had merely decided that the measures in question were examples of arbitrary and unjustifiable discrimination.<sup>416</sup> Essentially, it appears that the Appellate Body was saying much the same as Wells or Pietro Castagno, that the chapeau serves as a necessary safeguard to protect Article XX from abuse. Quick agrees, noting that a “high environmental standard” measure can comply with the chapeau if it is implemented carefully and fairly.<sup>417</sup>

If the chapeau is to be made friendlier to environmental measures, Pietro Castagno notes that Gaines suggests changing the presumption or burden of the provision.<sup>418</sup> Gaines argues that if a measure meets a paragraph of Article XX then there should be a presumption of compliance with the chapeau unless “complaining Members can demonstrate obviously discriminatory treatment of traded goods or a clear effort to disguise trade restrictions behind a green mask.”<sup>419</sup> Thus, Pietro Castagno notes that Gaines's argument would suggest that:<sup>420</sup>

the complaining party should be required to demonstrate that the measure at stake violates *all* the chapeau's requirements, thus achieving a considerable relaxation of the standard as we know it today.

### *Conclusion*

Article XX currently provides environmentalists with their best hope of finding compatibility between climate change measures and trade law. Indeed, Matsushita and his co-authors notes that Article XX is “an adequate tool for a balanced approach to the trade and environment controversy.”<sup>421</sup> Both Article XX(b) and (g) are likely to be friendly to any climate change measure that is adopted by member states. This includes measures that may breach Article III as it is

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<sup>415</sup> *US – Shrimp*, above n 275, at [185]-[186].

<sup>416</sup> *US – Shrimp*, above n 275, at [185]-[186].

<sup>417</sup> Quick, above n 271, at 973.

<sup>418</sup> Pietro Castagno, above n 320, at 153.

<sup>419</sup> Sanford Gaines, “The WTO'S Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures” (2001) 22 *J. Int'l L.* 739 at 852.

<sup>420</sup> Pietro Castagno, above n 320, at 153.

<sup>421</sup> Matsushita, above n 1, at 731.

currently interpreted. This would tend to suggest that the academic fretting over Article III is unnecessary and governments can still take environmental action even if “likeness” is defined solely through a market lens.

However, there are questions still surrounding the chapeau. It is a tougher provision to fulfil for climate change measures and may be the main stumbling step for any climate change provision. Bearing in mind the idea of a “soft conflict” defined above, there is the possibility that Article XX might still be able to salvage environmental measures while still limiting their true effectiveness because they must be watered down to meet the tough test of the chapeau. However, that might not always be the case. *Brazil – Retreaded Tyres* highlights this situation. The Appellate Body found that the MERCOSUR exemptions for certain countries constituted arbitrary or unjustifiable discrimination.<sup>422</sup> Therefore, Brazil had two ways to bring its measure into WTO consistency. It could grant all countries the MERCOSUR exemptions, therefore lowering the level of environmental protection and highlighting the fear noted above. However, Brazil could have simply got rid of any exemptions, therefore increasing the environmental protection of the measure. Therefore, while the chapeau can frustrate environmental protections; the chapeau also has the ability to lead to more environmentally stringent measures.

While some academics believe that the chapeau is a necessary bottleneck to protect the international trading system, the current threat of the climate change might demand some sort of change to make it easier for member states to protect the environment. One such way might be to flip the presumption of who should prove that the chapeau has been met or breached. On the other hand, another approach may be to interpret the substantial provisions of the GATT, like Article III, in a more mutually supportive way, which leaves Article XX and its chapeau with its necessary bottleneck. This paper will ultimately suggest that the latter is the best way forward.

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<sup>422</sup> *Brazil – Retreaded Tyres*, above n 324, at 258(b)(i).

### *Subsidies, Feed-in Tariffs & Canada – Renewable Energy*

Kati Kulovesi remarks that unlike trade bans and border carbon adjustments, which dominate areas of academic research but are largely theoretical ideas which have yet to be put into practice, “government policies to boost renewable energy and clean technology are emerging as the most concrete testing ground for assessing the mutual supportiveness of WTO rules and climate change law.”<sup>423</sup> Such a statement is backed up by the Appellate Body decisions of *Canada – Renewable Energy*<sup>424</sup> and *India – Solar Cells*.<sup>425</sup> These two cases tackle two environment-related issues:

- i. Feed-in tariffs and WTO rules around subsidies, which will be dealt with now; and
- ii. Local content requirements and WTO consistency with Article III, which will be dealt with in the next section.

### *Environmental Subsidies and Feed-In Tariffs*

Around 70% of global greenhouse emissions come from the generation, transmission and distribution of electricity and, as such, de-carbonizing the power sector is a critical step in combating climate change.<sup>426</sup> The development of renewable energy is, therefore, crucial. However, renewable energy is “more cost-intensive than conventional energy” and therefore it needs fiscal supports from governments.<sup>427</sup> This governmental assistance can come in many forms, such as tax incentives, grants, or pricing support.<sup>428</sup> Feed-in tariffs, a form of pricing support, are increasingly used to promote renewable energy.<sup>429</sup> In fact, feed-in tariffs are “one of the most effective incentives for fostering GHG reductions... with the production of renewable energy.”<sup>430</sup>

<sup>423</sup> Kati Kulovesi, 'International Trade Disputes on Renewable Energy: Testing Ground for Mutual Supportiveness of WTO Law and Climate Change Law' (2014) 23(3) RECIEL 342 at 342.

<sup>424</sup> *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, 24 May 2013 (Report of the Appellate Body).

<sup>425</sup> *India – Solar Cells*, above n 106.

<sup>426</sup> Weber & Koch, above n 105, at 757.

<sup>427</sup> Weber & Koch, above n 105, at 757-758.

<sup>428</sup> Farah & Cima, above n 54, at 1104.

<sup>429</sup> Kulovesi, above n 423, at 344.

<sup>430</sup> S. Gupta and others, *Policies, Instruments and Co-operative Arrangements*, in R Howse & P van Bork (ed) *Options for Liberalising Trade in Environmental Goods in the Doha Round* (International Centre for Trade and Sustainable Development, 2007).

Feed-in tariffs work by creating long-term contracts between governments and energy producers, which offer a premium price for the electricity generated by renewable industries.<sup>431</sup> This set, attractive price therefore means companies can be assured that their investment will not be at risk.<sup>432</sup> The question of feed-in tariffs and their consistency with WTO law was raised in *Canada – Renewable Energy*.

#### *Trade Laws on Subsidies*

Subsidies can raise issues under not only the GATT, but also the Agreement on Agriculture and the SCM Agreement.<sup>433</sup> All three of these treaties are found in Annex 1A from the Uruguay Rounds, and in the event of a conflict the GATT is put to one side in favour of the more specific agreements.<sup>434</sup> The relevant provisions of those agreements are Articles 3.3 and 8 of the Agreement on Agriculture and Article VI and XVI of the GATT.<sup>435</sup> The SCM Agreement in its entirety is relevant to the question. Between these three treaties, there could be the potential of having “pure climate policies” which “promote renewable energy” as being declared incompatible with WTO law.<sup>436</sup>

In terms of measures taken to combat climate change, the most likely agreement that will be looked at initially is the SCM Agreement. The Agreement on Agriculture is likely to be relevant only in occasional situations. Meanwhile, under Article XX of the GATT, there is the potential to salvage environmentally friendly measures from incompatibility with trade law. However, it is unclear if Article XX could be used to help justify measures found wanting by the SCM Agreement. Such an approach has been described as requiring a “heroic approach to interpretation.”<sup>437</sup> This point will be discussed later.

The SCM Agreement is concerned with subsidies and countervailing measures. Article 1 defines a subsidy. A subsidy requires two ingredients under Article I.

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<sup>431</sup> Kulovesi, above n 423, at 344.

<sup>432</sup> Kulovesi, above n 423, at 344.

<sup>433</sup> Condon, above n 238, at 899; Agreement on Subsidies and Countervailing Measures 1869 UNTS 14 (entered into force 1 January 1995).

<sup>434</sup> Agreement on the Establishment of the World Trade Organization, above n 110, at Annex 1A, General Interpretative Note.

<sup>435</sup> Condon, above n 238, at 900.

<sup>436</sup> Kulovesi, above n 423, at 343.

<sup>437</sup> Marceau & Trachtman, above n 253, at 874.

First, there must be either some “financial contribution by a government or any public body within the territory of a Member”<sup>438</sup> or there must be “any form of income or price support in the sense of Article XVI of the GATT 1994”.<sup>439</sup> Secondly, “a benefit” must be conferred.<sup>440</sup> As the Appellate Body noted in *Brazil – Aircraft*, these two factors are “separate legal elements” and together “they determine whether a ‘subsidy’ exists”.<sup>441</sup> This latter issue about “a benefit” proved to be the key point in the *Canada – Renewable Energy* case and appears to be the key point when considering climate change reform. However, before turning to that decision, it is prudent to just briefly make note of several other provisions of the SCM Agreement.

For a subsidy to potentially be subject to other parts of the agreement, it also has to meet the requirements of specificity found in Article 2.<sup>442</sup> A subsidy is specific if it is limited to certain industries or enterprises, or certain enterprises in designated geographical regions.<sup>443</sup> In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body remarked that specificity should be understood through “concurrent application” of the principles of Article 2.1, though there may be some cases where specificity is obvious by reason of fact or law.<sup>444</sup>

Any prohibited subsidy under Article 3 is regarded to be specific.<sup>445</sup> Prohibited subsidies are not allowed under the SCM Agreement and exist if the subsidy is contingent upon export performances or the use of domestic goods over imported ones.<sup>446</sup> The Appellate Body noted that the key word in Article 3 is “contingent”.<sup>447</sup> *De jure* and *de facto* contingency have the same “legal standard”, but *de jure* contingency relies on the “words of the relevant legislation” whereas

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<sup>438</sup> SCM Agreement, above n 433, art 1.1(a)(1).

<sup>439</sup> SCM Agreement, above n 433, art 1.1(a)(2).

<sup>440</sup> SCM Agreement, above n 433, art 1.1(b).

<sup>441</sup> *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, 20 August 1999 (Report of the Appellate Body) at [157].

<sup>442</sup> SCM Agreement, above n 433, art 2.

<sup>443</sup> SCM Agreement, above n 443, art 2.

<sup>444</sup> *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 25 March 2011 (Report of the Appellate Body) at [371].

<sup>445</sup> SCM Agreement, above n 433, art 2.3.

<sup>446</sup> SCM Agreement, above n 433, art 3.

<sup>447</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 20 August 1999 (Report of the Appellate Body) at [166].

*de facto* contingency “must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy”.<sup>448</sup> In the end, “contingent” means “‘conditional’ or ‘dependent on something else’”.<sup>449</sup> Meanwhile, other subsidies may be “actionable” if they cause “adverse effects” to the interests of another SCM Agreement member states, whether that be through: injury to the domestic industry of another member, nullification or impairment of benefits to other members under the GATT, or causing serious prejudice to the interests of another member.<sup>450</sup>

*The Appellate Body’s Decision in Canada – Renewable Energy*

The Canadian province of Ontario implemented a feed-in tariff programme in 2009 to increase the levels of electricity generated by renewable energy.<sup>451</sup> Generators who participate in the scheme are guaranteed a certain price per kWh of electricity from the government for the term of either a 20 or 40 year long contract.<sup>452</sup> It was this part of the feed-in tariff scheme that Japan argued triggered the subsidy rules around the SCM Agreement.

The first factor that had to be considered was whether the feed-in tariff programme met one of the criteria of Article 1.1(a) of the SCM Agreement. The Panel had characterised the programme as failing under Article 1.1(a)(iii) “a government provides goods or services other than general infrastructure, or purchases goods”.<sup>453</sup> The Panel noted that Article 1.1(a)(iii) is met when a government obtains some sort of possession or entitlement over a good via the making of some sort of payment.<sup>454</sup> The Panel concluded that Ontario was purchasing an entitlement to electricity and therefore Article 1.1(a)(iii) had been met.<sup>455</sup> The Appellate Body agreed with this classification.<sup>456</sup> They rejected the appeal from Japan that the more apt classification was under Article 1.1(a)(i),

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<sup>448</sup> *Canada – Aircraft*, above n 447, at [167].

<sup>449</sup> *Canada – Aircraft*, above n 447, at [166].

<sup>450</sup> SCM Agreement, above n 433, art 5.

<sup>451</sup> *Canada – Renewable Energy*, above n 424, at [4.17].

<sup>452</sup> *Canada – Renewable Energy*, above n 424, at [4.17].

<sup>453</sup> *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013 (Report of the Panel) [7.222] & [7.243].

<sup>454</sup> *Canada – Renewable Energy* (Panel), above n 453, at [7.231].

<sup>455</sup> *Canada – Renewable Energy* (Panel), above n 453, at [7.229] at [7.231]-[7.239].

<sup>456</sup> *Canada – Renewable Energy*, above n 424, at [5.128].

being a “direct transfer of funds”.<sup>457</sup> However, the Appellate Body did note that the Panel was incorrect to find that (i) and (iii) of Article 1.1(a) were mutually exclusive.<sup>458</sup>

The main question the Appellate Body concerned itself with was whether a “benefit” had been conferred.<sup>459</sup> The Appellate Body had earlier considered the meaning of “benefit” in *Canada-Aircraft*. They noted that a dictionary definition of the word aligned with the comments of an earlier panel in saying that benefit “clearly encompasses some form of advantage.”<sup>460</sup> The Appellate Body went beyond a dictionary meaning, though, noting that “benefit” implies a recipient.<sup>461</sup> Therefore, the question of a “benefit” is concerned with the recipient and not with any potential cost to the government.<sup>462</sup> Further, “benefit” requires some kind of comparison and therefore there is no benefit “unless the “financial contribution” makes the recipient “better off than it would otherwise have been, absent that contribution.”<sup>463</sup> Of this discussion found in *Canada – Aircraft*, the Appellate Body in *Canada – Renewable Energy* affirmed the conclusion that a benefit has been conferred “if the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market.”<sup>464</sup> Therefore, a marketplace assessment is required.<sup>465</sup>

The Panel in *Canada-Renewable Energy* were divided over whether a benefit had been conferred.<sup>466</sup> The majority ruled that Japan did not provide enough evidence to prove a benefit. However, one dissenting voice suggested that because solar energy would not have been in the market without the feed-in tariff, a benefit therefore existed.<sup>467</sup> However, the Appellate Body decided that all members of the Panel had erred in their decision by failing to first correctly identify the relevant

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<sup>457</sup> *Canada – Renewable Energy*, above n 424, at [5.132].

<sup>458</sup> *Canada – Renewable Energy*, above n 424, at [5.121].

<sup>459</sup> Kulovesi, above n 423, at 346.

<sup>460</sup> *Canada – Aircraft*, above n 447, at [153].

<sup>461</sup> *Canada – Aircraft*, above n 447, at [154].

<sup>462</sup> *Canada – Aircraft*, above n 447, at [155].

<sup>463</sup> *Canada – Aircraft*, above n 447, at [157].

<sup>464</sup> *Canada – Renewable Energy*, above n 424, at [5.163].

<sup>465</sup> *Canada – Renewable Energy*, above n 424, at [5.165].

<sup>466</sup> Kulovesi, above n 423, at 346.

<sup>467</sup> Kulovesi, above n 423, at 346.

market mentioned in the test in *Canada-Aircraft*.<sup>468</sup>

The Panel had identified the market as the electricity market in general.<sup>469</sup> However, the Appellate Body decided that the relevant market was narrower. They noted that while “electricity is physically identical, regardless of how it is generated”, there are “additional factors that may be used to differentiate on the demand-side, which the Panel did not consider in its analysis of the relevant market.”<sup>470</sup> Further, they did not analyse supply-side factors at all.<sup>471</sup> This failure to take into account demand-side substitutability was inconsistent with the approach in *EC and certain member States – Large Civil Aircraft* where both demand-side and supply-side factors were considered important.<sup>472</sup>

The first observation the Appellate Body made on the supply-side factors was that they “suggest that windpower and solar PV producers of electricity cannot compete with other electricity producers because of differences in cost structures and operating costs and characteristics.”<sup>473</sup> Wind and solar technologies have high capital costs, low operations cost, produce electricity intermittently and cannot be relied on for base-load and peak-load electricity.<sup>474</sup> Further, while conventional generators can put price constraints on renewable generators, the same cannot be said for the opposite situation.<sup>475</sup> When all of this is considered, the Appellate Body came to the conclusion that:<sup>476</sup>

the differences in costs for conventional and renewable electricity are so significant, markets for wind- and solar PV-generated electricity can only come into existence as a matter of government regulation. It is often the government’s choice of supply-mix of electricity generation technologies that creates markets for wind- and solar PV-generated electricity.

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<sup>468</sup> *Canada – Renewable Energy*, above n 424, at [5.169].

<sup>469</sup> *Canada – Renewable Energy* (Panel), above n 453, at [7.318].

<sup>470</sup> *Canada – Renewable Energy*, above n 424, at [5.170].

<sup>471</sup> *Canada – Renewable Energy*, above n 424, at [5.171].

<sup>472</sup> *Canada – Renewable Energy*, above n 424, at [5.171].

<sup>473</sup> *Canada – Renewable Energy*, above n 424, at [5.174].

<sup>474</sup> *Canada – Renewable Energy*, above n 424, at [5.174].

<sup>475</sup> *Canada – Renewable Energy*, above n 424, at [5.174].

<sup>476</sup> *Canada – Renewable Energy*, above n 424, at [5.175].

In light of this, the Appellate Body ruled that the benefit comparison for Article 1.1(b) should be conducted not in the wholesale electricity market as a whole, as the Panel had done, but rather “within the competitive markets for wind- and solar PV-generated electricity, which are created by the government definition of the energy supply-mix.”<sup>477</sup> When discussing the relevant benchmarks for such a comparison, the Appellate Body wrote:<sup>478</sup>

Thus, where the government has defined an energy supply-mix that includes windpower and solar PV electricity generation technologies, as in the present disputes, a benchmark comparison for purposes of a benefit analysis for windpower and solar PV electricity generation should be with the terms and conditions that would be available under market-based conditions for each of these technologies, taking the supply-mix as a given.

The Appellate Body also rejected the dissenting opinion in the panel report (endorsed by Japan) that a benefit was conferred because “but for” the feed-in tariff programme, generators would not have entered the market.<sup>479</sup> Such an approach would be using the wholesale electricity market, which as noted by the Appellate Body, was the wrong market benchmark.<sup>480</sup>

Ultimately, despite the considerable reasoning given to the area of subsidies and feed-in tariff programmes, the Appellate Body felt they had insufficient evidence presented before them and as such were unable to come to a conclusion on if the programme was a subsidy under the SCM Agreement.<sup>481</sup>

#### *Academic Debate on Canada – Renewable Energy*

Luca Rubini, who has written numerous papers on the Appellate Body's decision,<sup>482</sup> made the observation that despite the diversity of articles on the case,

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<sup>477</sup> *Canada – Renewable Energy*, above n 424, at [5.178].

<sup>478</sup> *Canada – Renewable Energy*, above n 424, at [5.190].

<sup>479</sup> *Canada – Renewable Energy*, above n 424, at [5.199].

<sup>480</sup> *Canada – Renewable Energy*, above n 424, at [5.199].

<sup>481</sup> *Canada – Renewable Energy*, above n 424, at [5.246].

<sup>482</sup> Luca Rubini "The wide and the narrow gate: Benchmarking in the SCM Agreement after the

“virtually all pieces share one common denominator. Their assessment is negative.”<sup>483</sup> Rubini concludes in his own literature review that it is “highly significant that (with a couple of exceptions) virtually all commentary so far is highly critical of the benefit analysis of the Panel (majority) and the Appellate Body.”<sup>484</sup>

Rajib Pal writes that the Appellate Body's decision in *Canada – Renewable Energy* was flawed for four reasons.<sup>485</sup> His first concern was that:<sup>486</sup>

the Appellate Body had no basis for concluding that the supply-side factors it deemed to be important... should have had any influence in determining the relevant market for purposes of its benefit analysis.

Others have agreed with such an assessment. Rubini notes that by considering supply-side factors, “the Appellate Body has made a fundamental mistake of economic methodology.”<sup>487</sup> This error came about by taking a competitive approach, where supply side factors can be important, for what is a state aid situation, where supply side factors should not be relevant.<sup>488</sup> Rubini concludes that “supply-side analysis is largely irrelevant”.<sup>489</sup> Similarly, Cosbey and Mavroidis argue that supply-side factors are “irrelevant to determining the definition of the relevant market for the purposes of establishing a benchmark.”<sup>490</sup> Meanwhile, even those who do not dismiss supply-side factors as a consideration,

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*Canada-Renewable Energy/FIT Ruling*' (2015) 14(2) WTR 211; Luca Rubini 'The Good, the Bad and the Ugly: Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies' (2014) 48(5) JWT 895; Luca Rubini 'Ain't Wasting' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space and Law Reform' (2012) 15(2) J Intl Econ L 525.

<sup>483</sup> Luca Rubini 'The wide and the narrow gate: Benchmarking in the SCM Agreement after the *Canada-Renewable Energy/FIT Ruling*' (2015) 14(2) WTR 211 at 213.

<sup>484</sup> Rubini, above n 483, at 218.

<sup>485</sup> Rajib Pal 'Has the Appellate Body's Decision in *Canada – Renewable Energy / Canada – Feed-in Tariff Programme* Opened the Door for Production Subsidies?' (2014) 17 J Intl Econ L 125 at 129.

<sup>486</sup> Pal, above n 485, at 129.

<sup>487</sup> Rubini, above n 483, at 219.

<sup>488</sup> Rubini, above n 483, at 219.

<sup>489</sup> Rubini, above n 483, at 219.

<sup>490</sup> Aaron Cosbey and Petros C. Mavroidis 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 J Intl Econ L 11 at 25.

such as Steve Charnovitz and Carolyn Fischer, do suggest that the Appellate Body's argument has a “lack of cogency.”<sup>491</sup>

Pal argues that the Appellate Body has incorrectly applied an approach from Article 6 to Article 1, despite their differences in terminology.<sup>492</sup> Cosby and Mavroidis agree, noting that the Appellate Body took the decision of *EC and Certain Member States – Large Civil Aircraft* out of context.<sup>493</sup> They all agree that while supply-side factors might be relevant when considering “serious prejudice” under Article 6, there is no good reason to incorporate it into a “benefit” analysis.<sup>494</sup> However, while ultimately disagreeing with the Appellate Body decision, Alexandre Genest is open to considering the use of *EC and Certain Member States – Large Civil Aircraft* when considering Article 1.1(b) of the SCM Agreement.<sup>495</sup>

Pal's second identified flaw in the Appellate Body's decision was that it “had no basis for concluding that those factors should outweigh the demand-side factors for determining the relevant market.”<sup>496</sup> Genest also agrees with this assessment, saying there was no legal basis.<sup>497</sup> It is a point that also troubles Charnovitz and Fischer, who note that there is no explanation from the Appellate Body as to how supply and demand factors should be weighed.<sup>498</sup> Pal writes that there is nothing to suggest that the demand-side factors should not have outweighed the supply-side and this would have given better effect to the SCM Agreement,<sup>499</sup> essentially repeating the arguments above that the supply-side factors were irrelevant.

Pal's third concern is that “the Appellate Body had no basis to attach significance to 'the Government of Ontario's choice of energy supply-mix' in its benefit

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<sup>491</sup> Steve Charnovitz & Carolyn Fischer, 'Canada-Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies' (2015) 14(2) WTR 177 at 204.

<sup>492</sup> Pal, above n 485, at 130.

<sup>493</sup> Cosby and Mavroidis, above n 490, at 25.

<sup>494</sup> Pal, above n 485, at 130-131; Cosby and Mavroidis, above n 490, at 25.

<sup>495</sup> Alexandre Genest, 'The *Canada – FIT* Case and the WTO Subsidies Agreement: Failed Fact-Finding, Needless Complexity, and Missed Judicial Economy' (2014) 10 McGill Int'l J. Sust. Dev. L. & Pol'y 237 at 249.

<sup>496</sup> Pal, above n 485, at 132.

<sup>497</sup> Genest, above n 495, at 249.

<sup>498</sup> Charnovitz and Fischer, above n 491, at 204.

<sup>499</sup> Pal, above n 485, at 132-133.

analysis.”<sup>500</sup> Charnovitz and Fischer note that by “equating politician preferences with consumer preferences” there is a risk of creating a “slippery slope” that introduces policy considerations into the benefit analysis.<sup>501</sup> This slippery slope fear is nearly universally shared by academics. Rubini argues that “there is no (full) overlap between *policies* and *markets*”.<sup>502</sup> By providing space for governmental preference for type of goods, Pal argues, the decision “risks rendering the SCM Agreement's subsidy disciplines meaningless.”<sup>503</sup> Genest suggests the Appellate Body’s approach has “signalled a greater tolerance of protectionist policies.”<sup>504</sup> Cosby and Mavroidis highlight this via an example.<sup>505</sup>

If country A sells widgets, and country B's producers come up with a new substitute for widgets that is uncompetitive because of cost structures and other supply-side factors, this ruling seems to give legal flexibility for country B to subsidize its uncompetitive producers. No benefit will be assessed because country B's producers are not in the same market as country A's producers, even though the two goods are substitutes.

Pal's final objection to the Appellate Body's decision was that they had “mis-applied the distinction it established between government interventions that create markets and those that support existing markets.”<sup>506</sup> This concern is based on the Appellate Body's comment that:<sup>507</sup>

while the creation of markets... does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies.

While analysing this development, Rubini provides a useful summary of what that

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<sup>500</sup> Pal, above n 485, at 133.

<sup>501</sup> Charnovitz and Fischer, above n 491, at 205.

<sup>502</sup> Rubini, above n 483, at 220.

<sup>503</sup> Pal, above n 485, at 133.

<sup>504</sup> Genest, above n 495, at 250.

<sup>505</sup> Cosby and Mavroidis, above n 490, at 26.

<sup>506</sup> Pal, above n 485, at 134.

<sup>507</sup> *Canada – Renewable Energy*, above n 424, at [5.188].

paragraph means. He writes that the Appellate Body is:<sup>508</sup>

not saying that market creation does never amount to a subsidy but that this does not automatically happen. You need to have other factors or circumstances present that may turn this act of creation into a subsidy problem. Absent them, the Appellate Body is crucially suggesting, you do not have a subsidy.

Pal argues that the Appellate Body was wrong to characterise the Ontario government as creating a new market, but rather was intervening in an existing market by “altering the electricity supply-mix and reducing demand for conventional electricity.”<sup>509</sup> Cosbey and Mavroidis go further by noting that this distinction between new and existing markets “has no statutory underpinning”.<sup>510</sup> The SCM Agreement does “not contain any language to this effect”.<sup>511</sup> Rubini’s characterisation of this new distinction is that the Appellate Body has created a “‘carve-out’, ‘exception’ or ‘exclusion’ of certain types of action from subsidy laws.”<sup>512</sup> This idea of a “carve out” has also been endorsed by Genest.<sup>513</sup>

Rubini has serious misgivings about this development, noting “the language of market creation, is dangerously *open-ended*.”<sup>514</sup> Further, it is something which has no “*legal or economic justification*.”<sup>515</sup> Rubini is also concerned with the sheer lack of clarity in the distinction, whether it is the question of how you identify a new market or how you define an appropriate level of costs and profits; ultimately, Rubini writes that “the boundaries of the ‘market creation’ scenario... are ultimately *undefined* and *unclear*.”<sup>516</sup> Cosbey and Mavroidis also note that it is difficult to decide what a new market is.<sup>517</sup>

Rubini believes that the Appellate Body’s motive for developing both supply-side

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<sup>508</sup> Rubini, above n 483, at 221.

<sup>509</sup> Pal, above n 485, at 134.

<sup>510</sup> Cosbey and Mavroidis, above n 490, at 27.

<sup>511</sup> Cosbey and Mavroidis, above n 490, at 27.

<sup>512</sup> Rubini, above n 483, at 221.

<sup>513</sup> Genest, above n 495, at 251.

<sup>514</sup> Rubini, above n 483, at 223.

<sup>515</sup> Rubini, above n 483, at 222.

<sup>516</sup> Rubini, above n 483, at 221-222.

<sup>517</sup> Cosbey and Mavroidis, above n 490, at 28.

importance in market definition and the distinction between new and existing market comes from:<sup>518</sup>

the belief that renewable energy is 'special' and that for this reason action to support it cannot be considered as exceptional or derogating (which is the essence of the legal notion of subsidy).

It is speculation that finds favour with other academics. Charnovitz and Fischer note that the Appellate Body is still haunted by *Tuna-Dolphin* and has gone out of its way to highlight its “environmental bona fides”.<sup>519</sup> Kulovesi also agreed that the Appellate Body’s decision came about from hoping to “avoid creating an open conflict between WTO law and one of the key policy instruments used to support renewable energy.”<sup>520</sup> The question then becomes, if, at the very least, this decision has been beneficial for the environment despite its questionable legal reasoning.

Cosbey and Mavroidis do not agree this has been a green victory.<sup>521</sup> There is first the element of if this has guaranteed feed-in tariff’s continued consistency with trade law. They write that “policy makers should not rely on the expectation that the legal acrobatics performed in this case will be repeated. FITs have not been offered a safe haven.”<sup>522</sup> Even under the legal acrobatics of *Canada – Renewable Energy*, they have their doubts that even the “cleanest of green measures” have been granted a safe harbour, since “relatively generous FIT schemes” are still likely to be found to be subsidies despite the new and existing market distinction.<sup>523</sup> Kulovesi does not believe a definitive answer has been provided about the WTO consistency of feed-in tariffs.<sup>524</sup> At a more principle-based level, Charnovitz and Fischer note that the Appellate Body has approached the issue of “green energy” the wrong way, suggesting that its necessity comes from replacing

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<sup>518</sup> Rubini, above n 483, at 224.

<sup>519</sup> Charnovitz and Fischer, above n 491, at 207.

<sup>520</sup> Kulovesi, above n 423, at 347.

<sup>521</sup> Cosbey and Mavroidis, above n 490, at 28.

<sup>522</sup> Cosbey and Mavroidis, above n 490, at 28.

<sup>523</sup> Cosbey and Mavroidis, above n 490, at 28.

<sup>524</sup> Kulovesi, above n 423, at 345.

fossil fuels to ensure guaranteed electricity supply, rather than the more pressing environmental reason of “facing the challenge of climate change”.<sup>525</sup>

On top of the fact that this decision might not be a safe haven for green measures, academics are concerned at how broad the door is. Rubini speculates that such broad language has given breathing space for action “beyond the clean energy sector” which could deliver a “huge blow to subsidy discipline, lessening transparency and control of potentially trade-distorting measures”.<sup>526</sup> Charnovitz and Fischer are also worried, noting that while the Appellate Body's interpretation could bode well for renewable energy schemes, “it could also open the door to less desired interventions.”<sup>527</sup> As an example of this, Pal considers corn-based ethanol production, which is less efficient than sugar-based production, could be justified under the reasoning of *Canada – Renewable Energy*.<sup>528</sup> Ultimately, Genest suggests that the decision could open “the floodgates for a surge of protectionist industrial policies.”<sup>529</sup>

Therefore, the academic literature has come to three conclusions with varying levels of unanimity: the decision has been made on faulty and unsustainable reasoning, it does not necessarily grant safe passage to all future renewable energy feed-in tariffs, and it has the potential to be exploited by less environmentally friendly to circumvent the SCM Agreement. The question becomes what options are being presented as a way forward from the *Canada – Renewable Energy*.

Rubini's attitude would seem to be to forget the whole thing had happened, suggesting that the best-case scenario, while unlikely, would be “to simply ignore the ruling”.<sup>530</sup> He goes on further to say that since the consideration of supply-side factors when defining the market was “simply wrong”, it is difficult to make the interpretation “less wrong”.<sup>531</sup> His option for the best forward is confrontational,

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<sup>525</sup> Charnovitz and Fischer, above n 491, at 207.

<sup>526</sup> Rubini, above n 483, at 228.

<sup>527</sup> Charnovitz and Fischer, above n 491, at 206.

<sup>528</sup> Pal, above n 485, at 135-136.

<sup>529</sup> Genest, above n 495, at 251.

<sup>530</sup> Rubini, above n 483, at 229.

<sup>531</sup> Rubini, above n 483, at 230.

suggesting:<sup>532</sup>

To step through the narrow gate would, by contrast, require adjudicators to shamelessly expose the deficiencies of the system (that is certain, desirable measures may be caught and even objected by subsidy disciplines), and force Members to recognise them and react.

Cosbey and Mavroidis consider that feed-in tariffs are likely a public good; addressing climate change is a public good, feed-in tariffs are not protectionist in nature, without domestic content requirements investors from all countries can experience the benefits, and a number of studies have suggested that feed-in tariffs “foster a rapid deployment of capacity for renewably generated electricity.”<sup>533</sup> In fact, in their opinion, this fact is why the Appellate Body was so desperate not to find the Ontario scheme a subsidy.<sup>534</sup> Therefore, they endeavoured to find a way that feed-in tariffs could be rescued under the SCM Agreement.

It must be noted that not everyone agreed with the idea that a feed-in tariff was a public good. Genest notes that the Auditor General of Ontario had concerns with the programme, but the Appellate Body ignored any doubts so as to fully embrace “the sustainable development claims associated with the FIT program.”<sup>535</sup> He remarked that a situation could occur, due to the way that electricity supply and demand works, where the Ontario market would have to stop “hydroelectricity production to favour wind and solar (which amounts to no environmental gain) and reducing nuclear production, which causes Ontario to incur significant costs and causes much disruption”.<sup>536</sup>

Even if we do work off the assumption that a feed-in tariff programme is a fundamental good, Cosbey and Mavroidis note that there is nothing approaching a public goods defence in the SCM Agreement.<sup>537</sup> Charnovitz and Fischer run into

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<sup>532</sup> Rubini, above n 483, at 230-231.

<sup>533</sup> Cosbey and Mavroidis, above n 490, at 30.

<sup>534</sup> Cosbey and Mavroidis, above n 490, at 31.

<sup>535</sup> Genest, above n 495, at 254.

<sup>536</sup> Genest, above n 495, at 254.

<sup>537</sup> Cosbey and Mavroidis, above n 490, at 36.

the same difficulties when they suggest that while they believe that WTO law did take into account policy considerations, it a difficult question to answer if benefit should have a policy-based factor.<sup>538</sup> It is possible that an “adequate remuneration” argument could be used to salvage some sort of public goods defence. Cosbey and Mavroidis consider a situation where the financial contribution is “simply payment of the full benefits conferred by the firm's actions – an internalization of external environmental costs.”<sup>539</sup> Indeed, Charnovitz and Fischer note the Appellate Body has suggested that competitive bidding could be used as a way of setting prices that would limit any feed-in tariff to “adequate remuneration”.<sup>540</sup>

When discussing such an idea, Cosbey and Mavroidis suggest it is not clear if a benefit would be conferred if “government's financial contributions were somehow exactly matched to the unpaid social benefits that would be derived from the investment that they support”.<sup>541</sup> However, they do not consider the idea of competitive bidding and conclude that it would be difficult to ensure that a subsidy exactly matched the social benefits it created, and therefore reject this approach as being possible.<sup>542</sup>

Another factor to try and protect environmentally friendly feed-in tariffs could be through some form of Article XX GATT defence. Several academics have considered Article XX's relevancy to the SCM Agreement. Charnovitz and Fischer would appear to be neutral on the idea, suggesting that there is not currently an exception analogous to Article XX but one could be incorporated if the SCM Agreement was revised “or interpreted”.<sup>543</sup> Genest is also neutral on the subject, saying that Article XX's relevancy to the SCM Agreement is “unanswered”.<sup>544</sup>

However, there is a strong school of thought that this would be going an interpretative step too far. Cosbey and Mavroidis note that there are clear

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<sup>538</sup> Charnovitz and Fischer, above n 491, at 206-207.

<sup>539</sup> Cosbey and Mavroidis, above n 490, at 36.

<sup>540</sup> Charnovitz and Fisher, above n 491, at 207.

<sup>541</sup> Cosbey and Mavroidis, above n 490, at 37.

<sup>542</sup> Cosbey and Mavroidis, above n 490, at 37.

<sup>543</sup> Charnovitz and Fisher, above n 491, at 188.

<sup>544</sup> Genest, above n 495, at 255.

indications that Article 8 of the SCM Agreement was the “only provision” that was meant to deal with these “green” subsidies, and that negotiators did not mean for Article XX to apply to the SCM Agreement.<sup>545</sup> Kulovesi agrees, writing that the SCM Agreement does not have environmental exceptions like Article XX and “thus, arguably even the ‘cleanest’ of green measures would find no safe harbour in facing the SCM Agreement”.<sup>546</sup> Marceau and Tratchman has described it as requiring a “heroic approach to interpretation.”<sup>547</sup> Condon would seem to be in agreement, noting that Article XX refers to “this Agreement”,<sup>548</sup> and echoing the comments of Cosbey and Mavroidis that negotiators did not make an attempt to incorporate the language of Article XX by its language or directly.<sup>549</sup>

In light of this apparent gulf between the SCM Agreement and Article XX, academic thought turns back to the now expired Article 8 of the SCM Agreement. Article 8 declared subsidies that met certain requirements and were concerned with regional aid, the environment, or research development were “non-actionable”.<sup>550</sup> Essentially, this was creating a traffic light system of prohibited subsidies (red), actionable subsidies (yellow), and non-actionable subsidies (green).<sup>551</sup> However, Article 8 expired in 2000 without any consensus to renew it.<sup>552</sup>

While it might be possible that a reinstatement of Article 8 is the best way forward, Cosbey and Mavroidis goes even further suggesting that “a wider exemption is warranted”.<sup>553</sup> They suggest a “hybrid approach that incorporated elements of Art. XX GATT and Art. 8 SCM Agreement” would be the best way forward.<sup>554</sup> They are not alone in such a viewpoint. Bigdeli also notes that a revival of Article 8 “may not have any substantial effect”,<sup>555</sup> and that any new

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<sup>545</sup> Cosbey and Mavroidis, above n 490, at 34.

<sup>546</sup> Kulovesi, above n 423, at 348.

<sup>547</sup> Marceau and Trachtman, above n 253, at 874.

<sup>548</sup> Condon, above n 238, at 903.

<sup>549</sup> Condon, above n 238, at 904.

<sup>550</sup> SCM Agreement, above n 433, art 8.

<sup>551</sup> Cosbey and Mavroidis, above n 490, at 39.

<sup>552</sup> Cosbey and Mavroidis, above n 490, at 41.

<sup>553</sup> Cosbey and Mavroidis, above n 490, at 42.

<sup>554</sup> Cosbey and Mavroidis, above n 490, at 46.

<sup>555</sup> Sadeq Z. Bigdeli 'Incentive Scheme to Promote Renewables and WTO Law of Subsidies' in T. Cottier, O. Nartova & S.Z Bigdeli *International Trade Regulation and Mitigation of Climate*

environmental exemption for subsidies should instead be based on Article XX(b).<sup>556</sup> Considering the stalling nature of the Doha round, Cosbey and Mavroidis would also seek to de-link any negotiation on this new provision from the normal trade rounds.<sup>557</sup> Essentially, this is the same conclusion reached by Rubini, who argues that the “only solution to the current 'turquoise mess' is law reform”.<sup>558</sup>

#### *Conclusion on Subsidies and the SCM Agreement*

Environmental subsidies can play an important role in moving the world away from fossil fuels and toward renewable energy. In particular, feed-in tariffs are being considered as a way of incentivising investment into renewable energy, which for investors can be a risky option. However, it is not clear if these programmes are subsidies and would be inconsistent with the SCM Agreement. The Appellate Body in *Canada – Renewable Energy* refused to say either way, but endeavoured to carve out a space for feed-in tariffs to possibly survive.

The reasoning of that decision has nearly been universally challenged by academics. The criticism is varied, worried about the preferential treatment giving to supply-side factors in a market analysis, to the newly created distinction between new and established markets. In near unison, writers are worried about whether the SCM Agreement has been severely hampered and that subsidies with a protectionist bent have unintentionally been given room to breathe.

While some academics have tried to consider how the SCM Agreement can be better interpreted to give more freedom to environmentally friendly policies, perhaps by applying Article XX of the GATT, there is a clear school of thought that the only way forward is law reform. Member states, under that line of reasoning, will need to come together and craft a new exemption, using Article 8 of the SCM Agreement and Article XX as a basis. However, consider the current stagnation of multilateral trade negotiations, any chance of treaty change seems unlikely, and at the very least, will take time and cannot be relied on. Pietro

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*Change* (Cambridge University Press, 2009) at 188.

<sup>556</sup> Bigdeli, above n 555, at 191.

<sup>557</sup> Cosbey and Mavroidis, above n 490, at 42.

<sup>558</sup> Rubini, above n 483, at 235.

Castagno describes, when discussing Article XX, any intervention by member states through treaty change as being “the last resort.”<sup>559</sup>

### *Domestic/Local Content Requirements – India – Solar Cells*

The shared concern in both *Canada – Renewable Energy* and *India – Solar Cells and Modules* are the domestic content requirements that both programmes included. In terms of renewable energy and combating climate change, domestic content requirements can allow a member state to build an industry that can assist in making the energy sector more environmentally friendly. Both the Ontario and Indian scheme sought to do this. Considering the recent nature of the panel and Appellate Body reports of *India – Solar Cell*, they have had very little written about their contents. This point, coupled with the fact that both reports cited the major parts of *Canada – Renewable Energy*, provides an opportunity for this literature review to consider the India case before reviewing the academic literature.

Before turning to the *India – Solar Cells* case, though, it is important to note that the Appellate Body’s decision in *Canada – Renewable Energy* masked another area of concern with domestic content requirements. Under Article 3.1(b) of the SCM Agreement, subsidies are prohibited if they are “contingent... upon the use of domestic over imported goods”.<sup>560</sup> It will become apparent when discussing domestic content requirements in the *India – Solar Cells* case that the practice struggles with being consistent under the GATT. However, domestic content requirements can also sink environmental subsidies under the SCM Agreement as well.

### *India – Solar Cells & Modules*

In 2010, the government of India launched the Jawaharlal Nehru National Solar Mission (‘JNNSM’) which had the objective “to establish India as a global leader in solar energy”.<sup>561</sup> The way the JNNSM primarily worked was for the Indian government to enter into long-term agreements with solar power developers (‘SPDs’). The issue that caused the United States’ complaint were the domestic

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<sup>559</sup> Pietro Castagno, above n 320, at 154.

<sup>560</sup> SCM Agreement, above n 433, art 3.1(b).

<sup>561</sup> *Resolution, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (11 January 2010) at 1-2.

content requirements ('DCR') that imposed certain mandatory requirements on the participating SPDs, which required them to use modules and cells manufactured in India.<sup>562</sup>

The United States claimed that the DCR measures were inconsistent with Article 2.1 of the TRIMS Agreement and Article III: 4 of the GATT.<sup>563</sup> India rejected this viewpoint.<sup>564</sup> The Panel noted that the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Programme* had taken the viewpoint that if something was found to fall within 1(a) of the Illustrative List then that was enough to conclude that the measure was a violation of both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT.<sup>565</sup> The Appellate Body agreed when it stated that falling within an example of the Illustrative List has be a decisive determinant of consistency with Article III:4 and not just an initial threshold to be met.<sup>566</sup>

The Panel found that the DCR measures were "TRIMs".<sup>567</sup> They accepted the United States' argument that the measures were investment measures because they encouraged the production of solar cells and modules in India.<sup>568</sup> This was consistent with the Panel's approach in *Indonesia – Autos* which considered investment measures in light of if they "pursued the promotion and development of specific industries with explicit reference to investment-related implications".<sup>569</sup> India's own policy objective stated that a "domestic solar manufacturing base to provide solar components" was an important part of the policy.<sup>570</sup>

Further, the Panel agreed with the United States that the DCR measures "require the purchase or use by an enterprise of products of domestic origin".<sup>571</sup> The DCR measures mandated that SPDs had to use solar cells and/or modules manufactured

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<sup>562</sup> *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, (Report of the Panel) at [7.8], [7.9] & [7.10].

<sup>563</sup> *India – Solar Cells* (Panel), above n 562, at [7.39].

<sup>564</sup> *India – Solar Cells* (Panel), above n 562, at [7.40].

<sup>565</sup> *India – Solar Cells* (Panel), above n 562, at [7.49].

<sup>566</sup> *India – Solar Cells* (Panel), above n 562, at [7.53].

<sup>567</sup> *India – Solar Cells* (Panel), above n 562, at [7.64].

<sup>568</sup> *India – Solar Cells* (Panel), above n 562, at [7.58].

<sup>569</sup> *India – Solar Cells* (Panel), above n 562, at [7.60].

<sup>570</sup> *India – Solar Cells* (Panel), above n 562, at [7.61].

<sup>571</sup> *India – Solar Cells* (Panel), above n 562, at [7.67].

in India.<sup>572</sup> Finally, the United States pointed out that SPDs must certify that they will meet the requirement for domestic content and they can be penalise for failing to do so and therefore they were mandatory.<sup>573</sup> Further, those who do comply with the DCR measures receive an advantage by being able to bid for an agreement to produce solar power.<sup>574</sup> The Panel noted this was similar to that seen in *Canada – Renewable Energy / Feed-In Tariff Program* and accepted the considerations of the United States.<sup>575</sup> As such, the Panel considered that the DCR measures fell within paragraph 1(a) of the Illustrative and were therefore inconsistent with both Article 2.1 of the TRIMS Agreement and Article III:4 of the GATT.<sup>576</sup>

Despite their conclusion, the Panel decided to undertake an Article III:4 analysis anyway. There was no dispute that solar cells and modules manufactured domestically in India and those imported from the United States were “like products”.<sup>577</sup> When considering whether the measure at issue was a “law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use”, the Panel noted that panels have repeatedly come to the conclusion this criteria is met where measures include a “condition that an enterprise accepts in order to receive an advantage”.<sup>578</sup> The DCR measures required compliance in order to receive the advantage of being able to bid for an agreement with the Indian government.<sup>579</sup>

The final factor that had to be considered was that of “less favourable treatment”. The Panel noted the Appellate Body’s decision of *Korea – Various Measures on Beef* which said that less favourable treatment is a question of “whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products”.<sup>580</sup> The DCR measures prohibited certain imported solar cells and modules, where the domestic versions were not prohibited, and as such the

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<sup>572</sup> *India – Solar Cells* (Panel), above n 562, at [7.67].

<sup>573</sup> *India – Solar Cells* (Panel), above n 562, at [7.68].

<sup>574</sup> *India – Solar Cells* (Panel), above n 562, at [7.68].

<sup>575</sup> *India – Solar Cells* (Panel), above n 562, at [7.72].

<sup>576</sup> *India – Solar Cells* (Panel), above n 562, at [7.73].

<sup>577</sup> *India – Solar Cells* (Panel), above n 562, at [7.82].

<sup>578</sup> *India – Solar Cells* (Panel), above n 562, at [7.87].

<sup>579</sup> *India – Solar Cells* (Panel), above n 562, at [7.88].

<sup>580</sup> *India – Solar Cells* (Panel), above n 562, at [7.92].

Panel concluded less favourable treatment had occurred.<sup>581</sup> As such, the DCR measures were inconsistent with both Article 2.1 of the TRIMS Agreement and, in a separate analysis, Article III:4 of the GATT 1994. This finding was not appealed to the Appellate Body.

India's submissions followed an alternate line of reasoning, being that the DCR measures fell under the government procurement derogation under Article III:8(a) and therefore were not inconsistent with WTO law.<sup>582</sup> Article III:8(a) reads:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

When considering the provision, the Appellate Body set out that Article III:8(a) is a “derogation” that exempts a member state from the national treatment obligation.<sup>583</sup> The United States' position was that the situation was indistinguishable to that seen in *Canada – Renewable Energy / Feed-In Tariff Program* and as such Article III:8(a) was inapplicable.<sup>584</sup>

The Panel considered the “threshold matter” that was the decisive factor in *Canada – Renewable Energy / Feed-In Tariff Program*.<sup>585</sup> The Appellate Body also considered this “threshold matter” in detail. In *Canada – Renewable Energy*, the Appellate Body said that:<sup>586</sup>

the scope of the terms “product purchased” in Article III:8(a) is informed by the scope of “products” referred to in the obligations set out in other paragraphs of Article III. Article

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<sup>581</sup> *India – Solar Cells* (Panel), above n 562, at [7.99].

<sup>582</sup> *India – Solar Cells* (Panel), above n 562, at [7.101].

<sup>583</sup> *India – Solar Cells*, above n 106, at [5.18].

<sup>584</sup> *India – Solar Cells* (Panel), above n 562, at [7.102].

<sup>585</sup> *India – Solar Cells* (Panel), above n 562, at [7.106].

<sup>586</sup> *Canada – Renewable Energy*, above n 424, at [5.63].

III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination.

The Appellate Body reiterated this point in *India – Solar Cells*, noting that “the product of foreign origin must be either “like” or “directly competitive” with or “substitutable” for – i.e. in a “competitive relationship” with - “the product purchased.””<sup>587</sup> The point that the Appellate Body was making is that it not reasonable that “the scope of a derogation can extend beyond the scope of the obligation from which derogation is sought.”<sup>588</sup> It is a valuable clarification that highlights the difference between Article III:8(a) and Article XX. The latter is a general exemption for various and multiple purposes, however Article III:8(a) is only relevant within the context of a foreign product being discriminated against under Article III.

The United States’ position in *India – Solar Cells and Modules* was that India was purchasing electricity, whereas the DCR measures were about solar cells and modules.<sup>589</sup> As such, they were not in a competitive relationship. This was the conclusion reached in *Canada – Renewable Energy / Feed-In Tariff Program* when the Appellate Body decided:<sup>590</sup>

In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship.

The Panel was not persuaded by India that the current dispute was distinguishable from that conclusion reached by the Appellate Body.<sup>591</sup> The “generation equipment” referred to above included solar cells and modules, which are the goods in question in the current.<sup>592</sup> In light of this, the Panel applied the Appellate Body’s decision and found that the DCR measures were not covered by Article

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<sup>587</sup> *India – Solar Cells*, above n 106, at [5.22].

<sup>588</sup> *India – Solar Cells*, above n 106, at [5.22].

<sup>589</sup> *India – Solar Cells* (Panel), above n 562, at [7.107].

<sup>590</sup> *Canada – Renewable Energy*, above n 424, at [5.79].

<sup>591</sup> *India – Solar Cells* (Panel), above n 562, at [7.120].

<sup>592</sup> *India – Solar Cells* (Panel), above n 562, at [7.123].

III:8(a).<sup>593</sup> The Appellate Body agreed with the Panel's findings, upholding them.<sup>594</sup> In making that finding, they noted that while:<sup>595</sup>

a consideration of inputs and processes of production may inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not displace the competitive relationship standard.

Finally, India put forward the argument that their scheme fell under Article XX. This paper has already considered Article XX and its environmental considerations, however it is worthwhile to briefly address India's arguments because they fell under provisions that are atypical for environmental-based situations, subsection (j) and (d).<sup>596</sup>

The Panel described Article XX(j) as establishing “a general exception for measures essential to the acquisition or distribution of products in general or local short supply”.<sup>597</sup> Intriguingly, Article XX(j) had never been invoked as a defence before.<sup>598</sup> Therefore, both the Panel and Appellate Body built their interpretation from the ground up. This paper will consider the more relevant discussion by the Appellate Body.

First, the Appellate Body considered the question of the measure needing to be “essential”. They considered the comment in *Korea – Various Measures on Beef* that “necessary” is “located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution’”.<sup>599</sup> Considering that the Oxford Dictionary defined essential as “absolutely indispensable or necessary”, the Appellate Body determined that essential “is located at least as close to the

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<sup>593</sup> *India – Solar Cells* (Panel), above n 562, at [7.135].

<sup>594</sup> *India – Solar Cells*, above n 106, at [5.41].

<sup>595</sup> *India – Solar Cells*, above n 106, at [5.40].

<sup>596</sup> *India – Solar Cells* (Panel), above n 562, at [7.188].

<sup>597</sup> *India – Solar Cells* (Panel), above n 562, at [7.198].

<sup>598</sup> *India – Solar Cells* (Panel), above n 562, at [7.202]; and *India – Solar Cells*, above n 106, at [5.58].

<sup>599</sup> *Korea – Various Measures on Beef*, above n 328, at [161].

“indispensable” end of the continuum as the word “necessary”.<sup>600</sup> They did, however, note that essential does require the same process of weighing and balancing as necessary does.<sup>601</sup>

The Appellate Body then moved onto consider the phrase “products in... short supply.”<sup>602</sup> As an initial starting point, they considered “short supply” to be referring to a situation where there is a “shortage”, a “deficiency in quantity; an amount lacking”.<sup>603</sup> Therefore, an assessment of if there is a deficiency requires:<sup>604</sup>

a comparison between “supply” and “demand”, such that products can be said to be “in short supply” when the “quantity” of a product that is “available” does not meet “demand” for that product.

Further, the use of “general or local” refer to a situation where “short supply exists within the territory of the Member invoking Article XX(j)”.<sup>605</sup> The Appellate Body noted that the provision was neutral to the origin of the products sought and therefore domestic and imported goods can factor into consideration.<sup>606</sup> This was a rejection of India's argument that a lack of a domestic manufacturing capacity could be enough to establish a shortage. In essence:<sup>607</sup>

Article XX(j) requires a careful scrutiny of the relationship between supply and demand based on a holistic consideration of trends in supply and demand as they evolve over time, as well as whether the conditions giving rise to short supply have ceased to exist.

In light of this, the Appellate Body upheld the Panel's decision that solar cells and

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<sup>600</sup> *India – Solar Cells*, above n 106, at [5.62].

<sup>601</sup> *India – Solar Cells*, above n 106, at [5.63].

<sup>602</sup> *India – Solar Cells*, above n 106, at [5.65].

<sup>603</sup> *India – Solar Cells*, above n 106, at [5.65].

<sup>604</sup> *India – Solar Cells*, above n 106, at [5.66].

<sup>605</sup> *India – Solar Cells*, above n 106, at [5.67].

<sup>606</sup> *India – Solar Cells*, above n 106, at [5.68].

<sup>607</sup> *India – Solar Cells*, above n 106, at [5.70].

modules were not “products in general or local short supply” and Article XX(j) did not apply in the current case.<sup>608</sup>

India also argued that Article XX(d) could apply. Article XX(d) creates a general exception for measures which are:

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

Unlike with Article XX(j), the Panel noted that Article XX(d) had a “considerable body of jurisprudence”.<sup>609</sup> The provision contains two cumulative requirements: the measure must be “designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT”, and then the measure must be “necessary to secure such compliance.”<sup>610</sup>

The Appellate Body, in their assessment, took notice of their earlier decision in *Mexico – Taxes on Soft Drinks*.<sup>611</sup> In that decision, the Appellate Body defined “laws or regulations” as:<sup>612</sup>

rules that form part of the domestic legal system of a WTO member, including rules deriving from international agreement that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.

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<sup>608</sup> *India – Solar Cells*, above n 106, at [5.90].

<sup>609</sup> *India – Solar Cells* (Panel), above n 562, at [7.267].

<sup>610</sup> *India – Solar Cells* (Panel), above n 562, at [7.267].

<sup>611</sup> *India – Solar Cells*, above n 106, at [5.106].

<sup>612</sup> *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 24 March 2006 (Report of the Appellate Body) at [79].

In *India – Solar Cells*, the Appellate Body went further in defining “laws or regulations”. They suggested that the term is not limited to instruments that are enforceable by law, but rather can include rules which a Member seek to comply with even when compliance is not coerced.<sup>613</sup> This provides a widening scope for the term. When considering the question of “to secure compliance”, the Appellate Body noted that the measure only needs to seek to secure the observance of the “laws or regulations” and not that the result has to be an absolute certainty.<sup>614</sup>

To conclude on their general comments, the Appellate Body provided guidance for future panels by saying that when considering if something is a law or regulation, they should consider:<sup>615</sup>

- (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including e.g. before a court of law; (iv) whether the rule has been adopted or recognised by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.

Of particular interest to environmental law is that India argued that its international law obligations were relevant to Article XX(d).<sup>616</sup> However, the Appellate Body in *Mexico – Taxes on Soft Drinks* ruled that international instruments did not meet the definition of “laws or regulation” in Article XX(d).<sup>617</sup> The provision is referring “to rules that form part of the domestic legal

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<sup>613</sup> *India – Solar Cells*, above n 106, at [5.109].

<sup>614</sup> *India – Solar Cells*, above n 106, at [5.108].

<sup>615</sup> *India – Solar Cells*, above n 106, at [5.127].

<sup>616</sup> *India – Solar Cells* (Panel), above n 562, at [7.269].

<sup>617</sup> *India – Solar Cells* (Panel), above n 562, at [7.289].

system of a WTO member.”<sup>618</sup> International instruments can become a part of a “domestic legal system”, though. The Appellate Body identified two ways this could be achieved. First, a WTO member could pass an “implementing instrument” that would implement the international instrument into domestic law.<sup>619</sup> Secondly, that it in some countries, international rules can have direct effect within a domestic system and therefore an implementing instrument is not necessary.<sup>620</sup> Therefore, international rules can fall under Article XX(d), but only if they “have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member’s legal system.”<sup>621</sup> The Appellate Body noted that even if an international instrument does form a part of the domestic legal system, it is still necessary to then make the assessment detailed above to see if it counts as a “law or regulation.”<sup>622</sup>

The Panel found that India failed to demonstrate that the international instruments had “direct effect” in India.<sup>623</sup> India’s evidence gave the Panel the impression that before an international instrument can have effect in the Indian legal system, the government needed to have taken some action to implement it.<sup>624</sup> As such, the Panel decided that India failed to show that the international instruments cited were “laws or regulations” under Article XX(d).<sup>625</sup> The Appellate Body agreed, saying that India had not sufficiently demonstrated that the international instruments formed a part of its domestic legal system.<sup>626</sup> Ultimately, it appeared that the Appellate Body was subtly expanding Article XX(d), giving India a chance to use international law, but only if it was an international law that had specific obligations, rather than principles, and that it had been implemented into domestic law. India had not met that threshold.

India did, however, also provide several domestic instruments for the purposes of Article XX(d), though, the Panel decided that only section 3 of the Electricity Act

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<sup>618</sup> *India – Solar Cells* (Panel), above n 562, at [7.289]; *Mexico – Soft Drinks*, above n 612, at [69].

<sup>619</sup> *Mexico – Taxes on Soft Drinks*, above n 612, at [69].

<sup>620</sup> *Mexico – Taxes on Soft Drinks*, above n 612, at [69].

<sup>621</sup> *India – Solar Cells* (Panel), above n 562, at [7.292].

<sup>622</sup> *India – Solar Cells*, above n 106, at [5.141].

<sup>623</sup> *India – Solar Cells* (Panel), above n 562, at [7.298].

<sup>624</sup> *India – Solar Cells* (Panel), above n 562, at [7.298].

<sup>625</sup> *India – Solar Cells* (Panel), above n 562, at [7.301].

<sup>626</sup> *India – Solar Cells*, above n 106, at [5.148].

was a “law or regulation” within the meaning of Article XX(d).<sup>627</sup> The Panel said they could see “no link or nexus between the DCR measures and Section 3 of the Electricity Act.”<sup>628</sup> Further, India had advanced no argument to explain the connection.<sup>629</sup> In light of this, the Panel found that Article XX(d) did not apply with regard to any of the DCR measures.<sup>630</sup> The Appellate Body agreed.<sup>631</sup>

### *Academic Literature*

Throughout this paper, we have considered environmental measures that come into conflict with WTO law and academia is concerned with how to interpret or reform trade rules to give these environmental measures space. There has been very little questioning of the environmental measures themselves. The emphasis has been on trade law. With regards to domestic content requirements, though, this is not the case. Academia is very concerned with the worth of domestic content requirements.

Rubini characterises any benefits coming from domestic content requirements as being “green vs. green conflict” at best.<sup>632</sup> This is because “any beneficial green impact deriving from domestic industry support would be compensated by a detrimental green impact for the competing industries of other countries”.<sup>633</sup> Others argue that DCRs are even worse. Cosbey and Mavroidis note that the immediate impact of DCRs are “*against* climate change mitigation, since they inevitably increase the cost of installed capacity by forcing investors to source from more costly local suppliers”.<sup>634</sup> It is a point that finds favour with Charnovitz and Fischer, who notes that the Ontario DCRs would have only made renewable energy more expensive in Canada.<sup>635</sup> Even Thomas Cottier, who is more friendly to DCRs, notes that from a decarbonisation viewpoint, “a local content requirement does not make sense as it increases costs for hardware and

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<sup>627</sup> *India – Solar Cells* (Panel), above n 562, at [7.319].

<sup>628</sup> *India – Solar Cells* (Panel), above n 562, at [7.329].

<sup>629</sup> *India – Solar Cells* (Panel), above n 562, at [7.329].

<sup>630</sup> *India – Solar Cells* (Panel), above n 562, at [7.333].

<sup>631</sup> *India – Solar Cells*, above n 106, at [5.151].

<sup>632</sup> Luca Rubini 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (2012) 15(2) J Intl Econ L 525 at 530.

<sup>633</sup> Rubini, above n 632, at 530.

<sup>634</sup> Cosbey and Mavroidis, above n 490, at 30.

<sup>635</sup> Charnovitz and Fischer, above n 491, at 188.

installations.”<sup>636</sup>

The benefits of DCRs are therefore not necessarily concerned with climate change mitigation. Cosby and Mavroidis note that the real objectives and impacts of DCRs are “rooted in national benefits such as job creation and fostering national firms that can compete at the global level in the renewable energy space.”<sup>637</sup> This view is corroborated by Oliver Johnson's interviews with Indian officials, who told him that the DCRs for the Indian Solar Scheme were concerned with “developing technological capabilities, ensuring energy security to sustain economic growth, developing technology export and leadership capacity, and pursuing energy access through off-grid opportunities.”<sup>638</sup> Further, he notes that several people he interviewed told him that the DCRs were due to “pressure from manufacturers”, a belief that was confirmed by the Ministry of New and Renewable Energy.<sup>639</sup> In light of this, such a finding seems to confirm Rubini's suggesting some DCRs are “clearly protectionist and cannot really be justified on environmental grounds.”<sup>640</sup> Even Cottier acknowledges that DCRs can sometime be motivated by “rent seeking protectionism.”<sup>641</sup>

Therefore, the question that is begging to be asked is whether DCRs can ever actually be beneficial in combating climate change. Cosby and Mavroidis propose utilising a modified version of the 'Bastable test', which was originally stated as saying “an industrial policy measure is worthwhile if the total costs of support are outweighed by the present discounted value of the benefits derived.”<sup>642</sup> The Bastable test is, in fact, just a following on of the ‘Mill test’.<sup>643</sup> The ‘Mill test’ notes that protection is only acceptable if: there is “dynamic learning effects”, the industry protection is temporary, and the industry must, at some point, become mature enough to stand alone without protection.<sup>644</sup> The

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<sup>636</sup> Thomas Cottier 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?' (2014) 1 RELP 40 at 44.

<sup>637</sup> Cosby and Mavroidis, above n 490, at 30.

<sup>638</sup> Oliver Johnson 'Promoting Green Industrial Development through Local Content Requirements: India's National Solar Mission' (2016) 16(2) Climate Policy 178 at 185.

<sup>639</sup> Johnson, above n 638, at 186.

<sup>640</sup> Rubini, above n 632, at 530.

<sup>641</sup> Cottier, above n 636, at 44.

<sup>642</sup> Cosby and Mavroidis, above n 490, at 30.

<sup>643</sup> Takashi Negishi *Developments of International Trade Theory* (Springer, Japan, 2001) at 75.

<sup>644</sup> Marc J. Melitz 'When and how should infant industries be protected?' (2005) 66(1) Journal of

knowledge learned during the protection stage should be available to newcomers, rather than being limited to one company.<sup>645</sup> In terms of DCRs then, they would be worthwhile if the future environmental benefits of the policy (such as new innovators and competitors in the environmental sector) end up outweighing the lost environmental benefits from the initial slower deployment of green technology.<sup>646</sup> According to the ‘Mill test’, the protection should also only be limited until the industry can stand on its own. With this in mind, it is appropriate to consider if DCRs can meet this standard. If they do, then it may be worthwhile to try and tackle how WTO law could be reinterpreted to provide the policy breathing room. However, if DCRs do not appear to meet the ‘Mill-Bastable test’ then it is suggested it is not worth the potential dissent and drama that such a reinterpretation could cause.

Rubini and Cottier both identify potential benefits from DCRs. Rubini notes that the argument in favour of DCRs is that they “would not only create competitive domestic players in the sector but ultimately, if it meant 'more agents of innovation' internationally, increase global competition”.<sup>647</sup> Cosbey, himself, notes that “innovation in renewable energy technology is a critically important global public good”.<sup>648</sup> Essentially, there is a danger to green industry if global competition is selected to a few countries. Cottier's argument in favour of DCRs are services-based.<sup>649</sup> He notes that maintenance is an issue of particular importance, since it is naturally advantageous to have local producers who are there on hand to manage and maintain installations.<sup>650</sup> Further, he suggests that DCRs may be justifiable for allowing the least developing countries build up an industrial base.<sup>651</sup>

Cosbey and Mavroidis note that any attempt to measure the environmental benefits of DCRs through a modified Bastable test would be difficult and

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International Economics 177 at 177.

<sup>645</sup> Negishi, above n 643, at 76.

<sup>646</sup> Cosbey and Mavroidis, above n 490, at 30.

<sup>647</sup> Rubini, above n 632, at 530.

<sup>648</sup> Aaron Cosbey 'Renewable Energy Subsidies and the WTO: The Wrong Law and the Wrong Venue' (2011) 44 Subsidy Watch 1 at 2.

<sup>649</sup> Cottier, above n 636, at 45.

<sup>650</sup> Cottier, above n 636, at 45.

<sup>651</sup> Cottier, above n 636, at 45.

challenging.<sup>652</sup> However, Oliver Johnson's case study of the effectiveness of the first phase of India's DCRs, that were eventually found to be WTO inconsistent, provides insight into the matter. Johnson's review of the Indian DCRs does not paint a particularly positive picture. He notes that an initial review concluded that the DCRs had "limited and potentially negative impacts."<sup>653</sup> Due to heavy losses for local manufacturer, an almost 50% reduction in workforce and non-existence R&D investment, Johnson reports that the DCRs were "widely considered to have failed in economic terms."<sup>654</sup> Ultimately, Johnson concludes "it is clear that the LCR failed to improve competitiveness and did not significantly increase job opportunities in solar manufacturing."<sup>655</sup> This finding is consistent with Hestermeyer and Nielsen's conclusion that DCRs can actually lead to an industry's competitiveness being hurt.<sup>656</sup> However, Johnson does note that the capacity of local manufacturing had increased and that the DCRs allowed some Indian manufacturers to "weather stormy market conditions".<sup>657</sup>

Bearing in mind Rubini and Cosby's comments about "innovators", it is important to note that Johnson found that despite the increase in manufacturing capacity, there had been "no opportunity for dynamic learning effects, which are the cornerstone of innovation capabilities and building competitiveness."<sup>658</sup> This is again consistent with the findings of Hestermeyer and Nielsen who state that the "episodic empirical evidence" shows that DCRs can lead to "uncompetitive national industry at enormous welfare cost."<sup>659</sup> In his conclusion, Johnson characterises the first phase of India's DCRs as being:<sup>660</sup>

partially successful in promoting domestic manufacturing as they appear to have helped Indian manufacturers weather some of the storm that has hit the global solar manufacturing industry in the past few years. In addition, LCRs did not hinder project

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<sup>652</sup> Cosby and Mavroidis, above n 490, at 30.

<sup>653</sup> Johnson, above n 638, at 187.

<sup>654</sup> Johnson, above n 638, at 187.

<sup>655</sup> Johnson, above n 638, at 188.

<sup>656</sup> Holger P. Hestermeyer & Laura Nielsen 'The Legality of Local Content Measures under WTO Law' (2014) 48(3) *JWT* 553 at 591.

<sup>657</sup> Johnson, above n 638, at 187.

<sup>658</sup> Johnson, above n 638, at 191.

<sup>659</sup> Hestermeyer, above n 656, at 591.

<sup>660</sup> Johnson, above n 638, at 191.

developers from meeting the installed capacity targets planned in the NSM and have led to impressive job creation in the solar industry. However, they have been less successful in building longer-term innovative capabilities, which are necessary to sustain competitiveness and make India a solar leader; there have been significant reductions in employment in manufacturing and limited development of technological and capabilities throughout the value chain.

This conclusion would seem to be consistent with that of Hestermeyer and Nielsen.<sup>661</sup> Considering these findings, it is hard to suggest it is worthwhile to argue against Charnovitz and Fischer's assessment that when considering DCRs in *Canada – Renewable Energy*, “the Panel and Appellate Body were rightly in agreement that the LCR constitutes a WTO violation”.<sup>662</sup>

### *Conclusion*

Domestic or local content requirements have been an increasingly common manufacturing policy.<sup>663</sup> However, the reasoning of the Appellate Body in *Canada – Renewable Energy*, reaffirmed in *India – Solar Cells & Modules*, would seem to rule out any possibility that DCRs can be consistent with either the GATT or TRIMs Agreement. Further, DCRs make a subsidy prohibited under Article 3.1(b) of the SCM Agreement.

However, it is unclear if DCRs are even that useful of a tool for combating climate change. Their primary worth is at a national level, providing economic growth and manufacturing jobs. They would appear to do very little at an environmental level and could, in fact, be outright protectionist. While some have suggested that perhaps they could be worthwhile at increasing competition and innovation in the renewable energy sector, the evidence from the Indian example suggest that any gains are marginal. As such, it is questionable if any effort should go toward pushing the boat out in interpreting WTO laws in a way that could make DCRs consistent with international trade law.

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<sup>661</sup> Hestermeyer, above n 656, at 591.

<sup>662</sup> Charnovitz and Fischer, above n 491, at 208.

<sup>663</sup> Hestermeyer, above n 656, at 553-554.

### *Other Areas of Potential Conflict*

There are, of course, other areas of potential conflict between WTO law and environmental measures. However, this paper cannot seek to address every conflict that might arise. Rather, when considering interpretative ideals for resolving the above conflicts, it might be possible to extrapolate out principles that can also be used when addressing these other conflicts. Of particular note are the issues surrounding carbon taxes and border tax adjustments, and anti-dumping rules.

A carbon tax is a tax on producers for emissions caused during the production process.<sup>664</sup> Border tax adjustments are a way to attempt to eliminate the advantages that exporters might gain if they come from a country which is not seeking to taking action against climate change.<sup>665</sup> In other words, border tax adjustments are an attempt to “level the playing field”.<sup>666</sup> Again, though, such environmental measures could run afoul of WTO laws, particularly Article I and III of the GATT 1994.<sup>667</sup> Border tax adjustments could be considered an “internal tax or other internal charge” under Article III(2) of the GATT and would therefore run the risk of being prohibited since domestic products are not subject to the same tax.<sup>668</sup> The threat of WTO action is not just an academic question when considering border tax adjustments, since the New Zealand's government position on them is that they are an undesirable option, partly because of the perceived risk of being in conflict with WTO rules.<sup>669</sup>

Carbon taxes could also become a retaliatory measure against countries that do not pull their weight in addressing climate change. The idea was put forward by the former French President Nicolas Sarkozy, who suggested that if the United States left the Paris Agreement then the European Union should impose carbon

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<sup>664</sup> Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli (ed) *International Trade Regulation and the Mitigation of Climate Change – World Trade Forum* (Cambridge University Press: New York, 2009) at 60.

<sup>665</sup> G. R Milner-White 'Kyoto v WTO: Carbon Tariffs – Addressing Conflict Between the Kyoto Protocol and International Trade Rules' (2009) 13 NZJEL 37 at 55.

<sup>666</sup> Milner-White, above n 665, at 38.

<sup>667</sup> Milner-White, above n 665, at 56.

<sup>668</sup> Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, above n 664, at 61.

<sup>669</sup> Milner-White, above n 665, at 61.

taxes on American goods.<sup>670</sup> Scott Lincicome of the Cato Institute argues that such an approach would be inconsistent with WTO law,<sup>671</sup> and Sarkozy was ultimately defeated in his campaign to return as French President, so the idea would appear dead. However, it might be the case that Sarkozy has opened Pandora's Box, and carbon taxes may be used in the future to ensure states come to the table when discussing international environmental action.

Ultimately, a carbon tax when being discussed under Article III will involve many of the same issues as already outlined above when discussing “like products”. Therefore, any change in interpretation of “like products” to make it more environmentally friendly will also make WTO law more hospitable to carbon taxes, at least regarding Article III and carbon taxes used as border adjustment mechanisms. A carbon tax used in the way envisioned by Sarkozy will run into difficulties under Article I and the Most Favoured Nation treatment. However, while the idea of carbon taxes as an environmental weapon was worth comment, this thesis does not have the space to dedicate a detailed analysis to any issue with Article I that it may run into.

Anti-dumping and climate change issues are highlighted by the recent dispute between the European Union and China, where China were producing a glut of solar panels and then concentrating on export-based policies.<sup>672</sup> The concept of anti-dumping is covered by Article VI of the GATT and the Anti-Dumping Agreement. They allow member states to implement anti-dumping measures if products are being dumped into their market and is causing material injury or threat to domestic industries who are producing like products.<sup>673</sup> However, as Kulovesi notes, there is the potential where anti-dumping measures are actually hurting climate change action, since the Chinese solar panels may be beneficial for European environmental policies.<sup>674</sup> Essentially, anti-dumping measures could ultimately lead to increase costs and making renewable energy more expensive,

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<sup>670</sup> Robbie Gramer, 'Can Europe Tax the US for Axing the Paris Climate Change Deal' (14 November 2016) Foreign Policy <<http://foreignpolicy.com/2016/11/14/can-europe-tax-the-u-s-for-axing-the-paris-climate-change-deal/>>.

<sup>671</sup> Gramer, above n 670.

<sup>672</sup> Kulovesi, above n 423, at 349.

<sup>673</sup> Kulovesi, above n 423, at 350.

<sup>674</sup> Kulovesi, above n 423, at 351.

which in terms of climate change mitigation would be unproductive.<sup>675</sup>

Therefore, it is important to keep in mind, that there are other potential conflicts between WTO laws and climate change mitigation than in just the areas that were considered in-depth in the above literature review.

### *Conclusion*

As is apparent, there is the potential for numerous hard and soft conflicts between WTO laws and measures that might be taken to combat climate change. The current interpretation of Article III could lead to many conflicts with environmental measures that focus on trying to reduce emissions or increase efficiency by favouring more environmentally friendly version of products. Article XX may provide an exception for those measures and therefore avoid any conflicts. However, this is not a foregone conclusion considering the limitations of the chapeau. Further, even if Article XX might salvage environmental measures, it could still hamstring them by reducing their effectiveness to make sure they are consistent with the chapeau. In effect, even the environmentally friendly Article XX could still cause soft conflicts and reduce the effectiveness of environmental measures. However, it must be noted that, as *Brazil – Retreaded Tyres* showed, the chapeau could actually increase the effectiveness of environmental measures by requiring countries to dispense with preferential exceptions to climate change action.

The sense of conflict is even more pronounced when considering the subject of subsidies and the SCM Agreement. While *Canada – Renewable Energy* managed to avoid an open conflict between trade law and a crucial environmental measure, academia is united in its stance that the decision cannot logically stand. Without some sort of legal space for environmental subsidies, there will be conflict between trade and climate change reform unless countries simply agree not to take action they are rightfully allowed to undertake.

However, not all potential conflicts are necessarily unwelcome developments. Local content requirements would appear to have limited usefulness in combating

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<sup>675</sup> Cottier, above n x, at 43.

climate change and helping the environment. Meanwhile, they are a potential breeding ground for increased protectionism in the global arena. Therefore, it is not necessarily a problem or a cause for concern if WTO law comes into conflict with local content requirements. Therefore, not all conflicts are created equal. However, the conflicts surrounding Article III, Article XX and the SCM Agreement are cause for concern and if the planet is to tackle climate change, then those conflicts will need to be addressed. Further, a way forward in addressing those conflicts might provide a template for dealing with any other areas of concern, such as if carbon taxes become more prevalent in the global arena.

#### ***Chapter IV – Incorporating Environmental Action into WTO Law – Mutual Supportiveness***

The easiest way to address these conflicts between climate change measures and trade law would be treaty change. This is, in so many words, the “magic wand” option. If we lived in an ideal world, we could wave a magic wand and change the WTO treaties in a way friendlier to environmental measures. For instance, this may be done by reintroducing the idea of non-actionable subsidies and the traffic light ideal to the SCM Agreement, and inserting a new, far more wide-reaching exception to the GATT concerned with measures taken to address climate change. This would be the gold standard for climate change action.

It is also incredibly unlikely. The prospects for any legislative solution to emerge in response to such issues like climate change are regarded as “low”.<sup>676</sup> The Committee on Trade and Environment was designed to make recommendations make changes to the WTO rulebook and yet it has now largely fallen “into hibernation”.<sup>677</sup> Even when the CTE has put forward proposal or discussed ideas, there has been “no real progress” on the matter.<sup>678</sup> As Pietro Castagno noted when discussing amending Article XX, treaty change is seen as the last resort.<sup>679</sup> In the face of the stalled Doha round and without any suggestion there may be a desire to undertake treaty change, it is suggested, for now, it must be written off as a way

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<sup>676</sup> Sivan Shlomo-Agon, ‘Clearing the Smoke: The Legitimation of Judicial Power at the WTO’ (2015) 49(4) *JWT* 539 at 540.

<sup>677</sup> Quick, above n 271, at 959.

<sup>678</sup> Quick, above n 271, at 961.

<sup>679</sup> Pietro Castagno, above n 320, at 154.

forward. As the potential threat of climate change looms over us, we need to be able to take urgent action.

Therefore, the only realistic conclusion is that action must be taken under the current legal regime of the WTO and its treaties, and how those laws are interpreted by panels and the Appellate Body. This is not a new suggestion. In fact, it is possible to say that the Appellate Body has already been doing such a thing successfully, having a “profound impact” in the field of trade and environment.<sup>680</sup> Its jurisdiction has expanded into previously unexplored issues.<sup>681</sup> As the review above shows, the Appellate Body has already made several decisions that would seem to extend interpretation in a way that is favourable to environmental arguments, whether it be *EC – Asbestos* and “likeness”, the broadening of Article XX, or the question of subsidies in *Canada – Renewable Energy*. The Appellate Body has shown itself willing to take reasonably bold interpretative steps.

However, it would be reckless to think this would be without opposition. Three former Director-Generals of GATT/WTO have said that the DSU is not the right forum to address environmental concerns, noting that “the WTO cannot be used as a Christmas tree on which to hang any and every good cause that might be secured by exercising trade power.”<sup>682</sup> They also stated, though, that branches of trade law cannot be “lopped off” just because they intersect with some other public policy.<sup>683</sup> Essentially, this statement from the former Director-Generals suggests Matsushita and his co-authors were right in saying that the Appellate Body’s reluctance to tackle issues like PPMs may stem from a belief that the GATT is for international trade and economic concerns and that to consider non-economic concerns would upset the status quo that the WTO and member states are content with.<sup>684</sup>

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<sup>680</sup> Quick, above n 271, at 980-981.

<sup>681</sup> Shlomo-Agon, above n 676, at 539.

<sup>682</sup> Arthur Dunkel, Peter Sutherland & Renato Ruggiero ‘Joint statement on the multilateral trading system’ (1 February 2001), World Trade Organization  
<[https://www.wto.org/english/news\\_e/news01\\_e/jointstatdavos\\_jan01\\_e.htm](https://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm)>.

<sup>683</sup> Dunkel, above 682 x.

<sup>684</sup> Matsushita, above n 1, at 190.

Considering this expansion and proclaimed doubt, the issue of legitimacy and judicial activism is an important one to consider. WTO practitioners are aware that once the WTO starts making decisions on non-trade factors, such as climate change measures, then a backlash might occur, with people wondering why the WTO should decide instead of democratic states.<sup>685</sup> Indeed, a criticism that has been made against the Appellate Body is that it has exceeded its authority when deciding on certain cases.<sup>686</sup>

This is further exacerbated by the fact that there is the potential for there to be a “deep-rooted institutional deficit of the WTO framework in the context of the tension between ‘*judicial interpretation*’ v. ‘*authoritative interpretation*.’”<sup>687</sup> While strictly speaking, the authoritative interpretation of WTO Agreements is vested with the Ministerial Conference and General Council only, they require a three-fourth majority from all members and no authoritative interpretation has been made.<sup>688</sup> This means, even if they could be changed by the Ministerial Conference or General Council, they are unlikely to be and as such interpretations by the Appellate Body have a *de facto* finality to them as interpretations of law.<sup>689</sup> Therefore, “any activist move from panels and the Appellate Body will certainly raise legitimacy question and inevitable carry significant implications.”<sup>690</sup>

It is therefore suggested that it is important that any change in interpretation comes about from a consistent, interpretative principle, rather than an inconsistent, slapdash approach that will bring into disrepute the standing of the Appellate Body and, by extension, the DSU. The academic response to the Appellate Body decision in *Canada – Renewable Energy* informs that opinion, where an inconsistent decision has largely been picked apart by writers. Further, while the Appellate Body cannot add or diminish rights and obligations set down in WTO agreements,<sup>691</sup> as long as the Appellate Body is interpreting provisions under the customary rules of treaty interpretation then they are not “adding or

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<sup>685</sup> Shlomo-Agon, above n 676, at 541.

<sup>686</sup> Howse, above n 20, at 12.

<sup>687</sup> Guan, above n 269, at 251.

<sup>688</sup> Guan, above n 269, at 251-252.

<sup>689</sup> Howse, above n 20, at 15.

<sup>690</sup> Guan, above n 269, at 252-253.

<sup>691</sup> Dispute Settlement Understanding, above n 9, art 19(2).

diminishing to existing obligations”.<sup>692</sup> Therefore, any interpretation principle must have some basis in the customary rules of treaty interpretation. There is also a safety valve. If WTO members disagree overwhelmingly with this new principle of interpretation then they can clarify this through an authoritative interpretation, however difficult this might be.<sup>693</sup>

Fortunately, a consistent approach in incorporating environmental concerns into the Appellate Body’s reasoning may be found through the principle of mutual supportiveness. Some solid groundwork on mutual supportiveness has been set down by Laura Stuart, and this paper intends to build on it, and then extend it even further to allow it to become a fully-fledged interpretative tool for the Appellate Body. Mutual supportiveness is the principle that the international community can go further than just avoiding conflicts between trade and environment, but rather develop “policies and laws in a ‘mutually supportive’ manner in order to protect the environment whilst upholding an open and non-discriminatory multilateral trading system.”<sup>694</sup> It allows the common objectives of both trade and the environment to be achieved.<sup>695</sup>

As a concept, mutual supportiveness is supported by several factors. Firstly, the UN has stressed since 1992 that economic growth and environmental protection should be “mutually supportive”.<sup>696</sup> In more trade specific language, the WTO has “emphasized that the goals of trade liberalization and sustainable development are mutually supportive.”<sup>697</sup> The Committee on Trade and Environment in 1996 endorsed the view that multilateral solutions to environmental problems were appropriate and that there could be a mutually supportive relationship between MEAs and the WTO agreements.<sup>698</sup> Any discussion of mutual supportiveness is enhanced by the fact that sustainable development is enshrined as a concept in the

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<sup>692</sup> Howse, above n 20, at 15.

<sup>693</sup> Howse, above n 20, at 16.

<sup>694</sup> Laura Stuart 'Trade and Environment: A Mutually Supportive Interpretation of WTO Agreements in Light of Multilateral Environmental Agreements' (2014) 12 NZJPIIL 379 at 381.

<sup>695</sup> Stuart, above n 694, at 384.

<sup>696</sup> Agenda 21, UN Conference on Environment and Development in 1992 at 2.9(d).

<sup>697</sup> Emily Barrett Lydgate, 'Sustainable development in the WTO: from mutual supportiveness to balancing' in *World Trade Review* (2012), 11:4, 621-639 at 622.

<sup>698</sup> Stuart, above n 694, at 392.

preamble of the WTO Agreement.<sup>699</sup> As a principle, mutual supportiveness works in the same area that says trade and environmental protection are both beneficial and crucial to society going forward.<sup>700</sup>

Stuart proposes that mutual supportiveness can be both a foundation of policy development within the WTO, but more importantly for this paper, she also suggests that mutual supportiveness could be used as an interpretative tool when deciding on environmentally-related trade disputes.<sup>701</sup> A mutually supportive interpretation would involve a Panel or the Appellate Body to consider the object and purpose of the WTO agreements in light of the wider context, including the rising concern about the environment, expressed by the increasing numbers of MEAs being created to protect and preserve it.<sup>702</sup>

Essentially, at its heart, a mutually supportive interpretation is one that avoids conflict between WTO law and MEAs. However, it is proposed that mutual supportiveness can be taken further, being used in trade plus environmental dispute even where there might not be an explicit MEA that may be in conflict. First, the Paris Agreement requires states to detail their emissions reductions in their NDCs.<sup>703</sup> It must be acknowledged, though, that it is doubtful if the actual goals of the NDCs are binding. The legally binding obligations are procedural in nature, such as provisions to submit NDCs once every five years,<sup>704</sup> rather than on the actual subject of implementation.<sup>705</sup> The impetus behind implementing the contents of the NDCs will be through more “economic, social and political obligations” rather than any legal obligations.<sup>706</sup> Regardless, it would undermine the spirit of the Paris Agreement, if not its law, for the WTO to block states’ attempt to reduce their emissions in line with their NDCs. Such a position is not mutually supportive. Secondly, sustainable development is embedded in the WTO Agreement itself.<sup>707</sup> Therefore, there is an argument that a mutually supportive

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<sup>699</sup> Agreement Establishing the World Trade Organization, above n 110, preamble.

<sup>700</sup> Matsushita, above n 1, at 716.

<sup>701</sup> Stuart, above n 694, at 382.

<sup>702</sup> Stuart, above n 694, at 396.

<sup>703</sup> Paris Agreement, above n 63, art 4(2).

<sup>704</sup> Paris Agreement, above n 63, art 4(9).

<sup>705</sup> Bodansky, above n 74, at 146-147; Voigt, above n 82, at 161.

<sup>706</sup> Jacquet and Jamieson, above n 88, at 645.

<sup>707</sup> Agreement Establishing the World Trade Organization, above n 110, preamble.

definition is required to give effect to the sustainable development principle of the WTO, even if there were no other MEAs involved. It is proposed then that a mutually supportive interpretation could be used when dealing with all trade plus environmental disputes.

The question is, though, if panels and the Appellate Body have the jurisdiction to adopt a new interpretative tool into their arsenal. The key provision is Article 3(2) of the DSU. It has been crucial in allowing panels and the Appellate Body to assert its role as being judicial in nature.<sup>708</sup> The Article itself reads that the Dispute Settlement System is “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”<sup>709</sup> Essentially, Article 3(2) of the DSU sets down that the WTO is not an island, but rather a part of a wide set of international institutions that make up international law.<sup>710</sup> This was confirmed by the Appellate Body in *US – Gasoline*, where they noted that Article 3(2) of the DSU directs the Appellate Body to ensure that WTO law is “not to be read in clinical isolation from public international law.”<sup>711</sup> Therefore, Article 3(2) provides confirmation that panels and the Appellate Body can decide on how WTO covered agreements are interpreted, taking into account public international law, as long as they are consistent with these customary rules.<sup>712</sup> The Vienna Convention on the Law of Treaties (VCLT) has partially codified the customary principles of treaty interpretation.<sup>713</sup>

The use of the VCLT is not unchallenged, though, based on the idea that it is “unreasonable, if not impossible, for a treaty created in Vienna in 1969 to codify interpretative rules of a treaty framework founded in 1995”, especially when not all WTO members are a party to the VCLT.<sup>714</sup> Further, the VCLT's drafting history suggests it was “never intended to be a full codification” of law.<sup>715</sup> However, there is the risk of not seeing the wood from the trees when discussing the exact place

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<sup>708</sup> Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21(3) EJIL 605 at 607.

<sup>709</sup> Dispute Settlement Understanding, above n 9, art 3(2).

<sup>710</sup> Stuart, above n 694, at 398.

<sup>711</sup> *US – Gasoline*, above n 147, at p 17.

<sup>712</sup> Howse, above n 20, at 15.

<sup>713</sup> *Japan – Alcoholic Beverages*, above n 147, at p 10.

<sup>714</sup> Guan, above n 269, at 237.

<sup>715</sup> Guan, above n 269, at 237.

of the VCLT in treaty interpretation. Article 3(2) does not necessarily mean that the customary rules of interpretation are the only factor of public international law that needs to be considered.

The Panel in *Korea – Measures Affecting Government Procurement* rejected such a stance, saying that Article 3(2) does not mean that all other international law except from the customary rules of interpretation are excluded.<sup>716</sup> Rather, if the WTO wanted to exclude certain parts of international law, then it had to exclude those within the treaty.<sup>717</sup> This is because WTO law is just one branch of public international law itself.<sup>718</sup> Therefore, while Article 31 to 33 of the VCLT are well-established as codifying the principles of customary rules in WTO jurisprudence,<sup>719</sup> the Appellate Body is now increasingly also taking note of non-codified principles of treaty interpretation as well.<sup>720</sup> In fact, as Isabella Van Damme notes, the Appellate Body is gaining in confidence, often adopting a more flexible approach with less reference to the VCLT.<sup>721</sup> This is demonstrated, for example, by the Appellate Body’s decision in *Japan – DRAMs (Korea)* which began their analysis straight from the SCM Agreement, without reference to the VCLT.<sup>722</sup>

Article 31(1) of the VCLT sets down that the starting point of any interpretation must be the actual terms of the text.<sup>723</sup> This is used by the Appellate Body, who usually takes its starting point as the ordinary meaning of the term in question.<sup>724</sup> This does not necessarily mean a dictionary meaning is particularly useful, as the Appellate Body noted in *EC – Asbestos*, “dictionary meanings leave many interpretive questions open.”<sup>725</sup> The Panel’s over-reliance with dictionary meaning

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<sup>716</sup> *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000 (Report of the Panel) at [7.96].

<sup>717</sup> Pauwelyn, above n 116, at 541.

<sup>718</sup> Pauwelyn, above n 116, at 538.

<sup>719</sup> Guan, above n 269, at 236.

<sup>720</sup> Van Damme, above n 708, at 621.

<sup>721</sup> Van Damme, above n 708, at 635.

<sup>722</sup> *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/, 17 December 2007 (Report of the Appellate Body) at [207]-[209].

<sup>723</sup> Van Damme, above n 708, at 620.

<sup>724</sup> Van Damme, above n 708, at 621.

<sup>725</sup> *EC – Asbestos*, above n 148, at [91]-[92].

in *US – Gambling* was criticised by the Appellate Body.<sup>726</sup> Instead of concentrating solely on dictionary meanings, the Appellate Body said in *EC – Chicken Cuts* that the ordinary meaning should be ascertained according to the particular circumstances of the case, taking into account the intention of the parties and the “particular circumstances” of the case.<sup>727</sup> Such a comment would appear to provide breathing room for mutually supportive interpretations. In climate change issues, the particular circumstances of the case may involve MEAs, such as the Paris Agreement, but it is also suggested that the considerable threat of climate change, coupled with the WTO's desire for sustainable development, could also be a “particular circumstance”. However, this does limit mutual supportiveness only to cases where there is a genuine environmental or climate change factor to consider.

An instrumental aspect of confirming and justifying interpretations is the “object and purpose of the treaty”.<sup>728</sup> It is here where Stuart sees a basis for mutually supportive interpretations to flourish.<sup>729</sup> While the purpose cannot form “an independent basis for interpretation”, it is still an important factor.<sup>730</sup> Since one of the objectives of the WTO Agreement is sustainable development, provisions need to be interpreted in a manner consistent with environmental objectives.<sup>731</sup> Of course, sustainable development is not the only objective. Indeed, the Appellate Body has noted that most treaties do not have one single object or purpose, but rather numerous and sometimes competing objectives, especially the WTO Agreement.<sup>732</sup> Therefore, it appears that the ordinary meaning must be consistent with the object and purpose of all other relevant elements of the treaties. For instance, an interpretation of Article XX(g) “relating to the conservation of exhaustible natural resources” could not be so broad “as seriously to subvert the purpose and object of Article III:4”.<sup>733</sup>

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<sup>726</sup> *US – Gambling*, above n 350, at [166].

<sup>727</sup> *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 27 September 2005 (Report of the Appellate Body) at [175].

<sup>728</sup> Van Damme, above n 708, at 631.

<sup>729</sup> Stuart, above n 694, at 411.

<sup>730</sup> Van Damme, above n 708, at 631.

<sup>731</sup> Stuart, above n 694, at 411.

<sup>732</sup> *US – Shrimp*, above n 275, at [17].

<sup>733</sup> *US – Gasoline*, above n 147, at p 16.

The case of *EC – Chicken Cuts* considered the relationship between the object and purpose of the entire provision and the object and purpose of individual provisions.<sup>734</sup> The Appellate Body said that the “object and purpose” of the treaty in its entirety is a starting point, and that the purpose of certain provisions can inform the purpose of the treaty as a whole, and vice versa.<sup>735</sup> Van Damme characterises this comment as the Appellate Body saying there needs to be a sense of harmony between the object and purpose of the treaty, and the object and purpose of a provision.<sup>736</sup> Again, it is suggested that this aspect of customary law on treaty interpretation is compatible with mutually supportive interpretations. Sustainable development is an objective of the WTO Agreement. If an interpretation does not go so far as to make sustainable development more important than the other objectives of the agreement, then it should be a legitimate and justified step in interpretations.

Another consideration is effectiveness.<sup>737</sup> The Appellate Body in *US – Gasoline* noted that “an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”<sup>738</sup> While the principle of effective interpretation is a part of customary international law on treaty interpretation,<sup>739</sup> the Panel in *US – Gambling* said that it was also a part of the good faith principle in Article 31(1) of the VLCT since an interpretation “should not lead to a result which is manifestly absurd or unreasonable.”<sup>740</sup> Effectiveness has other beneficial elements as a principle of interpretation. It assists in allowing an evolutionary interpretation of the treaty to occur since “the treaty must remain effective rather than ineffective” and as such, the interpretation of the treaty may need to evolve to ensure this occurs.<sup>741</sup> Further, it assists in making sure that treaty interpretation is kept intellectually

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<sup>734</sup> Van Damme, above n 708, at 632.

<sup>735</sup> *EC – Chicken Cuts*, above n 727, at [238].

<sup>736</sup> Van Damme, above n 708, at 632.

<sup>737</sup> Van Damme, above n 708, at 635.

<sup>738</sup> *US – Gasoline*, above n 147, at p 21.

<sup>739</sup> Van Damme, above n 708, at 636.

<sup>740</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005 (Report of the Panel) at [6.49].

<sup>741</sup> Van Damme, above n 708, at 637.

coherent by ensuring that there are no contradictions.<sup>742</sup>

It is here, when discussing effectiveness, that another argument in favour of mutually supportive interpretations to ensure sustainable development can be made. As mentioned at the very start of this paper, the consequences of climate change could lead to both huge human and economic costs. The annual cost could be up to 20% of world GDP,<sup>743</sup> and the reality is no one can really know how high the price of climate change might end up being.<sup>744</sup> Good faith and effectiveness as principles mean that interpretations should not lead to results, which are “manifestly absurd or unreasonable”.<sup>745</sup> It is arguably “unreasonable” or even “absurd” that WTO laws could stop countries from taking action against climate change, which if not taken could lead to a disruption in international trade, therefore limiting the effectiveness of the purpose of the WTO. On its own, this argument is a long bow to draw. However, as merely one side factor in favour of mutual supportiveness, coupled with the more substantial points of sustainable development as an object of the WTO, and the existence of other multilateral environmental agreements, the idea of mutual supportiveness is strengthened.

Considering these interpretative rules for the WTO, the question becomes if mutual supportiveness can be used as an interpretative tool? The answer appears to be yes. Stuart certainly appears to agree. She makes the argument that Article 31 of the Vienna Convention provides a way for panels to incorporate the principle of mutual supportiveness into treaty interpretation since it requires treaties to be interpreted in “good faith” and to consider “any relevant rules of international law applicable in the relations between the parties.”<sup>746</sup> In light of this, panels could take a mutually supportive approach by interpreting WTO rules in a way consistent with international environment law, which would then give effect to the WTO objective of sustainable development.<sup>747</sup> MEAs can therefore be considered when the subject matter is directly relevant to the issue in

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<sup>742</sup> Van Damme, above n 708, at 637.

<sup>743</sup> Cottier, Nartova & Shingal, above n 57, at 1013.

<sup>744</sup> Bartelmus, above n 99, at 60.

<sup>745</sup> *US – Gambling* (Panel), above n 740, at [6.49].

<sup>746</sup> Stuart, above n 694, at 400.

<sup>747</sup> Stuart, above n 694, at 400.

dispute.<sup>748</sup>

However, mutual supportiveness can go beyond what is suggested by Stuart. One of the purposes of the WTO Agreement is sustainable development, as set out in the preamble. According to the VCLT, an important consideration for interpretations is the purpose or objective of the treaty. Therefore, sustainable development, through mutual supportiveness, should inform any interpretation of WTO laws, even when there are no direct conflicts with MEAs to consider.

As long as a mutually supportive interpretation fits within the customary rules of interpretation, and are therefore unlikely to add or diminish WTO rights or obligations,<sup>749</sup> then there should be no reason why it cannot be utilised throughout the DSU process. Therefore, it is proposed that a way to alleviate conflict between trade rules and climate change-related measures is for panels and the Appellate Body to consider mutually supportive interpretations, based on not just relevant MEAs, but also mutually supportive to the concept of sustainable development itself.

### ***Chapter V – Mutual Supportiveness' Potential***

Mutual supportiveness therefore has many attractive elements to it. As demonstrated above, using mutual supportiveness as an interpretative tool can be said to fit within the pre-existing rules of interpretation for the Appellate Body and panels. Further, unlike comprehensive treaty reform, mutual supportiveness can be used from tomorrow as an interpretative tool. It would not need to be incorporated into some future trade round. Instead, the Appellate Body could just begin to use it as a part of their method of interpretation without any formal trigger. Therefore, mutual supportiveness has considerable benefits for it as a tool to help resolve conflict between climate change measures and WTO laws.

This paper identified three areas where conflicts may exist: Article III and measures that tackle the efficiency of a product (as well as carbon taxes), Article

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<sup>748</sup> Stuart, above n 694, at 411.

<sup>749</sup> Howse, above n 20, at 15.

XX and how the general exceptions are used, and environmental subsidies and the SCM Agreement. Each area has interpretative questions that would have to be resolved to allow climate change measures to become consistent with WTO law. The question is how far mutual supportiveness can go in resolving those conflicts.

*Article III and “Like Products”*

Article III could be a considerable roadblock for WTO members who want to tackle climate change through environmental measures. Both efficiency-based differentiation on goods, and potential carbon taxes, are just the main examples of measures that might be limited or blocked by the enforcement of WTO law. For instance, a state may want to phase out the sales of certain inefficient goods or impose a carbon tax as a part of their NDC under the Paris Agreement. However, these measures may struggle to avoid coming into conflict with Article III. This is because they may differentiate between products that for all appearances, including the Appellate Body's four step assessment for likeness, look to be “like products”. However, if climate change is to be addressed and potential severe consequences are to be avoided, then these measures need to be given a certain amount of breathing room in WTO law. As stated above, the most practical and preferable way to approach this is through a mutually supportive interpretation of “like products”.

Before considering how this can occur, it is important to address Article XX. Article XX provides exceptions for these measures to survive, however this still might not be enough room for climate change measures. Further, as will be discussed later, it is suggested that it would be problematic and dangerous to broaden the Article XX exceptions much further. They are already quite liberal with only the chapeau serving as a narrow door. Therefore, it may be preferable to “fix” Article III, rather than just ballooning Article XX out until it is so wide, it threatens to undermine WTO law.

There are two potential mutually supportive interpretations that may make Article III friendlier to climate change measures. First, the long-running issue of PPMs could be tackled, broadening the meaning of “like products” by taking into account their PPMs, and also the emissions that they cause while being used, as a

part of their physical properties and consumers' preference. Secondly, there could be some type of “intent” test reincorporated into Article III, like the old “aims and effect” test. This paper proposes that, in terms of a mutually supportive interpretation, the latter option is preferable.

That is not the equivalent of saying that the issue of PPMs could not be satisfactorily solved. As both Howse and Pauwelyn argue, this could be done by considering the preferences of consumers.<sup>750</sup> The point is essentially that as climate change becomes more of a problem, consumers will begin to differentiate products in accordance with their impact on the planet via their PPMs.<sup>751</sup> Essentially, as people come to terms with the potential consequences of greenhouse emissions, they will buy goods, such as appliances, which have been produced in an environmentally friendly way. There is a problem in this argument, though, and that is highlighted by the Appellate Body's decision in *US – Clove Cigarettes*.<sup>752</sup>

*US – Clove Cigarettes* is a case that involved Article 2.1 of the TBT Agreement, rather than Article III of the GATT. However, the Appellate Body noted the similarities between the two provisions in the interpretation of “like products”, and also took guidance from an earlier decision, *Philippines – Distilled Spirits*, which was a case involving Article III.<sup>753</sup> Ultimately, the Appellate Body said that:<sup>754</sup>

it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like.

This is a genuine problem to the Howse and Paulwelyn argument about

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<sup>750</sup> Howse, above n 20, at 515; Pauwelyn, above n 235, at 586.

<sup>751</sup> Pauwelyn, above n 235, at 586.

<sup>752</sup> *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 24 April 2012 (Report of the Appellate Body).

<sup>753</sup> *US – Clove Cigarettes*, above n 752, at 143.

<sup>754</sup> *US – Clove Cigarettes*, above n 752, at 142.

consumers' preference and PPMs. Some consumers do not accept that climate change exists. Some may believe in climate change, but will not change their preferences. Therefore, to some consumers, energy efficient and non-efficient products are still “highly substitutable” and therefore that will support a conclusion that products are alike despite their differences in PPMs. This does not mean that Howse and Pauwelyn's arguments are untenable; it just means that there is another aspect of Appellate Body interpretation that would have to change. A threshold would have to be set for how large a segment of consumers could get without factoring into the Appellate Body's thinking.

On the other hand, the “physical properties of the product” could be broadened to include emissions caused via the *use* of the product, in a similar way to how alcoholic content has once been used.<sup>755</sup> It is suggested that this is more viable than considering PPMs using this argument. The carbon content of the production process is not inherent to the product.<sup>756</sup> However, there is a far stronger argument in suggesting that the carbon footprint of a product's lifetime of use is inherently a physical property of the product itself. The Appellate Body in *EC – Asbestos* said that the “physical properties of the product” is intended to “cover the physical qualities and characteristics of the products”.<sup>757</sup> The carbon footprint of a product when it is used is clearly a characteristic of that product. Further, the Appellate Body noted that those physical properties “that are likely to influence the competitive relationship between products in the marketplace” in particular are of importance to the assessment.<sup>758</sup> Companies have begun to advertise their goods and services on the basis of their environmental friendliness and their carbon footprints. As such, it seems there is ample room to consider a product's carbon footprint during its lifetime of use as a “physical property” that must be assessed. Therefore, without little interpretative change, there could be a successful argument that under the first head of the “likeness” assessment, an energy efficient product and another version of that product which is inefficient (such as fridges), are in fact not “like products”.

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<sup>755</sup> *US – Malt Beverages*, above n 260, at [5.71]-[5.73].

<sup>756</sup> *Condon*, above n 238, at 909-910.

<sup>757</sup> *EC – Asbestos*, above n 148, at 110.

<sup>758</sup> *EC – Asbestos*, above n 148, at 114.

As such, it would appear that there are potential ways to interpret “like product” in a mutually supportive way that relies on the actual likeness of the product itself. PPMs would be considered via the way consumers prefer goods that have been produced in an environmentally friendly way. Meanwhile, the energy efficiency of a product would be a factor of its physical properties. It would be two interpretative changes that would appear to make Article III mutually supportive with the concept of sustainable development and environmental agreements. However, it is still suggested it is not the best way to go forward.

First, there is the fact that such an interpretation will be going against previous jurisprudence. While this is not a fatal flaw, and will be discussed later when considering an “intent test”, it is suggested that if the Appellate Body is going to take a controversial interpretation, it should be an interpretation that is guaranteed to work. This is not the case here. It is hard to get over the point made by academics such as Quick, Lau, Marceau and Trachtman that identical products cannot be differentiated by consumers’ preferences alone.<sup>759</sup> There would likely need to be some other difference to make the products “unlike”, which cannot be guaranteed. Further, there is the risk of abuse since consumers’ preferences can be manipulated by government and therefore used as a potential shield for protectionism.<sup>760</sup> Finally, it places climate change reform at the whims of consumers. Consumers may not factor in environmental measures when purchasing, even if they are aware of the consequences of climate change. It is easier for consumers, with pinched wallets, to not consider a more energy efficient item even if it is vital that they should do so. When considering the comments of *US – Clove Cigarettes*, it means that consumers might defeat PPMs making products unlike. Therefore, while this mutually supportive interpretation could potentially work, its effectiveness is questionable.

Ultimately, Bernasconi-Osterwalder and her co-writers suggest that something like the “aims and effect” test is necessary if PPMs are going to be an Article III consideration.<sup>761</sup> The intersection between an “intent test” and PPMs is an

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<sup>759</sup> Quick and Lau, above n 166, at 432; Marceau and Trachtman, above n 253, at 859.

<sup>760</sup> Quick and Lau, above n 166, at 432-433.

<sup>761</sup> Bernasconi-Osterwalder, above n 140, at 210.

important one to consider, because there is a risk of inventing an interpretation that is not needed. An “intent test” would also give room for climate change measures concerned with PPMs. However, a PPMs friendly interpretation of Article III does not necessarily do much good for anything other than PPMs factors. Therefore, it seems only sensible to see if a mutually supportive interpretation of Article III can be constructed that would take introduce some sort of “intent test”.

It is important to note that unlike the PPMs issue, where jurisprudence has stubbornly ignored all attempt to factor it in,<sup>762</sup> Article III did used to have an “intent test” in the form of the “aims and effect” test, which was expressed by a Panel in *US – Taxes on Automobiles*.<sup>763</sup> This test came about because Article III:1 notes that Article III is concerned with domestic laws and taxes being applied “so as to afford protection to domestic production”. Therefore, if states were applying measures, but not in a way that afforded protection to domestic products, then Article III had not been breached. It is a test that gave context to Article III as being “an obligation not to discriminate” but not condoning all deregulations.<sup>764</sup> The “so as to afford protection to domestic production” seems like an important foundation on which to build a mutually supportive interpretation.

However, the elephant in the room must be addressed. The Appellate Body has already struck down the idea of such a test in *Japan – Alcoholic Beverages II*. The Appellate Body essentially declared intent an irrelevant consideration, noting that it “does not matter” even if the member state had no intention to engage in protectionism.<sup>765</sup> Therefore, if an “intent test” is to be revived, the concerns of the Appellate Body from that decision must be overcome.

It is important to note that the Appellate Body's jurisprudence lies somewhere between the traditional positions of common law and civil law when considering the doctrine of precedence. In a common law system, under stare decisis, the

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<sup>762</sup> Matsushita, above n 1, at 190.

<sup>763</sup> *US – Taxes on Automobiles*, above n 184, at [5.10].

<sup>764</sup> Cosbey & Mavroidis, above n 183, at 291.

<sup>765</sup> *Japan – Alcoholic Beverages*, above n 147, at p 27-28.

ruling of courts have binding power over lower or equal courts.<sup>766</sup> However, in a civil law system, often it is the rule that no judge can establish a legally binding precedent.<sup>767</sup> Rulings of the Appellate Body fall somewhere in the middle. Like a civil law system, the DSU sets down that the Appellate Body's decision is only binding on the “parties to the dispute.”<sup>768</sup> An earlier Appellate Body decision is not binding on some future dispute. However, the Appellate Body has suggested in both *Japan – Alcoholic Beverages II* and *United States – Stainless Steel (Mexico)* that there may be some slight resemblance of stare decisis in the DSU system.<sup>769</sup>

In *Japan – Alcoholic Beverages II*, the Appellate Body noted that while adopted reports are not binding outside of their specific dispute, they are “often considered by subsequent panels” and “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”<sup>770</sup> More recently, in *United States – Stainless Steel (Mexico)*,<sup>771</sup> the Appellate Body has been even stronger in its desire for some semblance of stare decisis. The Appellate Body stressed the need for “consistency and stability” and “security and predictability.”<sup>772</sup> They spoke harshly of the Panel's failure to “follow previously adopted Appellate Body reports addressing the same issue.”<sup>773</sup> Ultimately, the Appellate Body concluded that they were:<sup>774</sup>

deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.

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<sup>766</sup> Woraboon Luanratana & Alessandro Romano, 'Stare Decisis in the WTO: Myth, Dream, or a Siren's Song' (2014) 48(4) *JWT* 773 at 775-776.

<sup>767</sup> Luanratana, above n 766, at 776.

<sup>768</sup> Dispute Settlement Understanding, above n 9, art 17(14).

<sup>769</sup> Luanratana, above n 766, at 776.

<sup>770</sup> *Japan – Alcoholic Beverages*, above n 147, at p 14.

<sup>771</sup> *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 20 May 2008 (Report of the Appellate Body).

<sup>772</sup> *US – Stainless Steel*, above n 771, at [161].

<sup>773</sup> *US – Stainless Steel*, above n 771, at [161].

<sup>774</sup> *US – Stainless Steel*, above n 771, at [162].

Therefore, the Appellate Body has shown a strong desire for panels to follow their decisions, and for there to be consistency and predictability in decisions under the DSU. However, ultimately the Appellate Body decisions are only binding on the specific dispute being heard. Therefore, *Japan – Alcoholic Beverages II*'s disdain for an “intent test” for Article III does not have to be followed. In fact, the circumstances of that decision, involving alcohol around twenty years ago, are vastly different to the discussion of climate change and environmental measures now. As such, the Appellate Body is not beholden to that previous decision.

The words of Justice Abraham in the International Court of Justice case, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*,<sup>775</sup> seem appropriate to mention, however. The Justice noted that while it is a judicial imperative to be “highly consistent in its jurisprudence”, ultimately “precedent is not inviolate” and the Court has the right to “change course or overturn its jurisprudence if, exceptionally, it considers that there are compelling reasons to do so.”<sup>776</sup> In light of the Appellate Body’s desire for there to be consistency and predictability, echoed by Justice Abraham’s comments in the International Court of Justice, it seems appropriate to consider *Japan – Alcoholic Beverages II* and why it should not be followed, instead of choosing to ignore it altogether.

The Appellate Body’s rejection of the “aims and effect” test was founded in both the test’s failure to consider protectionism as a key principle, and the idea that “government intent was too subjective.”<sup>777</sup> The first concern seems more readily fixed by ensuring any test still factors protectionism into the mix. The main issue is the Appellate Body’s desire to stay far away from the question of “subjective intentions”.<sup>778</sup> The Appellate Body has noted in *Chile – Alcoholic Beverages* that one of the reasons it does not consider subjective intentions is that they are “not accessible to treaty interpreters.”<sup>779</sup> Matsushita and his co-authors suggest that the

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<sup>775</sup> *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Preliminary Objections)*, 5 October 2016.

<sup>776</sup> Declaration of President Abraham, above n 776, at 10-11.

<sup>777</sup> Lydgate, above n 162, at 438.

<sup>778</sup> *Chile – Alcoholic Beverages*, above n 192, at [62].

<sup>779</sup> *Chile – Alcoholic Beverages*, above n 192, at [62].

Appellate Body does not want to delve into the workings of member states, some of them being dictatorships and military governments.<sup>780</sup> This is all well and good, but it is suggested that such an approach is a question of taking the easiest route, and not necessarily the correct one.

Article III: 1 informs the interpretation of Article III and the phrase “so as to afford protection to domestic production” is an important factor of any interpretation. If a member state does not intend to protect domestic industries, but is rather trying to tackle climate change, then has Article III really been breached? This thesis suggests that no real mutually supportive interpretation with sustainable development can exist where the Appellate Body and panels limit the ability for states to differentiate like products, not to engage in protectionism, but because there is a very real environmental need to do so. Further, member states may need to take certain steps to address their level of emissions and follow the plans set out in their NDCs under the Paris Agreement. For instance, the interim NDCs lodged by both the United States and the European Union note the transport sector is an important area to address.<sup>781</sup> The United States explicitly discuss the need for fuel economy standards.<sup>782</sup> Therefore, vehicles may have to be treated differently depending on their fuel efficiency. A mutually supportive interpretation of Article III should allow those measures room to breathe if they are intended as action under the Paris Agreement and not a matter of protectionism.

An example of a similar approach could be seen by the International Centre for Settlement of Investment Dispute's ('ICSID') decision of *Philip Morris v. Uruguay*.<sup>783</sup> Uruguay had taken measures against smoking after adopting the World Health Organization's Framework Convention on Tobacco Control ('FCTC'). Philip Morris took action under a Bilateral Investment Treaty between

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<sup>780</sup> Matsushita, above n 1, at 188.

<sup>781</sup> Submission by Latvia and the European Commission on Behalf of the European Union and its Member States (6 March 2015) <<http://www4.unfccc.int/Submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf>>; U.S Cover Note INDC and Accompanying Information <<http://www4.unfccc.int/Submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf>>.

<sup>782</sup> U.S Cover Note INDC and Accompanying Information, above n 782.

<sup>783</sup> *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay* ARB/10/7, 8 July 2016.

Switzerland and Uruguay, with one such argument being that the measures were arbitrary. The ICSID noted several aspects when ruling in favour of Uruguay. First, the measures taken by Uruguay were recognised as measures that were effective in protecting public health by the WHO.<sup>784</sup> Secondly, the measures were taken “in accordance” with the FCTC.<sup>785</sup> Thirdly, an inquiry should consider whether “there was a manifest lack of reasons for the legislation.”<sup>786</sup> Finally, the ICSID noted that the FCTC should be used as “a point of reference on the basis of which to determine the reasonableness of the two measures”.<sup>787</sup> Therefore, there could be a situation when the Appellate Body has to decide if a measure is an act or protectionism or an environmental measure related to the Paris Agreement. The Appellate Body could use the Paris Agreement as a point of reference to decide, and also possibly receive information from environmental organizations as to the effectiveness of the measure.

Ultimately, the question of divining the real intent of the member state may be difficult, but it is necessary to provide a mutually supportive interpretation and give full effect to the goal of sustainable development. Further, because the element of intent will become a factor due to the necessity of mutual supportiveness, it means that not all Article III disputes will require the Appellate Body to delve into the intentions of a member states. They will only have to do so in a situation where it is necessary to be mutually supportive with sustainable development or other MEAs.

The Appellate Body may also be hesitant to enact an intent test because it is afraid of being seen as overstepping their jurisdiction and therefore calling their legitimacy into question.<sup>788</sup> The Appellate Body might consider that the WTO is an economic forum and that member states may be unhappy with attempts to factor in more non-economic issues.<sup>789</sup> Simply put, the time has come where climate change is an economic factor and has to be addressed, and therefore the latter point should be overcome, even if some dissent is raised. On the question of

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<sup>784</sup> *Philip Morris v. Uruguay*, above n 783, at [391].

<sup>785</sup> *Philip Morris v. Uruguay*, above n 783, at [395].

<sup>786</sup> *Philip Morris v. Uruguay*, above n 783, at [399].

<sup>787</sup> *Philip Morris v. Uruguay*, above n 783, at [401].

<sup>788</sup> Horn and Weiler, above n 145, at 143.

<sup>789</sup> Matsushita, above n 1, at 190.

legitimacy and jurisdiction, it is suggested that as long as any mutually supportive interpretation is made in line with the customary rules of treaty interpretation, then the Appellate Body or any panel would be acting within their jurisdiction and therefore legitimately.<sup>790</sup> As noted above, some of the factors to take into account in interpretation are: the actual terms, the particular circumstances, the object and purpose of the treaty and the individual provision, and consistency.

When considering the customary rules of interpretations, there are considerably strong arguments in favour of a mutually supportive interpretation that provides some sort of “intent test”. First, there is the object and purpose of both WTO law as a whole and Article III. One of the objects of the WTO Agreement is sustainable development.<sup>791</sup> Therefore, when considering an interpretation, the Appellate Body and panels should also factor in if it is mutually supportive with the ideal of sustainable development. Further, and very importantly, it does not appear such a contradiction would contradict with the purpose of Article III. Article III’s purpose is stated plainly that it is to ensure domestic laws or internal taxes “should not be applied to imported or domestic products so as to afford protection to domestic production.”<sup>792</sup> Article III’s purpose is to stop protectionism, explaining why the Appellate Body seemed concerned that the “aims and effect” test did not consider the principle of protectionism enough.<sup>793</sup> Preventing protectionism and ensuring sustainable development are not exclusive of each other, though. If a state is genuinely taking action due to an environmental reason, and is not concerned with domestic production at all, then it is not engaging in protectionism even if that might require differing treatment of products that could be regarded as like.

This would also seem to go to the heart of the question of what the member states intended when they signed up to the GATT. It seems far-fetched to suggest that states intended to sign away their rights to regulate products when considering Article III but rather, they were intending to limit protectionism on the global

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<sup>790</sup> Howse, above n 20, at 15.

<sup>791</sup> Agreement on the Establishing of the World Trade Organization, above n 110, preamble.

<sup>792</sup> GATT, above n 6, art III.

<sup>793</sup> Lydgate, above n 162, at 438.

stage.<sup>794</sup> Therefore, some sort of “intent test”, some test that sees if the measure in question is a protectionist measure or one with a genuine and legitimate regulatory goal, seems not only workable but actually essential to giving full effect to both the purpose of the treaty and also the intention of the parties when they signed it.

Furthermore, an “intent test” would provide a much more consistent relationship between Article III of the GATT and Article 2.1 of the TBT Agreement. The need for a consistent relationship has been stated in academia, but also by the Appellate Body. While noting that the two provisions are different,<sup>795</sup> the Appellate Body has said that Article 2.1 of the TBT Agreement “closely resembles” Article III.<sup>796</sup> Ultimately, the Appellate Body declared that “the two Agreements should be interpreted in a coherent and consistent manner.”<sup>797</sup> It is a point that was agreed with by James Flett when he wrote that Article III:4 and Article 2.1 “must be interpreted in a coherent and consistent manner.”<sup>798</sup> However, currently Article 2.1 of the TBT has a built in “legitimate regulatory distinction” test. Article III does not, states having to rely solely on the exceptions in Article XX.

This is arguably not a consistent and coherent approach. It has led to a situation where the TBT is an easier test to get through than the GATT,<sup>799</sup> and therefore there is at least one example where a member has relied solely on the GATT to bring a claim, ignoring the newer TBT Agreement.<sup>800</sup> Essentially, if the current interpretation stands, there is the risk that the United States will be right in saying that there is a “very real possibility... that Article 2.1 of the TBT Agreement will become superfluous, and the legal approach developed in the recent TBT disputes will become just an historical footnote.”<sup>801</sup> However, if Article III had an “intent test” as a part of its interpretation, it would be more consistent with the Article 2.1 and its test of a “legitimate regulatory distinction.” This would satisfy the

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<sup>794</sup> Cosby & Mavroidis, above n 183, at 291.

<sup>795</sup> *US – Clove Cigarettes*, above n 752, at [101].

<sup>796</sup> *US – Clove Cigarettes*, above n 752, at [99].

<sup>797</sup> *US – Clove Cigarettes*, above n 742, at [91].

<sup>798</sup> Flett, above n 171, at 70.

<sup>799</sup> Lydgate, above n 162, at 426.

<sup>800</sup> Lydgate, above n 162, at 443.

<sup>801</sup> Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 18 June 2014 <[https://geneva.usmission.gov/wp-content/uploads/2014/06/June.18.DSB\\_Ins\\_final\\_as-delivered.pdf](https://geneva.usmission.gov/wp-content/uploads/2014/06/June.18.DSB_Ins_final_as-delivered.pdf)>.

comments found in the Appellate Body's decision of *US – Clove Cigarettes*.<sup>802</sup>

Therefore, it seems readily apparent that an “intent test” should be the mutually supportive interpretation of Article III. It will allow WTO members to undertake climate change reform, possibly in line with their NDCs under the Paris Agreement, and therefore will give effect to the WTO goal of sustainable development. It does not contradict the purpose of Article III, which is prohibiting protectionism. Instead, it seems to give full effect to the intention of states that Article III is about discouraging protectionism, but not the prohibition of all regulations. It would make the TBT Agreement and the GATT more consistent with each other. The question then becomes how such an “intent test” should be formulated.

There are several ways that an “intent test” could be done, all of which requiring the Appellate Body or panel to look into the intent of the measure in dispute. First, the “aims and effect” test could be revived, or repackaged slightly as the “effect and purpose” test.<sup>803</sup> This would require there to be “intent – actual or constructed” for the measure to be protectionist.<sup>804</sup> Alternatively, “like products” could have both a market dimension and a policy dimension.<sup>805</sup> Therefore, a product must be both “policy like” and “market like” to trigger Article III.<sup>806</sup> Finally, there is the more radical option of allowing the member states to determine the critical factor in the “likeness” of two products.<sup>807</sup> This would allow a state to say that the question is if the products are alike in terms of their efficiency or carbon footprint.<sup>808</sup>

The latter choice seems the most eye-catching and it would certainly be a boon for climate change reform action. However, it goes further than just creating an “intent test”. It changes the interpretation of Article III fundamentally. Arguments could be made that the test would be too susceptible for abuse. Protectionist

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<sup>802</sup> *US – Clove Cigarettes*, above n 752, at [91].

<sup>803</sup> Howse & Regan, above n 204, at 257; Horn & Weiler, above n 145, at 137.

<sup>804</sup> Horn & Weiler, above n 145, at 138.

<sup>805</sup> Grossman, above n 205, at 205; Cosbey & Mavroidis, above n 183, at 294.

<sup>806</sup> Cosbey & Mavroidis, above n 183, at 294.

<sup>807</sup> Horn & Weiler, above n 145, at 139.

<sup>808</sup> Horn & Weiler, above n 145, at 140.

measures could be hidden as states choose alternative comparators that mask the real protectionist intent. Whereas a disguised restriction on trade can be stopped by Article XX's chapeau when that Article is being abused, it is not clear if Article III:1 could serve the same purpose. Further, while it is possible such an interpretation could be justified under the customary rules of treaty interpretation, it is suggested that the Appellate Body would seem unlikely to take to such a radical reinterpretation, especially when considering the comments of Matsushita and his co-authors, and the three former Director-Generals of the WTO about their concerns around non-economic factors being involved in trade issues. This thesis is not suggesting that an alternative comparator is impossible to make work, but rather takes the position that the path of least resistance for the most gain is the ideal for any interpretation and this option does not meet that standard.

While the "aims and effect" test may have familiarity going for it, the idea "likeness" having both a market and policy dimension seems the most sustainable approach going forward. The reason for that statement comes mostly down to trying to make intent a little easier to gauge, to make it slightly less subjective. The "aims and effect" test requires the Appellate Body to ascertain what the intention of the member state was when passing the measure. It is a task that the Appellate Body has been reluctant to do in the past,<sup>809</sup> and opponents would argue that intent could be used to hide protectionist measures. However, the question of "policy likeness" could be slightly easier to decide on, following a mixed subjective-objective test.

"Policy likeness", as previously defined by Cosbey and Mavroidis, is a consideration of whether it is "desirable from an international efficiency point of view to treat" products alike or unlike.<sup>810</sup> In terms of a mutually supportive interpretation, the phrasing could be that products are policy "unlike" where it is "desirable from a sustainable development viewpoint to treat products as unlike". It is suggested that the mutually supportive interpretation of Article III should be as followed. First, the Appellate Body would consider if the products are "market

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<sup>809</sup> *Japan – Alcoholic Beverages*, above n 147, at p 29; *Chile – Alcoholic Beverages*, above n 192, at [62].

<sup>810</sup> Cosbey & Mavroidis, above n 183, at 294.

like”, as they currently do now. However, they would then tackle the question of if the products are “policy like” or if there is a genuine, non-protectionist reason for treating them differently. The Appellate Body should consider the reasoning given for the measure by the challenged member state, therefore bringing in the “intent” factor. However, the Appellate Body would also go further when making assessment. They could consider if the intent is genuine or if it is merely hiding a protectionist measure. The Appellate Body could take account of the international context to see if this type of policy difference is recognised by science or other members of the international community, such as if it is appearing in NDCs under the Paris Agreement.

In effect, the new test would appear to be something very similar to that proposed by Grossman, Horn, and Mavroidis on one hand,<sup>811</sup> and Lydgate on the other.<sup>812</sup> Such an approach would give climate change reform room to breathe, while being mutually supportive of both the principle of sustainable development and the desired goal to discourage and prohibit protectionism in order to liberalise trade.

In conclusion, this thesis is suggesting that when dealing with climate change measures, the Appellate Body should adopt a mutually supportive interpretation of Article III. Such an interpretation essentially leads to a revised “aims and effect” test. This ensures that Article III is being interpreted to stop protectionism, but not prohibit genuine regulatory action. The approach being proposed is to add another element to the “like product” assessment, by introducing a “policy like” factor on top of the current market approach. This would be a mixed subjective-objective test to ensure that the measure in question is to combat climate change rather than engaging in protectionism.

#### *The General Exceptions of Article XX*

Broadly speaking, it is suggested that Article XX’s current interpretation is already mutually supportive with sustainable development and provides crucial room for climate change reform to breathe. Article XX(g) is a broad test, that

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<sup>811</sup> Grossman, above n 205, at 205; Horn & Weiler, above n 145, at 137-138; Cosby & Mavroidis, above n 183, at 294.

<sup>812</sup> Lydgate, above n 162, at 425.

should be easily met by any climate change measure.<sup>813</sup> Even the narrower Article XX(b) is likely to also be accessible to most climate change measures, with a “relative relaxation of the “necessity test””.<sup>814</sup> Certainly, not all climate change measures would meet these two exceptions, but those measures that fail to meet (g) or (b) probably do have structural problems that need to be addressed. A climate change measure that fails to meet (g) probably does not have a corresponding measure on domestic products and such a flaw should be addressed. Similarly, if a climate change measure does not meet (b) then it is probably because there is an alternative measure that is less trade restrictive but just as effective. In the spirit of mutual supportiveness, the less trade restrictive measure should be preferred if it is equally effective.

The potential issue of Article XX is around its chapeau, which is the most restrictive part of the Article XX process, at least for environmental concerns.<sup>815</sup> It may limit member states from taking climate change action or force them to engage in multilateral negotiations that may be fruitless and waste valuable time. Arguments could be made that the chapeau needs a more mutually supportive interpretation. One such way might be to flip the burden of proof on the chapeau so that there is an assumption the chapeau has been met unless the challenging party can prove that it has been breached.<sup>816</sup> However, this goes against the very notion that when a party is claiming a defence, it is up to them to then prove that defence exists.<sup>817</sup> Further, there is the risk that if Article XX is interpreted too broadly then it would ultimately defeat the entire purpose of the GATT,<sup>818</sup> a fact that would not be in line with the customary rules of interpretation.

Ultimately, as this paper noted earlier when discussing Article XX, there are two ways the Appellate Body can tackle the task of minimising conflict between the GATT and climate change measures. First, there could be the choice of broadening Article XX, with the most obvious target being the chapeau, which could be interpreted in a more lenient way. Secondly, the substantial provisions of

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<sup>813</sup> Wells, above n 316, at 224; Pietro Castagno, above n 320, at 147; Doelle, above n 305, at 98.

<sup>814</sup> Castagno, above n 320, at 146.

<sup>815</sup> Deane, above n 300, at 155; Doelle, above n 305, at 98.

<sup>816</sup> Gaines, above n 419, at 852.

<sup>817</sup> Van den Bossche, above n 270, at 258.

<sup>818</sup> Wells, above n 316, at 228.

trade law itself, such as Article III, could be interpreted in a mutually supportive way so that climate change measures would not come into conflict with them. This paper has chosen the latter as the best way forward. It allows Article XX to maintain its position as an important exception with a necessary bottleneck as a safeguard through the chapeau.<sup>819</sup> It also ensures that states who take climate change action do not have to rely on an exception, but instead can rest easier knowing that they have not breached a WTO obligation.

However, that is not to say that there are no changes that can be made to make Article XX more mutually supportive toward the concept of sustainable development and other multilateral environmental agreements. It is suggested that the interpretation of “laws or regulations” in Article XX(d) could have a more mutually supportive interpretation that supports multilateral environmental agreements, like the Paris Agreement. This is highlighted by the decision of the Appellate Body in *India – Solar Cells*. In that decision, the Appellate Body ruled that India’s environmental obligations under international law were not “laws or regulations” for the purposes of Article XX(d).<sup>820</sup> This was because they had failed to meet the definition found in *Mexico – Taxes on Soft Drinks* which defined “laws or regulations” as needing to have “been incorporated into the domestic legal system of a WTO member or have direct effect according to that WTO Member’s legal system.”<sup>821</sup> Either the international instrument had to be implemented by passing an “implementing instrument”,<sup>822</sup> or the law has to have “direct effect” due to a country’s legal system automatically implementing international instruments into the domestic law.<sup>823</sup>

This current interpretation would exclude certain environmental agreements, such as the Paris Agreement, which is a legal treaty,<sup>824</sup> ratified by states but likely never to be implemented or have direct effect in a country’s legal system. Such a stance does not appear to be mutually supportive. One of the Paris Agreement’s objectives is to hold global average temperature rises to “well below” 2 degrees

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<sup>819</sup> Pietro Castagno, above n 320, at 151; Wells, above n 316, at 228.

<sup>820</sup> *India – Solar Cells*, above n 106, at [5.148].

<sup>821</sup> *Mexico – Taxes on Soft Drink*, above n 612, at [79].

<sup>822</sup> *Mexico – Taxes on Soft Drink*, above n 612, at [69].

<sup>823</sup> *Mexico – Taxes on Soft Drink*, above n 612, at [69].

<sup>824</sup> Savaresi, above n 61, at 15; Bodansky, above n 74, at 150.

Celsius.<sup>825</sup> Further, the Agreement requires countries to publish NDCs explaining how they will combat climate change.<sup>826</sup> While meeting these NDCs is not a requirement of the Agreement,<sup>827</sup> a failure to do may bring international shame on a country. However, currently, if a WTO member state enacts a measure as stated in their NDCs, they cannot rely on Article XX(d) as an exception when accused of breaching trade rules. At first glance, this seems problematic and, as such, a more lenient interpretation that takes into account international law, even if not in direct effect, could be worth looking at.

The Appellate Body would appear to be open to somewhat broadening the interpretation of Article XX(d) when they said in *India – Solar Cells* that a rule also included rules which a Member seek to comply with, even if compliance is not coerced.<sup>828</sup> However, ultimately, the Appellate Body still declared that the various international treaties and the agreements that India had signed up to were not, for the purposes of Article XX(d), a part of India's domestic legal system.<sup>829</sup> Therefore, the mutually supportive interpretation of Article XX(d) would try to rectify that issue. It would take the position that when member states sign and ratify an international agreement, then they intend to be obligated to follow such an agreement, even if it has not been directly implemented into their domestic legal system.

However, the mutually supportive interpretation would have to go further than this. Even if an international agreement is considered a part of a country's domestic system, it still needs to be a “law or regulation”. The Appellate Body said that panels should consider the following when deciding if there is a law or regulation:<sup>830</sup>

- (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal

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<sup>825</sup> Paris Agreement, above n 63, art 2(1)(a).

<sup>826</sup> Paris Agreement, above n 63, art 4(2).

<sup>827</sup> Voigt, above n 82, at 161.

<sup>828</sup> *India - Solar Cells*, above n 106, at [5.109].

<sup>829</sup> *India – Solar Cells*, above n 106, at [5.148].

<sup>830</sup> *India – Solar Cells*, above n 106, at [5.127].

system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including e.g. before a court of law; (iv) whether the rule has been adopted or recognised by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.

However, this approach would struggle to include the Paris Agreement as a “law or regulation”. As stated several times before, following the measures set out in NDCs under the Paris Agreement is not a binding requirement.<sup>831</sup> Therefore, even if a country argues that they are enacting this measure to secure compliance with their NDC, it may struggle to be a law or rule under Article XX(d). There is not much specificity, the law is not legally enforceable, and there are no accompanying penalties or sanctions. Therefore, a mutually supportive interpretation would also have to shift how a law or regulation is defined. It could be done, but the question that needs to be addressed is if it is necessary to do so.

Paragraph (g) and (b) seem to be an easy threshold for climate change measures to meet, as previously discussed. The issue climate change measures will have is threading the needle through the chapeau. It begs the question if it is worthwhile to try and concoct an interpretation to also make (d) more of an environmentally friendly exception as well since those measures in danger can probably already rely on either (g) or (b). As this thesis has and will show, with regards to Article III and the SCM Agreement, the Appellate Body should not be afraid to challenge existing interpretations and create new ones in the search for mutual supportiveness. However, in this situation, where its usefulness is in doubt, this thesis suggests that discretion might be the better part of valour.

#### *Subsidies and the SCM Agreement*

One of the key weapons in a country's arsenal when combating climate change may be the use of subsidies to promote green industries. The most obvious

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<sup>831</sup> Voigt, above n 82, at 161.

example of this is found in the energy and electricity industry. Renewable energy, such as solar or wind power, may need government assistance to be able to compete with the more readily established oil and coal industries, which are known to damage the environment and contribute to climate change. However, due to the failure to renew Article 8 of the SCM Agreement, there is now the potential for a near fatal conflict between trade law and climate change reform.

Article 8 used to provide safe harbour for potential environmental subsidies, giving them a green light under the traffic light system.<sup>832</sup> Without Article 8 now, though, there would appear to be no exemptions. It seems uncontroversial to say that the most preferable option would be treaty change.<sup>833</sup> The return of Article 8, or something even stronger in its place, could once again provide a “green light” for environmental subsidies to survive.<sup>834</sup> However, as already discussed in this paper, the likelihood of substantive treaty change seems unlikely. Further, this paper doesn't subscribe to Rubini's conclusion that the Appellate Body should take the SCM Agreement to its logical extreme of frustrating all worthwhile subsidies to highlight how ridiculous the current law is and how it needs to be changed.<sup>835</sup> While the end goal may be worthwhile, climate change is a concern now and any further delay may fatally undermine the planet's attempt to halt warming before it becomes catastrophic. Therefore, the question becomes: is there some mutually supportive interpretation that can be adopted to ease or negate any conflict between environmental subsidies and the SCM Agreement.

First, there is the matter of the current interpretation used by the Appellate Body, reasoned in *Canada – Renewable Energy*. For a subsidy to be in existence there must be a benefit that has been conferred. The Appellate Body deemed that a marketplace assessment is required when deciding if a benefit has been conferred. Such an assessment should take into account supply-side factors and other demand-side factors beyond its physical properties.<sup>836</sup> In terms of electricity, while renewable and non-renewable generated electricity may be identical, the

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<sup>832</sup> Cosby & Mavroidis, above n 490, at 39.

<sup>833</sup> Cosby & Mavroidis, above n 490, at 42; Bigdeli, above n 555, at 191; Rubini, above n 483, at 235.

<sup>834</sup> Cosby & Mavroidis, above n 490, at 46.

<sup>835</sup> Rubini, above n 483, at 230-231.

<sup>836</sup> *Canada – Renewable Energy*, above n 424, at [5.170]-[5.171].

supply-side factors led to a situation where they were essentially different markets, and therefore a marketplace assessment should only look at renewable energy.<sup>837</sup> It has to be said that such an interpretation appears to be one that endeavoured to be mutually supportive.

However, it has been the subject of considerable, if not overwhelming, criticism.<sup>838</sup> Unlike with adding a policy dimension to “likeness” in Article III, where there is academic support for such a move, the consideration of supply side factors in a marketplace assessment for Article 1 of the SCM Agreement seems universally condemned. In the face of such criticism, it is hard to seriously contemplate maintaining such an interpretation. As such, there are two potential roads that can be taken by the Appellate Body. First, they could consider other potential interpretations for “benefit” so as to avoid environmental subsidies falling under the SCM Agreement. Essentially, “benefit” would have to be interpreted in such a way that it does not include the government providing a financial contribution to renewable energy producers. The second option is to attempt to incorporate the Article XX exceptions into the SCM Agreement, therefore offering some sort of safe harbour for environmental subsidies, while ensuring that Article 1 of the SCM Agreement is interpreted in a way that is above reproach.

On the question of Article XX's relevancy to the SCM Agreement, there are strong voices against it being applicable to SCM Agreement disputes. The arguments against it are diverse. First, Article XX refers to “this Agreement”, suggesting it only applies to the GATT.<sup>839</sup> Secondly, negotiators made no attempt to incorporate Article XX-esque language into the SCM Agreement.<sup>840</sup> Also, Article 8 of the SCM Agreement appears to take the place of Article XX and its existence would suggest there was no intention for Article XX to apply to the SCM Agreement.<sup>841</sup> In the face of these arguments, Marceau and Tratchman has suggested that it would require a “heroic approach to interpretation” to incorporate the Article XX

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<sup>837</sup> *Canada – Renewable Energy*, above n 424, at [5.190].

<sup>838</sup> Rubini, above n 483, at 218.

<sup>839</sup> Condon, above n 238, at 903.

<sup>840</sup> Condon, above n 238, at 904.

<sup>841</sup> Cosby & Mavroidis, above n 490, at 34.

general exceptions into the SCM Agreement.<sup>842</sup>

However, there are some potential approaches that can be taken to try and justify Article XX's inclusion into the SCM Agreement. First, *China – Publications and Audiovisual Products* demonstrates that the Appellate Body is willing to extend Article XX to other WTO agreements.<sup>843</sup> That dispute involved China's decision to regulate the importation of media-related goods, such as books and DVDs.<sup>844</sup> The United States argued this was in conflict with China's Accession Protocol to the WTO.<sup>845</sup> China argued that since the Accession Protocol included the phrase, “without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement”, they could invoke Article XX in this situation.<sup>846</sup> The Appellate Body ultimately decided that Article XX could be relied on as long as China's measures “are of a type that the *WTO Agreement* recognizes that Members may take when they satisfy prescribed disciplines and meet specified conditions”.<sup>847</sup> Furthermore, there needs to be a “clearly discernable, objective link” between the measure and the regulation of the trade in issue.<sup>848</sup> Essentially, the Appellate Body was opening the door to Article XX applying to the Accession Protocols as long as certain conditions have been met.

Another argument in favour of Article XX applying to the SCM Agreement can be made around the customary rules of *lex specialis* and *lex generalis*. Customary international law dictates that a *lex specialis* provision takes precedence over a *lex generalis* provision.<sup>849</sup> This tends to be because *lex specialis* rules are more to the point and more effective than *lex generalis* rules.<sup>850</sup> Therefore, in situations concerning subsidies, the SCM Agreement takes precedence over that of the GATT Agreement. However, that does not stop the GATT Agreement from filling in gaps in the more specific law, when the SCM Agreement is silent on the

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<sup>842</sup> Marceau and Trachtman, above n 253, at 874.

<sup>843</sup> Farah and Cima, above n 54, at 1115.

<sup>844</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 19 January 2010 (Report of the Appellate Body) at [1].

<sup>845</sup> *China – Publications and Audiovisual Products*, above n 845, at [2].

<sup>846</sup> *China – Publications and Audiovisual Products*, above n 845, at [205].

<sup>847</sup> *China – Publications and Audiovisual Products*, above n 845, at [230].

<sup>848</sup> *China – Publications and Audiovisual Products*, above n 845, at [230].

<sup>849</sup> International Law Commission, above n 115, at 56.

<sup>850</sup> International Law Commission, above n 115, at 60.

matter.<sup>851</sup> Finally, there is just a matter of consistency and effectiveness. Currently, while many trade restrictive measures can be justified via Article XX, subsidies, which are often less trade restrictive, cannot be salvaged.<sup>852</sup>

Each of these arguments, though, contains flaws. While *China – Publications and Audiovisual Products* demonstrated a willingness of the Appellate Body to extend Article XX to other agreements, the later decision in *China – Raw Materials* did not extend Article XX to another agreement outside of the GATT.<sup>853</sup> Further, the SCM Agreement does not contain the same language as the Chinese Accession Protocol. The trouble with an interpretation along the lines of *lex specialis* and *lex generalis* is that the *lex specialis*, the SCM Agreement, did have a provision for this situation and the gap only exists due to the intention of the parties not to renew the provision. This is not a genuine situation where there is an unforeseen gap in a *lex specialis* treaty that a *lex generalis* treaty can fill. Finally, while it may seem logically inconsistent that a subsidy cannot be salvaged in the same way a ban or quota can, countries have decided that subsidies should have its own specific treaty and they chose not to renew the non-actionable section. As such, it appears that trying to incorporate Article XX exceptions into the SCM Agreement would be a difficult endeavour.

Tackling the interpretation of “benefit” in a way that is mutually supportive is also problematic, mainly since the most obvious mutually supportive interpretation has been shredded by criticism. However, it is not the only approach that can be taken. One potential option may be an “adequate remuneration” or “internalization of external environmental costs” interpretation, which was identified by Cosbey and Mavroidis.<sup>854</sup> They, ultimately, decided such an option would be too difficult to work.<sup>855</sup> However, in the absence of any other obvious approach, it is worthwhile to at least consider the practicalities of such a suggestion.

According to WTO jurisprudence, a benefit is conferred “if the recipient has

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<sup>851</sup> Farah and Cima, above n 54, at 1114.

<sup>852</sup> Farah and Cima, above n 54, at 1114-1115.

<sup>853</sup> *China – Raw Materials*, above n 281, at [307].

<sup>854</sup> Cosbey and Mavroidis, above n 490, at 36.

<sup>855</sup> Cosbey and Mavroidis, above n 490, at 37.

received a “financial contribution” on terms more favourable than those available to the recipient in the market.”<sup>856</sup> The potential cost to a government does not factor into being a benefit.<sup>857</sup> The potential argument goes that a feed-in tariff might not be a benefit under this definition if it is merely adequate remuneration, or an internalization of external environmental costs.<sup>858</sup> Essentially, the argument is as followed: non-renewable electricity providers are providing electricity. Renewable providers, who may have a feed-in tariff programme, are providing electricity too, but they are also delivering other environmental benefits for the state. Therefore, the feed-in tariff is “adequate remuneration” for those otherwise “unpaid social benefits”.<sup>859</sup> Any remuneration for social or environmental benefits is not a “financial contribution on terms more favourable than those available to the recipient in the market”.

The flaw in such an interpretation, though, is how the Appellate Body could measure what is “adequate remuneration”. There must be a way to recognise when a government is overpaying for the environmental benefits, and therefore giving a favourable financial contribution to a recipient, otherwise the effectiveness of the SCM Agreement is threatened. However, there seems to be no obvious way to measure such a factor. Charnovitz and Fischer suggest that competitive bidding might be one way to set prices,<sup>860</sup> and Cosbey and Mavroidis do consider such an approach.<sup>861</sup> Their conclusion, though, is that would be too difficult to exactly match the subsidy to the social benefit and therefore any such “adequate remuneration” argument is infeasible.<sup>862</sup>

Let us consider this approach through the lens of it being an interpretation that is mutually supportive with the concept of sustainable development and other environmental factors, such as the Paris Agreement and NDCs that might rely on subsidies or feed-in tariff to increase energy generated by clean, green means. It is clearly mutually supportive to recognise the fact that renewable energy provides

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<sup>856</sup> *Canada – Aircraft*, above n 447, at [157]; *Canada – Renewable Energy*, above n 424, at [5.163].

<sup>857</sup> *Canada – Aircraft*, above n 447, at [155].

<sup>858</sup> Cosbey and Mavroidis, above n 490, at 36.

<sup>859</sup> Cosbey and Mavroidis, above n 490, at 37.

<sup>860</sup> Charnovitz and Fischer, above n 491, at 207.

<sup>861</sup> Cosbey and Mavroidis, above n 490, at 37.

<sup>862</sup> Cosbey and Mavroidis, above n 490, at 37.

other benefits than just the generation of electricity. The benefits of renewable production are less greenhouse emissions, which is a considerable fact when considering that around 70% of greenhouse emissions come from the electricity sector.<sup>863</sup> In fact, the change from non-renewable to renewable energy may be the single most important action in the fight against climate change.<sup>864</sup> Therefore, to recognise that there are benefits to renewable production is mutually supportive to the concept of sustainable development. A company that receives income for producing such a benefit is not receiving a more favourable financial contribution than non-renewable producers, because they are, in effect, providing a different service or product. This approach leads to the same conclusion of the Appellate Body in *Canada – Renewable Energy*, that renewable and non-renewable electricity production are different markets, but hopefully in a cleaner, less controversial way.

The final aspect that must be tackled, though, is how to calculate what reasonable remuneration is and what is not. It is suggested that the most mutually supportive way forward is to leave that as an element that the challenging party must prove, just like they would be asked to show if there is “less favourable treatment” in an Article III GATT dispute. After all, “the burden of proof rests upon the party... who asserts the affirmative of a particular claim”.<sup>865</sup> This is a principle that has been consistently applied by the Appellate Body and panels.<sup>866</sup> Since the challenging party is asserting there is a benefit, it would be up to the challenging party to show that the feed-in tariff is providing a price that is so generous it amounts to a benefit. This could be done in several ways. The challenging party could use a similar market from another jurisdiction as an example of what adequate remuneration really is. They could use examples of competitive bidding in other jurisdictions. It would be up to the challenging party to demonstrate that a benefit exists because the measure in question is too generous.

Such an approach is, arguably, the best way forward. It recognises the importance

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<sup>863</sup> Weber and Koch, above n 105, at 757.

<sup>864</sup> Weber and Koch, above n 105, at 757.

<sup>865</sup> *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 23 May 1997 (Report of the Appellate Body) at 14.

<sup>866</sup> Van den Bossche, above n 270, at 258.

of renewable energy production and allows producers to be paid adequately and fairly for their investment. Meanwhile, it still ensures that the SCM Agreement has teeth. If a measure is so obviously generous, then a challenging party should have little difficulties in establishing that a benefit is in existence. If a measure is “adequate remuneration” then it will stand freely. Only the grey area, where it is not clear cut if the scheme is too generous, will trouble emerge. It will be difficult, if not impossible, to draw an exact line between what is adequate and generous. However, it is suggested that this is the “least bad” option. It can still be argued under the customary rules of treaty interpretation, is also mutually supportive, and can salvage these potentially crucial environmental measures.

Therefore, this thesis suggests that the best way forward is to replace the interpretation of *Canada – Renewable Energy* with a mutually supportive interpretation based on “adequate remuneration”. It recognises that renewable energy is different to non-renewable energy production because it provides other benefits than just the production of electricity. Therefore, a benefit is only in existence if the price being paid is too generous and is therefore providing a financial contribution beyond one which is merely an internalization of external environment costs. It is up to the challenging party to prove that the price is too generous.

## ***Chapter VI – Conclusion***

International trade and environmental issues, most notably climate change reform, are two of the biggest areas that need to be tackled by the modern world. Trade is, arguably, the engine of global growth and has reduced poverty across the planet. Meanwhile environmental issues are now more important than ever before. Combating and limiting climate change is critical in ensuring that severe and damaging change to the planet does not occur. Otherwise, climate change could lead to expensive costs, and the loss of human, animal and plant life. And yet, climate change measures can, and do, run into conflict with the trade laws set down and governed by the WTO.

As an example, measures seeking to promote more efficient or climate-friendly

products could fall foul of Article III of the GATT and the “like product” assessment. The same can also be said about carbon taxes. Subsidies and feed-in tariffs, potentially crucial in moving the planet away from non-renewable energy to cleaner, greener electricity, can be threatened by the SCM Agreement. Local or domestic content requirements can offend the principles of both the GATT and SCM Agreements. While Article XX of the GATT can attempt to resolve some of these conflicts, through the general exceptions to trade law, its applicability is not universal to all trade and environment disputes.

It is worthwhile to note that not all conflicts are created equal. Some conflicts should be resolved to allow trade law and environmental measures to flourish in conjunction with each other. Other conflicts do not require such immediate action. While it is necessary to try and salvage a safe space for subsidies and feed-in tariffs for renewable energy in international trade law, the questionable effectiveness of domestic content requirements means that the latter does not warrant the same vigour as the former. A central tenet of this thesis is that while conflicts should be resolved when necessary for environmental reasons, the path of least resistance should be followed if possible.

The most obvious resolution to these trade and environment disputes is treaty change. However, based on current and past examples of WTO negotiation, any attempt seems doomed to failure. In its place, this thesis suggests the best way forward is to use the principle of mutual supportiveness as an interpretative tool. WTO law should be interpreted in a way which is not only consistent with other multilateral environmental agreements, such as the Paris Agreement, but also in a way which is mutually supportive of the WTO goal of sustainable development. The Appellate Body can adopt such an interpretative tool in line with the DSU and the customary laws of treaty interpretation without putting their legitimacy into question.

Armed with mutual supportiveness as an interpretative tool, the Appellate Body could and should resolve some of the conflicts identified in this thesis. Article III can be interpreted in such a way as to include a “policy likeness”, which would create a space for governments to regulate goods for genuine environmental

reasons. Such a reinterpretation of Article III could also provide more space for carbon taxes to be properly utilised by WTO members. Meanwhile the chaos left behind by the Appellate Body's ruling in *Canada – Renewable Energy* could be eased via a mutually supportive interpretation of benefit that allows for some sort of “adequate remuneration” for renewable energy producers.

Ultimately, this thesis concludes that both international trade and action against climate change is important, and where the two conflict, resolution should be sought instead of trade law being used to shut down climate change reform. As such, WTO law would be interpreted in a way which is mutually supportive toward its goal over sustainable development. A couple of practical examples of mutual supportiveness in action have been put forward, and can hopefully be used as a foundation to address any further conflicts that arise between trade law and climate change reform.

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