Process-Based Trade Related Environmental Measures under the GATT/WTO Rules and Effects on Least Developed Countries (LDC)

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Introduction

The interaction between the GATT[1] rules and environmental protection is one of the most argued topics.[2] The trade-environment debate can be made in different contexts. One of the most argued topics is the issue of process-based measures under the GATT/WTO rules.[3] Two extreme views are reflected in respect of PPMs.[4] One of the extremes, to which many developing countries adhere, is that process-based environmental measures do not have support from the text of the GATT.[5] The ruling in the Tuna/Dolphin case, where the panel decided that measures based on PPMs were GATT-inconsistent, lent support for this line of argument.[6] On the other side of the debate we can find those who argue that neither the texts nor the GATT jurisprudence support any distinction between measures based on product or process.[7] This line of thinking is strongly reinforced by the Appellate body's decision in the Shrimp/Turtle case.[8] According to the Appellate body's ruling, the US trade measure which targeted the method of production or harvest was not *a priori* inconsistent with the GATT rules, although it was found to be inconsistent with the preambular requirements of article XX, which is generally known as chapeau.[9]

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[1] Unless expressly provided otherwise, GATT, in this paper, refers to the General Agreement on Tariffs & Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994).

[2] Howse & Regan "The Product/ Process Distinction: An Illusory Basis for Disciplining "Unilateralism" In trade Policy" (2000) *11European Journal of International Law (EJIL)* 249 at 250.

[3] Potts *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Development* (2008) available at <http://www.iisd.org/pdf/2008/ppms_gatt.pdf > (accessed 17 March 2008) 1-3.

[4] PPM refers to process and production methods; a PPM measure refers to trade measures imposed by members based on process and production methods utilized to manufacture or to harvest products; and it is usually used interchangeably with the phrase process-based measure.

[5] Howse & Regan, *supra* note 2.

[6] Howse & Regan, *supra* note 2, at 249-50.

[7] *Ibid*; see also Charnovitz "The Law of Environmental 'PPMs' in to the WTO: Debunking the Myth of Illegality" (2002) 27 *Yale Journal of International Law (Yale J. Int'l L)* 59 at 60.

[8] House & Regan, *supra* note 2, at 249.

[9] The Appellate body in the *shrimp/turtle* case is said to come up with a decision which contradicts the conventional view that the GATT rules do not support trade measures based on PPMs. See *United States* –

Whether or not the GATT rules lend support to process-based environmental measure, it has positive or negative implications on efforts of environmental protection and trade liberalisation. For environmentalists, destructive PPMs are root causes of most environmental problems.[10] Lobbyists of environmental protection emphasised the need to impose process-based trade measures for the purpose of promoting environmentally sound PPMs.[11] On the other hand, proponents of free trade argue that process-based environmental measures encourage unilateral trade protectionism, which defeats the overriding objective of multi-lateral trading system.[12] The negative effect of this measure is high on developing countries, particularly on Least Developed Countries (LDCs), as they have no means to adopt environmental friendly production process.[13]

In this paper, I will argue that process-based trade measures are not *a priori* inconsistent with the text of the relevant articles of the GATT. The writer recognises that process-based measures have negative effects on the trade and development interests of developing countries, particularly LDCs. I will argue that there are mechanisms which can help to reconcile the trade and environment interests in the context of PPMs. For this purpose, the paper is divided in to four major parts. Part one will provide general background about the concepts of PPM and the arguments towards it. Part two will focus on the relevant provisions of the GATT in relation to which the issue of PPM may arise. This part will also examine several case laws to substantiate arguments. Part three will deal with global efforts, both with in and outside the WTO system, to bring about solutions that can reconcile the development and trade interests of developing countries, particularly LDCs, on the one hand, and the environmental interests of developed countries on the other. The paper will end with conclusion.

Import Prohibition of Shrimp and Shrimp Products, Appellate Body report (WT/DS58/R/AB) adopted November 6 1998(here in after Shrimp-Turtle (AB)) para 121 & 176; See also Howse & Regan, *supra* note 2, at 249-50.

[10] Snap & Lefkovitz "Searching for GATT's Environmental Miranda: Are "process standards" getting "due process?"(1994) *27 Cornell International Law Journal (Cornell Int'l L. J.)* 777 at 779.

[11] International Institute for Sustainable Development & Center for International Environmental Law (IISD & CIEL): *The State of Trade Law and the Environment: Key issues for the next Decades* working paper, 2003.

[12] *Ibid.*

[13] Potts, *supra* note 3, at 1-2.

I. Overview of PPMs

A. What are PPMs?

In the context of trade and environment relationship, PPMs becomes one of the most controversial issues in the international trade regime.[14] Generally applied in the international trade context, PPM refers to the way in which a certain product is produced or a natural resource is exploited.[15] The broad understanding of PPM, therefore, encompasses the issue of environment, labour and human rights during the manufacturing or harvesting stage of a product.[16] With in the specific context of trade-environment debate, PPMs reflects the adverse effect on the environment of a certain production method. PPM rules, regardless of their context in environment, labour or human rights, regulate the production or harvesting stage of products before they are distributed to sale. [17]

A paper prepared by the Organization for Economic Cooperation and Development (here in after the OECD) classified PPMs into two broad categories depending on the point at which the environmental effect of a product manifests itself.[18] These categories are: product related PPMs and Non-Product Related PPMs (NPR-PPMs).[19] The classification is meant to identify weather the environmental effect of a certain PPM manifests itself during consumption or manufacturing stage.[20] In other words, the classification is a

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[14] Tetarwal & Mehta Process and production methods (PPMs)-Implications for developing countries (2000) CUTS BRIEFING PAPER No. 7 at 1.
[15] *Ibid.*
[16] Tetarwal & Mehta, *supra note* 14, at 5.
[17] PPM standards can be formulated in a variety of ways. A country may follow a positive list approach in which it sets out specific process and production methods which demands manufacturers to adopt those methods in their production of commodities. The other approach is a negative list approach by which a PPM regulation forbids the use of specific methods of production and allows all other methods. Countries may still specify emission or performance effects that need to be avoided. In some circumstances, it happens to be difficult to make clear demarcation between these different methods as some regulations lie at the boundary of one and another. See OECD Secretariat: *Process and Production Methods (PPMs): Conceptual framework and Considerations on Use of PPM-based trade measure* (OECD/GD (97)137) 1997.
[18] *Ibid.*
[19] Following the OECD's model, several writers adopt the product related PPMs and non-product related PPMs distinction; See, for example, Bernasconi-Osterwalder *et al Environment and Trade: A guide to WTO Jurisprudence* (2006) 204; Gains "process and production methods: How to produce sound policy for Environmental PPM-Based trade measure?" (2002) 27 *Columbia Journal of Environmental Law* (*Colum. J. Envtl. L.)* 383 at 396-399.
[20]OECD Secretariat, *supra* note 17.

means to make distinction between a PPM requirement that deals with consumption externalities and those that address production externalities.[21] Accordingly, a product related PPM-based measure exclusively deals with production method that has a negative impact on the final product.[22] Product related PPM measure is used to ensure the safety, quality and usability of products.[23] For example, a PPM requirement which regulates the residue level of pesticides added to fruit during the production stage is purely a product-related PPM.[24]

There are PPM requirements that have nothing to do with the physical characteristics or chemical property of the final product. The product, which the PPM regulation meant to govern, serves the same purpose or assures the same quality as like products produced in a different and environmentally-friendly manner.[25] Nevertheless, social or ecological policies make a government to put a regulatory regime on those PPMs.[26] These PPMs are referred as NPR-PPMs as they have nothing to do with the usability and quality of the final output.[27] These PPM requirements address production externality in the form of restriction on input use in the production or cultivation of product, or requirement to adopt a specified technology.[28]

The OECD paper further classified NPR-PPMs into three categories based on the jurisdictional scope within which certain PPM may cause adverse environmental

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[21] PPM requirements which address consumption externality concern about the environmental effects of production methods which manifest themselves at the latter stage of the products' life cycle-at distribution or consumption stage, or when goods are consumed or disposed of after consumption. These requirements deal with physical or chemical characteristics of the product (affected by the method of production adopted) to be offered to the market. On the other hand, a PPM standard which purports to regulate production externalities deals with the environmental effects of production methods which manifest themselves at the production stage of the product before it is offered to the market. See *Ibid*; See also United Nations Environmental Programme & International institute for Sustainable Development(UNEP & IISD): *Environment and Trade*: *A Hand Book* 2000, available at <www.iisd.org/trade/handbook/5_1.htm > accessed on March 16, 2008.

[22] Bernasconi-Osterwalder, *supra* note 19, at 204.

[23] Charnovitz, *supra* note 7, at 65.

[24] The typical characteristics of product related PPM is that the production methods utilized can be directly detectible in the final product. See UNEP & IISD, supra note 21; see also Bernasconi-Osterwalder, *supra* note 19, at 204.

[25] OECD Secretariat, *supra* note 17.

[26] *Ibid.*

[27] The typical characteristic of NPR-PPM is that the method of production used can not be directly detected from the final product. See. Bernasconi-Osterwalder, *supra* note 19, at 204; see also the *Ibid.*

[28] Bernasconi-Osterwalder , *supra* note 19, at 204

effects.[29] Certain PPMs, thought not discernable in the final product through sale, distribution, conception and disposal, may still have environmental spillover beyond the country where the product is produced. Thus, the adverse environmental effect may be global, transboundary or national.[30] In some instances, a PPM may be used in a place where no country exercise jurisdiction under international law, such as the high sea.[31]

B. Controversies over PPM

Trade measures that purport to discipline patterns of production have become the primary focus of international policy debate that threatens trade interest and environmental protection antagonistic.[32] Environmentalists claim that most environmental problems trace their root-causes to environmentally destructive PPMs.[33] Environmentalists underscore the need to regulate PPMs for two principal reasons. First, environmentally unsustainable production methods add to environmental stress which may be irreversible.[34] Second, in the absence of regulatory regime that ensures imported products are subject to high environmental standard, the effort to apply high environmental standard to domestic products will be hindered.[35] Higher environmental standards most likely add to cost of production to producers. In a situation where only domestic producers are subjected to higher standards, they may not be able to equally compete with foreign producers that may offer their products with relatively cheaper price. It is logical to assume that no country wants to make its producers less competitive by imposing higher environmental standards without ensuring that producers in exporting countries are subjected to comparable standards. Lobbyists of environmental protection

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[29] OECD Secretariat, *supra* note 17.

[30] The spillover of PPM is said to have transboundary effects where it affects, directly or indirectly, plant, animal, human health and life, soil, water, forest etc of the physically adjacent countries or shared geographical region. A PPM is said to pose global environmental adverse effect where it affects global commons or resources which are shared by all countries. This latter environmental problem includes ozone layer depletion, climatic change, and harm to biodiversity.[30] When the environmental effect of a certain PPM is limited to a country where it situates, it is said to be national. It may include resource depletion, air, water soil pollution and loss of biodiversity. See *Ibid.*

[31] *Ibid.*

[32] Snap & Lefkovitz, *supra* note 10, at 779. The issue of PPM proves to be difficulty not only in the context of GATT/WTO but also in the NAFTA and other trade negotiations. See Houseman "the North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment" (1994) 30 *Stanford Journal of International Law (Stan. J. Int'l L.)* 379 at 406

[33] *Ibid.*

[34] IISD & CIEL, *supra* note 11.

[35] *Ibid.*

argue that efforts to protect environment can not be realised without successfully regulating PPMs.[36] Snap and Lefkovitz suggested that trade measures are the most effective tools to deal with the environmental externalities of destructive PPMs.[37] Environmentalists often criticise the multilateral trading system for not allowing a clear distinction between products produced in a sustainable manner and those produced in unsustainable manner.[38]

The other side of the debate saw opposite view, especially motivated by development concerns. Many developing countries and small trading powers argue that making environmental conditionality on trade will create additional barrier to trade that will, in turn, erode the development objectives of trade liberalization.[39] These countries perceive environmental conditions through PPM measures as systematic and "veiled" "protectionism" devised by developed countries in order to protect their industries from increased competition due to other changes in trade law.[40] For developing countries and LDCs, the issue of PPM is closely associated with the question of market access.[41] Developing countries also expressed concern that developed countries can use their commercial power to impose their environmental standards on other nations without their consent to those standards.[42] Some environmental standards may not reflect the social, economic and environmental realities of developing countries.[43] Many developing countries worry that allowing PPM-based trade measures may serve a precedent for consideration of other social programmes, such as labour standards and human rights.[44] Besides, sovereignty argument is raised, especially in relation to environmental externalities limited to exporting country.[45] The decision as to the method of production must be left to the discretion of the exporting country where the adverse effect of PPM is

[36] Snap & Lefkovitz, *supra* note 10, at 779.
[37] *Ibid.*
[38] Tetarwal & Mehta, *supra* note 14, at 4.
[39] IISD & CIEL, *supra* note 11.
[40] *Ibid*; See also Tetarwal & Mehta, *supra* note 14, at 1.
[41] By demanding exporters to adopt a certain production methods, countries may make it burdensome and expensive for exporters of economically poor countries to sell in importing countries' market. Bernasconi-Osterwalder, *supra* note 19, at 204; Pots, *supra* note 3, at 1-2; see also Tetarwal & Mehta, *supra* note 14, at 1
[42] Tetarwal & Mehta, *supra* note 14, at 5
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

limited to that country alone. An expression of state sovereignty under general international law includes the authority of a state to decide on matters exclusively within its territory.

A number of countries developed policies to reduce the various negative effects that PPMs have on environment.[46] These measures may, directly or indirectly, affect international trade.[47] These measures, referred generally as trade-affecting PPM measures, include import ban of products produced in environmentally-unfriendly manner, tax schemes based on production methods, border tax adjustment to offset PPM based domestic taxation etc.[48] The following part will deal with the GATT/WTO compatibility of process based trade measures in light of the major principles of the trading system and of the general exceptions.

II. The GATT Provisions in the Context of which PPMs may arise

A. Overview

The GATT possesses key provisions which are pillars of this agreement. Two of these provisions, article I and III, create the very important principle of the trading system, non-discrimination.[49] The other equally important principle is found under article XI which forbids import and export ban and quantitative restriction on goods. The issue of PPM may arise in relation to one or more of those principles.[50] In the context of these three principles, a PPM measure may be found either GATT compatible or otherwise. If a PPM measure is found to be GATT-inconsistent owing to those principles, a member

[46] Bernasconi-Osterwalder , *supra* note 19, at 203.
[47] *Ibid.*
[48] *Ibid.*
[49] Article I provides for the most favoured nations treatment by which products of a member shall be accorded equal treatment with like products of any other trading partner in respect of custom duties and charges, the method of levying such duties and charges and all rules and formalities in connection with importation and exportation. Article III provides for national treatment principle by which products of any member shall be treated equally with like domestic products of importing member in relation to internal taxes and other internal charges, laws, regulations and requirements affecting internal sale, purchase, transportation, distribution or use of products. The meaning of 'like product' in the GATT rules vary depending on a number of considerations, some of which will be dealt with in this part of the paper. See *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report (WT/DS135/AB/R) / adopted April 5, 2001 (here in after EC-Asbestos (AB)) at papa 88.
[50] Depending on the specific PPM issue, overlap of those principles may occur while determining the GATT compatibility of a PPM-based trade measure. The number and nature of issues vary based on which principle we are relaying to resolve the PPM question.

may still justify its action under the general exceptions of article XX depending on the nature and purpose of the measure it takes.[51]

The following subtopics will deal with the issues of PPM in the context of article I and III of the GATT. On the basis of its degree of relevance to the PPM issue, article III is discussed before article I. Since article XX (b) and (g) have immense importance in connection with the issue of PPMs, the discussions of their provisions are treated separately.

B. Article III

The provisions of Article III provides for the national treatment principle which obliges WTO members to treat imported products not less favourably than domestic like products.[52] The logical construction of this principle is that members may treat imported products less favourably than domestic products if the two products are not "like products". Determination of whether two products, in respect of which different treatments are accorded, are like products is crucial in deciding whether a member violates its obligation of non-discrimination under article III of GATT. When an imported product is found to be unlike with a domestic product in dispute, different treatment, by a member, of those products may not be challenged under article III. The issue of "like product", therefore, plays a central role in deciding whether a less favourable treatment to imported products violate the non-discrimination obligation of a member under article III.

In the context of article III, a process-based trade measure may pose the issue of likeness in a number of ways. This interrelation exists principally based on the fact that many domestic environmental measures differentiate between products which are, on face or use, similar, but differ in the environmental effect of their PPMs.[53]For example, a member's regulation may prohibit sale of a product unless at least a certain proportion of its weight has come from raw materials exploited in environmentally friendly manner.

[51]Charnovitz, *supra* note 7, at 92.
[52] See *infra* note 70 for the relevant paragraphs of article III.
[53] Bernasconi-Osterwalder , *supra* note 19, at 8.

Or, a member may impose import prohibition on certain products which are produced in environmentally unsustainable manner. These measures violates article III only if sustainable and unsustainable products are considered as like products. Determination of whether these two categories of products are like or not depend on whether we should stick only to the physical nature or end-use of the two products or some additional factors totally extraneous to physical characteristics of the products. If environmental considerations are taken in the interpretation of likeness, two products, which are like with respect to their physical characteristics and end-use, may be unlike with in the meaning of article III owning to differences in their process and production methods.[54] Some times, however, the application of article III to a process-based trade measure is controversial as two pre-WTO panels decided that the scope of application of this article may not extend to non-product based measures.[55]

The Tuna-Dolphin I involved the US measure that imposed trade embargo on imports of commercial yellow fin tuna and yellow fin tuna products harvested with purse-seine nets.[56] The panel explicitly pointed out that the US measure regulated the harvesting techniques, not tuna as a product.[57] The panel noted that article III.4 applies only in relation to those measures that regulate product as product, not process and production methods.[58] Accordingly, the panel directly applied article XI and found the US measure

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[54] Howse & Regan, *supra* note2, at 61.

[55] See *United States – Restrictions on Imports of Tuna*, panel report (DS21/R) 3 September 1991 (not adopted) (here in after Tuna-Dolphin I) at para 5.14; see also *United States – Restrictions on Imports of Tuna* panel report (DS29/R) 16 June 1994 (not adopted) (here in after Tuna-Dolphin II), at para 5.9.

[56] The ruling of the Tuna-Dolphin I panel has important implications on the issue of PPM because of two reasons. First, the panel generally excluded application of article III for PPM measure, and chose article XI as an appropriate provision to PPM issues. An important question in this connection is what would be the application of article XI if a PPM measure was different from import ban or quantitative restriction? Clearly, article XI would not apply. Since the panel generally excluded article III from PPM analysis, and article XI has limited application for the above reason, the solution to the issue whether a process based measure that differentiates between domestic and similar imported products is a *per se* violation of GATT-obligations would remain uncertain. Logically, a measure can be found to be GATT-inconsistent or otherwise only if it falls under one of the relevant provisions of the agreement. Secondly, the panel incidentally touched up on the issue of likeness and found that method of harvest, or process of production may not affect a certain product as a product. In the view of the panel, US must have accorded Mexican tuna treatment not less favourably than that it accorded to domestic tuna regardless of differences in the harvesting methods. This, in effect, means that Mexican tuna is like product with US tuna. In other words, PPM may not be taken in to account in determining whether two products are "like".

[57] Tuna-Dolphin I, *supra* note 55.

[58] *Ibid.*

as GATT- inconsistent.[59] However, the panel incidentally touched the issue of likeness. The panel noted that the United States measure would violate article III.4 even if the article was applicable. The panel reasoned out that:

> "…article III: 4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product… Article III: 4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels."[60]

Again, in the *Tuna/Dolphin II,* the panel made article III inapplicable, as the US trade embargo distinguished between tuna products according to harvesting practice.[61] The panel repeatedly underscored the fact that difference in harvesting techniques may not affect products as products. Therefore, any measure targeting against certain production process method is outside the scope of article III.[62]

The US-Gasoline case dealt with the issue of likeness, although not directly in the context of environmental PPM. [63] The panel, in determining whether imported and domestic gasoline are like products, found that chemically identical domestic and imported gasoline are "like products" under article III.4.[64] More importantly, the panel pointed out that determination of likeness in article III.4 should be done "on the objective basis of likeness as products…not based on extraneous factors".[65] If applied in the context of environmental PPM, the panel's decision in the US-Gasoline case would mean that differences in the method of production may not be considered as factor to determine two products as "unlike" products. The panel's ruling in the US gasoline case limited the

[59] Tuna-Dolphin I, *supra* note 55, at para 5.18.
[60] Tuna-Dolphin I, *supra* note 55, at para 5.15.
[61] See Tuna-Dolphin II, *supra* note 55.
[62] See Tuna-Dolphin II, *supra* note 55, at para 5.7-5.9.
[63] The US clean air act set out rules for establishing baselines figure for gasoline sold on the US market. The gasoline rule came up with different types of baselines for domestic and imported gasoline with the purpose of regulating the composition and emission effects of gasoline. See *United States – Standards for Reformulated and Conventional Gasoline, panel* report (WT/DS2/R) Adopted 20 May 1996(here in after US-gasoline), para 2.1-2.13.
[64] US-Gasoline, *supra* note 63, at Para 6.7-9.
[65] US-Gasoline, *supra* note 63, at Para 6.12.

possibility that determination of likeness may go beyond the physical characteristics of products.

The issue of likeness may arise in relation to consumers' tastes and habits in a given market. Differences in consumers' choice and preference between domestic and imported products based on factors extraneous to the products' physical property, chemical components and end-use may be invoked as a factor in determining the likeness of products. For example, consumers in a give market may prefer products produced in environmentally friendly manner to those similar products produced in unsustainable manner. The very important issue is, however, whether the willingness of consumers to choose one product instead of another is relevant to determine likeness under article III.

In the EC-Asbestos case, the Appellate Body pointed out that the issue of like product is concerned with competitive relationships between and among products.[66] It is, therefore, necessary to evaluate whether and to what extent the products involved are in a competitive relationship in the given market place.[67] In the view of the Appellate Body, one of the elements to determine whether there is a competitive relationship lies on consumers' tastes and habits in a given market.[68] The existence of preference by consumers towards one product instead of the other may be taken as a factor to determine the products as not like products.[69] What is still left to be decided is whether consumers' preference can be affected based on the difference in the methods in which products are

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[66] EC-Asbestos, *supra* note 55, at para 103.

[67] See Ibid. The appellate body's focus on "competitiveness" criterion seems to be reinforced by the overall purpose of article III. This article in meant to oblige members not to treat domestic products more favourably than competitive imported products for protectionist purpose. In the absence of competitive relationship between domestic and imported products a countries regulation can not be applied for protectionist policy.

[68] The appellate body made reference to the criteria set out by the working group on border tax adjustment. It was established in 28 March 1968 to examine the provisions of the general agreement relevant to border tax adjustments and to come up with proposal in light of such examination. The working party proposed some criteria for determining, on a case by case basis, of likeness. These criteria are: the product's end uses in a given market; consumer's taste and habits, which change from country to country; the product's properties, nature and quality. See Border tax adjustment, Report of the working party adopted on 2 December 1970, L/3464; see also EC-Asbestos, *supra* note 49, at para 109,117-123.

[69] The existence of difference in preference between chrysotile asbestos and PCG fibres was among the reasons why the Appellate Body considered the two products as unlike. See EC-Asbestos (AB), *supra* note 49, at para 122& 126.

produced. This is a question of fact that differs from one country to another, and to be decided on a case-by-case basis.

The issue of likeness may also arise in relation to the "aim" of a process-based trade measure.[70] Some panels and the Appellate Body dealt with the issue as to whether two products should be considered like when they are identical with respect to all factors, except some elements totally extraneous to the products' physical characteristics or use, and when the purpose of different measures is based on *bona fide* policy considerations. In the US-Malt Beverages case, the panel added the "aim" test to the "traditional" elements which have been taken in to account in determining the likeness of two products.[71] In order to determine whether a product is like product with in the meaning of article III.2, the panel emphasised on the purpose behind a disputed trade measure. [72] The panel considered that the like product determination under article III.2 should take consideration of the purpose of the article.[73] The panel noted that the purpose of article III is emphasised in its first paragraph.[74] The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term "like products" in this

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[70] This kind of issue is inspired by the phraseology of paragraphs of article III. The relevant parts of this paragraphs read as follows: paragraph 1, "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, ….*should not be applied to imported or domestic products so as to afford protection to domestic production".* /emphasis added/; Paragraph 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.*[70] /Emphasis added/; Paragraph 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....." Paragraph (1) provides the general policy objective for national treatment. To what extent this paragraph can influence application of subsequent paragraphs is a subject of debate. See *United States – Measures Affecting Alcoholic and Malt Beverages* panel report (BISD 39S/206) adopted 19 June 1992(here in after US-Malt Beverages), at para 5.27.

[71] The traditional elements are the product's end use in a given market, consumers' tests and habits, which change from country to country; the product's properties, nature and quality. See Cottier & Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in the World Trade Law* (2000) 119-122.

[72] US-Malt Beverage, *supra* note 70, at para 5.24.

[73] *Ibid.*

[74]The panel report in the relevant part stated that "The purpose of Article III is... not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production''. See US-Malt Beverage, *supra* note 70, at para 5.25.

Article. In the panel's view, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production". [75]

The panel in the US-Auto case approached the issue of likeness in the same way as the previous panel. This panel decided that determination of likeness under article III.2 has to include examination of the aim and effect of the particular measure.[76] In the context of PPMs, the panels' ruling in the above two cases can be taken to mean that a country's process based measure may not be necessarily inconsistent with article III, even if it results in different treatment of domestic and identical imported products. The reason for this construction lies on the fact that two products may be considered as not like products based on the difference in their PPMs, provided that the measure is not taken "so as to afford" protection to domestic products.

Subsequent panels and Appellate Body decisions rejected the line of argument adopted by the above two panels. In the Japanese-Alcoholic beverages, the panel explicitly noted that determination of likeness may not include examination of the aim of a measure which differentiates between imported and domestic products.[77] The panel was limited only to the "traditional" elements of like products determination.[78] On appeal, the Appellate body affirmed the panel's finding that determination of likeness under article III.2 may not take into account whether the measure was meant to afford protection to domestic products.[79] The Appellate body in the EC-Banana case rejected the "aim" test as an incorrect application of the like product determination under III.4.

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[75] See *Ibid.* The panel underscored that the "aim" of a measure is important only at the stage of diterminatin of likeness. In the panel's view, if products are designated as like products, " a regulatory product differentiation, e.g.for standardization or environmental purposes, become inconsistant with article III even if the regulation is not applied so as to afford protection to domestic products." See US-Malt Beverage, *supra* note 70, at para 5.72; Following US malts beverage case, proponents of aim-and effect test propose panels to consider whether a disputed tax or regulation has a protective aim or effect in determining products' likeness. See, Charnovitz, *supra* note 7, at 89-90.

[76] See *United States-Tax on Automobiles*, Panel Report (DS31/R) (here in after US-Auto) October 11, 19 94 (not adopted) para 5.9-15.

[77] See *Japan - Taxes on Alcoholic Beverages Panel Report* (WT/DS8, 10, 11/R), Adopted November 1, 1996(here in after Japanese-Alcoholic Beverages), at para 6.17-18.

[78] See supra note 71 for explanation of the traditional elements.

[79] *Japan - Taxes on Alcoholic Beverages* Appellate Body Report (WT/DS8,10,11/AB/R), Adopted November 1, 1996(here in after Japanese-Alcoholic Beverage (AB)),at para 40.

In summery, the jurisprudence in the GATT/WTO does not indicate that extraneous and non-economic factors, such as PPMs, are relevant for determining whether products are like. It is only in the context of consumers' tastes and habits that the Appellate Body's ruling dictate that difference in PPM may be relevant in determining likeness. Even in that scenario, a case by case analysis of the existence of consumers' preference to one product instead of the other in a given market is necessary. It can also be inferred from the WTO case laws that the purpose behind a policy objective, such as environmental protection, may not be considered in determining whether products are "like".[80]

C. Article I

Article I.1 of the GATT provides the general most-favoured nations treatment. According to this principle,

> "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded *immediately and unconditionally* to the like product originated in or destined for the territories of all other contracting parties."[81]

The equal treatment of products under article 1.1 applies as between like products. The important issue is whether differences in PPM are considered to determine the likeness of products. In the Spain-Unroasted Coffee case, the panel pointed out that differences resulting from cultivation and processing methods are not relevant in determining whether products are like.[82] Apart from this panel's decision, the case law on the issue of

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[80] Howse and Regan strongly argue that any construction of like product language in article III that excludes consideration of processed based measures in determining like products is "superficially plausible". However, it has to be noted that if PPMs are to be considered in determining like products under article III, it will promote disguised protectionism as members may discriminate imported products merely based on the methods of production. It is also important to note that consideration of "aim" or "purpose" of a measure, such as environmental protection, may not be consistent with the structure and purpose of the GATT because of two reasons. Firstly, the list of exceptions in GATT Article XX would become redundant if the "aims" specified there were taken into account under an Article III analysis. Secondly, the trade liberalisation objective of the GATT would be hindered as the bulk of the members are developing countries and LDCS which may not be able to afford to adopt methods of productions required by some of the trading partners. Even if the different treatment owing to PPM is intended for genuine environmental protection objectives, developing countries and LDCs will be denied of benefits that they would have acquired from the trade liberalisation. See Howse & Regan, *supra* note 2, at 252.

[81] Emphasis added.

[82] *Spain- Tariff Treatment of Unroasted Coffee* Panel Report (L/5135-28S/102) adopted June 11, 1981, at para 4.6.

likeness within the context of PPM under article I is limited. It is important to note that the issue of likeness in relation to article III may have important bearing on the same issue under article I. However, the scope of the concept of likeness differs in these two articles.[83]

In the context of PPM the most relevant issue under article I is whether advantages, immunities and privileges may be conditioned based on PPMs, without being considered *per se* inconsistent with the members' obligation.[84] The words "immediately" and "unconditionally" in article I.1 are likely to pose the issue of PPM. The panel's decision in the Belgian family allowance case provides an important bearing on the issue under article I, although the case did not directly involve PPMs.[85] In the context of "conditionality" test, the panel pointed out that the Belgian law which exempted countries with a "family allowance plan" similar to Belgium's family allowance scheme was inconsistent with article I, as it took consideration totally unrelated to the product.[86]

In the Indonesia automotives case, the panel dealt with an Indonesian import duty based on Indonesian content levels in imported cars, and found that Indonesia's measure was inconsistent with GATT article I.[87] The panel noted that advantages under article I "cannot be made conditional on any criterion that is not related to the imported product itself". [88] Although the import duty was not origin neutral, the panel's statement generalized all "criteria" as an illegal basis for conditioning an advantage under Article I.[89]

The panel in the Canada-auto case modified the generalization made by the previous panel.[90] In this case, Canada subjected an advantage and duty exemption conditional

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[83] See EC-Asbestos (AB), *supra* note 49, at para 88; see also Japanese-Alcoholic Beverage (AB), *supra* note 79, at para 46.
[84] Potts, *supra* note 3, at 19.
[85] See *Belgium – Family Allowances*, panel report (BISD 1S/59) *adopted* November 7, 1952, at para 3.
[86] *Ibid.*
[87] *Indonesia - Certain Measures Affecting the Automobile Industry* Panel Report (WT/DS54, 55, 59, 64/R) adopted July 23, 1998(here in after Indonesia -Automobile), at para 14.143.
[88] *Ibid.*
[89] Potts, *supra* note 3, at 20.
[90] *Canada - Certain Measures Affecting the Automotive Industry,* Panel Report (WT/DS139, 142/R) adopted June 19, 2000(here in after Canada-Automotive), at para 10.23-30.

upon meeting a condition which Japan argued was unrelated to the products themselves. The panel rejected Japanese argument, stating that the word "unconditionally" must be interpreted in light of the object and purpose of article I. The panel pointed out that "unconditionally" does not pertain to the advantage *per se*, but must be seen in the context of whether the measure involves discrimination between like products of different countries. In the panel's view, only advantages that are not granted "unconditionally" to the like products of all members will be found to be inconsistent with Article I.1.[91] In relevant part, the panel stated,

> "We do not…believe that the word unconditionally in article I.1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with article I.1, irrespective of whether and how such criteria relate to the origin of the imported products."[92]

The panel's decision in the Canada automotive case shows that origin neutral non-product conditions, such as PPMs, are not *per se* violation of Article I.[93] In the context of PPM, the decision by the Canada-Auto panel can be taken to mean that a country may condition an advantage on the adoption of a certain process and production methods. The appellate body did not address this point when the case was taken on appeal.

D. Article XX Exceptions

Article XX of GATT is central to the discussion of PPMs, as the justifiability of a process-based measure under the general provisions of GATT, such as the non-discrimination provisions, has been addressed in the negative in the GATT/WTO jurisprudence in the majority of cases. Article XX provides ten specific instances in which a trade measure, otherwise inconsistent with one of the provisions of GATT, may be justified. Although it failed to specifically mention "environmental protection" in

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[91] *Ibid.*

[92] Canada-Automotive, *supra* note 90, at para 10.24.

[93] The panel stated that, "there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other hand, whether, an advantage, once it has been granted to the products of any country, is accorded 'unconditionally' to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded 'unconditionally' to the like products of other Members. See Canada-Automotive, *supra* note 90, at para 10.24; see also Potts, *supra* note 3, at 20.

those exceptions, two paragraphs, (b) and (g), address environment based trade measures.[94] According to these exceptions, members may adopt or enforce measures necessary to protect human, animal or plant life or health; or relating to the conservation of exhaustible natural resources if the measures are made in conjunction with restrictions on domestic production or consumption.

Several issues, relevant to the discussion of PPM, may be raised in relation to article XX (b) and (g). The issues, more or less, include the following:

i. when is a measure presumed to be necessary in relation to paragraph (b);
ii. what is the jurisdictional scope of these exceptions;
iii. Whether a unilateral trade measure can be justified under these exceptions; and,
iv. When a measure is presumed to constitute arbitrary or unjustified discrimination, or disguised restriction on international trade.

The following part deals with these issues separately. However, the issues under ii and iii above will be discussed together.

1. The Necessity Test

A trade measure that a member wants to take, under article XX (b), must be "necessary" to protect human, animal or plant life or health. When is a measure deemed to be necessary is an important issue often being raised in the GATT and WTO panels and the Appellate Body. In the Tuna-dolphin I, the panel rejected the US import ban as not necessary with in the meaning of XX (b).95 In the panel's view, a measure is necessary if a member, raising article XX (b) exception, demonstrates that it had exhausted all options reasonably available to it to pursue its policy objective through measures consistent with

[94] These two paragraphs, together with the Chapeau, read: "subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries...or a disguised restriction on international trade, nothing in this greement shall be construed to prevent the adoption or enforcement by any contracting party of measures:..(b) necessary to protect human, animalor plant life or health; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption..." See Snap & Lefkovitz, *supra* note 10, at 796.
[95] Tuna-dolphin I, *supra* note 55, at para 5.24-5.29.

the General Agreement.96 The Tuna-dolphin II panel also rejected the US measure as not necessary.97 The panel noted that "necessary" means "no alternative" is available.98 In the EC-Asbestos case, the panel endorsed the criterion set out in previous pane decisions. 99 The EC-asbestos panel pointed out that a measure is necessary only where there is no an alternative measure consistent with the GATT, or a less inconsistent with it, which could reasonably be expected to achieve the policy objective at issue.100

The GATT/WTO case laws show that there is a consistent jurisprudence in relation to what measure is "necessary" with in the meaning of article XX (b). The fact that other alternative measure, which is consistent with the GATT or less inconsistent with it, can reasonably achieve the policy objective at issue makes a more GATT inconsistent measure unnecessary. The "no other alternative measure" in the interpretation of the word "necessary" under article XX (b) maintains a proper balance between environmental objectives and free trade interests. It does not forbid taking GATT-inconsistent measures for legitimate policy objectives. However, the otherwise GATT-inconsistent measure must be the last option.

2. Jurisdictional Scope of the Exceptions

Trade-affecting PPM measures often aim at protecting natural resources, environment, human, animal, plant, etc that are located, at least in part, outside of the boundaries of a member taking the measures.101 This is mainly because most PPMs focus on the way in which a product is produced or harvested, rather than on the effect of the product per se.102 A unilateral Process-based measures are often criticised for being extraterritorial

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[96] Tuna-dolphin I, *supra* note 55, at para 5.28.
[97] Tuna-dolphin II, *supra* note 55, at para 5.39; In this dispute, the US agued that "necessary" means "needed", where as the EEC insisted that "a measure otherwise inconsistent with the General Agreement could only be justified as necessary under Article XX (b) if no other consistent measure, or more consistent measure, were reasonably available to fulfill the policy objective." See Tuna-dolphin II, *supra* note 55, at para 5.34.
[98] Tuna-dolphin II, *supra* note 55, at para 5.35.
[99] *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products,* Panel Report (WT/DS135/R) / adopted April 5, 2001(here in after EC-Asbestos), at papa 8.198-199.
[100] *Ibid.*
[101] Bernasconi-Osterwalder, *supra* note 19, at 205.
[102] *Ibid.*

and violating the principle of "sovereignty".103 It can be argued that the home country should decide which methods of production or harvesting procedures must be utilised. Under customary international law, a state is presumed to be in excess of its jurisdiction when it regulates acts outside its territory by person who is not national to it, or the act has no effect within its territory.104 However, it can be argued that a member, which takes a unilateral process-based measure, does not directly regulate the behaviour that foreign producers may adopt, as the latter are not in any ways forbidden to proceed with their unsustainable production process with out incurring civil or criminal liability.105 What the importing country does, through its measure, is refusing the importation of those products produced in environmentally unfriendly manner.106 Besides, the regulation, which creates the measure, is enforced within the territory of the member which takes such measure.107 On the other hand, it may be argued that the member unilaterally restricts foreign producers from importing their products into its territory and is, therefore, extraterritorial.108 Although the application of the measure is not extraterritorial, the effect of the measure, nevertheless, is extraterritorial.109

In Tuna-Dolphin I, Mexico argued that article XX (b) exception may not apply for a measure imposed to protect the life and health of human and animals outside the jurisdiction of the countries taking such measure.[110] The panel pointed out that the text of article XX does not explicitly indicate the jurisdictional scope of the exceptions.[111] However, the panel decided that a measure is justified under article XX (b) and (g) exception to the extent that it targets to the protection of human, animal or plant life or health, or to the conservation of exhaustible natural resources within the territory of the

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[103] The term "extraterritorial" is usually used with out sufficient legal precision. It is arguable whether there is an "extraterritorial" measure when a country unilaterally imposed import ban on some products which are produced in environmentally-unsustainable manner. See Bernasconi-Osterwalder, *supra* note 19, at 236; see also Howse & Regan, *supra* note 2, at 274.
[104] Brownlie *Principles of Public International Law* (1973) 299-303.
[105] Howse & Regan, *supra* note 2, at 274.
[106] *Ibid.*
[107] *Ibid.*
[108] Bernasconi-Osterwarder, *supra* note 19, at 238.
[109] *Ibid.*
[110] Tuna-dolphin I, *supra* note 55, at para 5.24.
[111] Tuna-dolphin I, *supra* note 55, at para 5.25.

member taking the measure.[112] The Tuna-Dolphin II panel modified the decision made by the Tuna-dolphin I panel by stating that "the Panel could see no valid reason supporting the conclusion that the provisions of Article XX (g) apply only to policies…located within the territory of the contracting party invoking the provision."[113] However, the panel pointed out that such extraterritorial measure is valid only in relation to nationals of the member enacting it.[114] After these panels' decision, many people view the trading system as hostile to values other than that of free trade.[115]

In the Shrimp-Turtle case, the Appellate Body did not give a comprehensive guidance for the issue whether there is an implied "jurisdictional limitation" in article XX exceptions.[116] The appellate body chose to decide the issue in the context of the specific circumstance of the case in dispute. The appellate body found that the migratory nature of see turtle create a sufficient nexus between the endangered marine population involved and the US for the purpose of article XX (g).[117] The appellate body's ruling is taken as an express recognition of states' interest to protect natural recourses outside of their jurisdiction if there is a sufficient nexus between the natural recourses being protected and the states purporting to take a trade measure.[118] Neither the Appellate Body in the Shrimp turtle case nor panels in other cases, except the first Tuna-Dolphin panel, addressed the issue of "extraterritoriality" when there is no sufficient nexus between the resources to be protected and the country which purports to take measure.[119]

In the absence of comprehensive guidelines as to the jurisdictional scope of article XX exceptions, the issue must be approached in light of other international rules and

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[112] See Tuna-dolphin I, *supra* note 55, at para 5.26-27, 5.32. In rejecting the US argument, the panel stated that, "if the broad interpretation of Article XX (b)…were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.'' See Tuna-dolphin I, *supra* note 55, at para 5.27.

[113] Tuna-dolphin II, *supra* note 55, at para 5.20.

[114] *Ibid.*

[115] Howse & Regan, *supra* note 2, at 250.

[116] The appellate body explicitly stated that, "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature or extent of that limitation." See Shrimp-Turtle (AB), *supra* note 9, at para133.

[117] *Ibid.*

[118] Condon *Trade, Environment and Sovereignty: Developing coherence between WTO Law and General international law* (PhD dissertation 2005 Born University) 145.

[119] Condon, *supra* note 118, at 147.

principles.[120] The WTO rules must be seen as part of the wider body of public international law.[121] States, under general international law, must demonstrate that a conduct, which it purports to regulate, has sufficient nexus with the state.[122] It is only in relation to transboundary and global environmental challenges that states may justify their measures.[123]

The Appellate Body's ruling in the Shrimp-Turtle case gives clear guidance with respect to the issue of whether unilateral measures may be justified under article XX exceptions.[124] The Appellate Body, in rejecting the panel's finding[125], stated that:

> "It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies … prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile…"[126]

It is made clear that some unilateral measures can survive article XX (g) exception.[127] The Appellate Body implicitly addressed the issue as to the circumstance in which a unilateral trade measure is justified. The Appellate body made reference to several multilateral agreements and international law principles which urge countries to look for multilateral solution to environmental challenges beyond the national territory of a

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[120] Condon, *supra* note 118, at 148.
[121] *Ibid.*
[122] Bernasconi-Osterwalder, *supra* note 19, at 239.
[123] Condon, *supra* note 124, at 148.
[124] Shrimp-Turtle (AB), *supra* note 9, at para 121.
[125] The panel noted that allowing members to condition market access on the adoption of certain policy, including environmental protection, will degrade the multilateral framework of the general agreement. The panel found out that the US unilateral measure could not be justified under the general exceptions. See *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* Panel Report (WT/DS58/R) Adopted November 6, 1998(here in after Shrimp-Turtle), at para 7.46.
[126] Shrimp-Turtle (AB), *supra* note 9, at para 121.
[127] The appellate body went further and stated that, "It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character." See Shrimp-Turtle (AB), *supra* note 9, at para 121; see also Condon, *supra* note 118, at 150.

member which purports to take measure.[128] The Appellate Body found that the US measure, though provisionally justified under article XX (g) exception, it failed to pass the requirement of the chapeau due to the fact that US did not make serious efforts to negotiate a treaty with affected countries before imposing the import ban.[129] It can be understood that a unilateral trade measure may be justified under article XX exceptions only after a reasonable effort towards multilateral solution fails.

3. The Chapeau

A measure, which is found to be consistent with one or more of the paragraphs from (a)-(j), has to pass further requirements in the Chapeau.130 The requirements under the chapeau are devised to check that members do not use article XX exceptions arbitrarily.131 Each of the exceptions from paragraphs (a)-(j) are limited and conditional exceptions from the substantive obligations of members under GATT-1994.132 The appellate body in the Shrimp-Turtle case stated that the chapeau of article XX is "one expression of the principle of good faith" under general international law. 133 This principle "controls the exercise of rights by states".134 The Appellate body expressed the chapeau as a means to "maintain a balance of rights and obligations between the right of a member to invoke one or another of the exceptions of Article XX…, on the one hand, and the substantive rights of the other members…"135 The principle, therefore, prohibits the "abusive" exercise of rights by states.136

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[128] The Appellate body made reference to Principle 12 of the Rio declaration; paragraph 2.22 (i) of agenda 21; article 5 of convention on biodiversity; annex I of the convention on species of wild animals. All of these declarations and conventions oppose unilateral measure in relation to environmental challenge out side of the jurisdiction of a state which purports to take the measure. Besides, all of them urge countries to seek for multilateral solution to transboundary and global environmental problems. See Shrimp-Turtle (AB), *supra* note 9, at para 168-69.

[129] Shrimp-Turtle (AB), *supra* note 9, at para 166.

[130] See Shrimp-Turtle (AB), *supra* note 9, at para 147, where the AB stated that although the US measure provisionally justified under article XX (g), it must also satisfy the requirement of the chapeau in order to be justified under article XX exceptions.

[131] Birnie & Boyel *International Law and the Environment* (2002) 711.

[132] Shrimp-Turtle (AB), *supra* note 9, at para 157.

[133] Shrimp-Turtle (AB), *supra* note 9, at para 158.

[134] *Ibid.*

[135] Shrimp-Turtle (AB), *supra* note 9, at para 156; see also *United States - Standards for Reformulated and Conventional Gasoline* Appellate Body Report (WT/DS2/AB/R) adopted May 20, 1998(here in after US-Gasoline (AB)), at para 23.

[136] Shrimp-Turtle (AB), *supra* note 9, at para 158; See also US-Gasoline (AB), *supra* note 135, at para 22.

The chapeau of article XX provides that a measure should not be applied in a manner which constitutes arbitrary and unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. A discriminatory application of a measure, which is provisionally justified under one of the specific paragraph of article XX, may not necessarily be inconsistent with the requirements of the chapeau. There is a possibility that a country may provide an acceptable rational for discriminatory application of its measure. In the Brazil-Tyres case, the discriminatory application of Brazil's measure was not an issue both before the Panel and the Appellate Body.[137] Rather, the European community argued that Brazil's discriminatory measure was arbitrary and unjustified.[138] The Appellate Body dealt with the issue as to what makes a discriminatory treatment unjustified and arbitrary. The Appellate Body stated that, "…whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination."[139]

The Appellate Body examined whether the rational behind Brazil's discriminatory application of the measure was related to the policy objective it wanted to achieve. The Appellate Body stated that:

> "…there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner…and when 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" [140]

In the view of the Appellate body, therefore, determination of the existence of arbitrary or unjustified discrimination requires an examination of the rational behind a discriminatory measure in light of the objective to which a measure is meant to be taken. If the rational

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[137] The case involves Brazil's import ban on retreaded and used tyres. Among other arguments, Brazil asserted that retreaded and used tyres can cause health risks to animal, plant and human. However, Brazil put exemption from the import ban of imports from some countries, commonly known as MERCOSUR with which Brazil formed the Southern Common market. See *Brazil- Measure Affecting Imports of Tyres* Appellate Body Report (WT/332/AB/R) December 3, 2007(here in after Brazil-Tyres (AB)), at para 121-122.

[138] Brazil-Tyres(AB), *supra* note 137, at para 220.

[139] Brazil-Tyres(AB), *supra* note 137, at para 225.

[140] Brazil-Tyres(AB), *supra* note 137, at para 227.

for a discriminatory measure is found to be unjustified, or unrelated to the objective of the measure, there will be arbitrary and unjustified discrimination.

In the Shrimp-Turtle case, the Appellate Body found the US discriminatory measure arbitrary and unjustifiable, as countries using identical methods to the US to exclude incidental mortality of see turtles were denied of access to the US market merely because shrimps were caught in the waters of countries which were not certified by the US.[141] The US measure, according to the Appellate Body, targeted not at the end that its policy should achieve, rather it focused on influencing other members to adopt the same regulatory regime as that of US.[142] In other words, the US discriminatory application of the measure was not justified, or not related to the policy objective that it purported to achieve. The policy objectives that US purported to achieve was to reduce the incidental mortality of sea turtles during shrimp harvests which could have been also achieved by recognizing identical methods of harvesting devices.

The Appellate Body, both in the Shrimp-Turtle and the Brazil-Tyres cases, failed to give detailed analysis on the issue of disguised restriction on international trade. In the Shrimp-Turtle case, since the US measure was found to be applied in a manner that constituted arbitrary and unjustified discrimination, where the same conditions prevailed, the Appellate Body found that it was not necessary to examine whether the measure was "a disguised restriction on international trade".[143] It is not clear whether the Appellate Body ignored this latter issue only because of judicial economy. In the US gasoline case, however, the Appellate Body explicitly noted that "unjustified discrimination", "arbitrary discrimination" and "disguised restriction on international trade" may be seen side by side and "impart meaning to one another".[144] The Appellate Body found that "disguised restriction" subsumes "arbitrary discrimination" and "unjustified discrimination".[145] However, it has to be noted that a country's measure, though not discriminatory in any ways among exporting countries or between foreign and domestic like products, can still

[141] Shrimp-Turtle (AB), *supra* note 9, at para 165.
[142] *Ibid*
[143] Shrimp-Turtle (AB), *supra* note 9, at para184.
[144] US-Gasoline (AB), *supra* note 135, at para125.
[145] *Ibid.*

be motivated by protectionist policy. For example, a country in which there is no particular environmentally unsustainable PPM may prohibit the import or domestic production of a product produced in a certain manner. In this hypothetical case, it is clear that there is no discrimination. The hidden purpose behind the measure can, however, be protectionist to favour domestic industries. In some instances, therefore, disguised restriction may not necessarily subsume arbitrary and unjustified discrimination. The real purpose of a measure purported to be taken under one of the exceptions of article XX must be examined in order to decide whether there is a disguised restriction on international trade.

In summery, the Appellate Body's decision in the shrimp-Turtle cast light on the debate whether a process based measure can be justified under the GATT.[146] It is viewed as recognition of unilateral process-based trade measure.[147] However, it balanced between interests of trade and environment and not as "favourable to unilateral action as either the trade or environmental community perceive".[148] Generally, it is safe to conclude that neither the text of the GATT nor the WTO jurisprudence supports the conclusion that process-based trade measures are *a priori* inconsistent with the GATT rules, at least in light of article XX exceptions.

III. Reconciling the Trade Environment Debate

A. Overview

It is far from being disputed that certain process and production methods have negative effects on environment. The spillover of some production methods can sometimes be felt

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[146] Appeleton "Shrimp/Turtle: Untangling the Nets" (1999) 2 *Journal of International Economic Law* (*J. Int'l Eco. L*) 477 at 491-92.

[147] *Ibid.*

[148] *Ibid*; see also Lowenfeld *International Economic Law* (2002) 323. The GATT community has expressed deep concern that the appellate body's decision apparently allows the use of process-based measures. The appellate body's finding in the Shrimp turtle case has been seen as a reversal of a longstanding jurisprudence which viewed process based measure as *a priori* inconsistent to the trading rules. See Chang "Towards a Greening GATT: Environmental Trade measures and the Shrimp-Turtle case"(2000-2001)74 *South California Law Review (S. Cal. L. Rev.)* 31; see also Bhagwati , After Seattle: Free trade and the WTO (2001), 77 *International Affair*(Int'l Aff), Available at <http://web.nps.navy.mil/~relooney/IntAffairs_1.pdf> (accessed April 15 2008) 28

beyond the country where the PPM is utilized.[149] Some countries may opt to take trade measures in order to discourage other countries which use environmentally unsound process and production methods. The ultimate objective of the country taking the measure may genuinely be motivated by environmental protection. The very important issue, in light of the economic and other realities of LDCs and developing countries, is whether trade measures are the most effective alternative to cope with PPM-related environmental problems.

A genuine and non-protectionist environmental policy measure must target at the effectiveness of trade measures to correct environmental wrongs committed out side of the territory. The overt reality associated with developing countries, especially LDCs, is lack of skills and technologies to utilize modern production methods with the least environmental externalities.[150] In these countries, poverty eradication is a major policy preoccupation.[151] Process based trade measures can potentially deny them market access, which thereby exacerbate the already impoverished economic, social and environmental conditions in those countries.[152] Besides, poverty can be one of the root causes of environmental problems in poor countries.[153] Since many environmental problems may not be confined where they are originally caused, they may have repercussions beyond national territory of a country or region. Creating economic capacity to developing countries can help them contribute the global effort towards environmental protection.[154] This fact indicates that there is a need to think about other alternative solution which can reconcile the development or trade need of poor countries and environmental concerns.

Some global efforts have been made to reconcile the ongoing debate on trade and environments. Some of these efforts are made outside the WTO system while others are

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[149] OECD Secretariat, *supra* note 17.
[150] Tetarwal & Mehta, *supra* note 14, at 5.
[151] See Agenda 21, U.N. Conference on Environment and Development (UNCED), Annex II, U.N. Doc. A/CONF. 151/26/Rev.1 (1992) (here in after Agenda 21).
[152] Since process-based trade measures some times take the form of import ban, LDCs could not get financial resource from international trade necessary to alleviate their social, economic and environmental problems.
[153] In an impoverished society where there is no alternative way of supporting life, people highly depend on the environment for survival, in one way or another, this in turn adversely affect the environment.
[154] Agenda 21, *supra* note151, at 2.19; see also Fijalkowski & Cameron (eds) *Trade and the Environment: Bridging the Gap* (1998) 125.

within the WTO. These efforts indicate alternative solutions to trade measures in order to alleviate global environmental problems. The following part will examine these efforts.

B. Out side the WTO

The UNCED[155] summit forwarded a number of policy recommendations related to trade and environment in a way that addressed the interests of both developed and developing countries.[156] One of the significant achievements of the UNCED may be explained in terms of the fact that it came up with the Rio-declaration.[157] The declaration provides momentum for reconciling the environment-development debates.[158] The declaration provides several provisions which directly deal with the issues of trade and environment. Principle 12 of this declaration recognises trade measures for the purpose of environmental protection. However, it makes sure that such measures are not taken for protectionist purpose. The principle reads:

> "Trade policy measures should not constitute a means of arbitrary or unjustified discrimination or a disguised restriction on international trade. Unilateral actions to deal with the environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.[159]

This principle reinforces the "sufficient nexus" approach to take a trade measure for protection of environment. Besides, it recognises a multilateral approach to deal with transboundary and global environmental problems to which the Appellate Body in the Shrimp turtle case make reference.[160]

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[155] UNCED refers to the United Nations Conference on Environment and Development that was held from June 3 through June 14, 1992, in Rio de Janeiro, Brazil.

[156] Vaughan "Trade and Environment: some North South Considerations" (1994) 27 *Cornell International Law Journal (Cornell. Int'l L. J)* 591 at 595.

[157] The Rio declaration is adopted in the UNCED by consensus, and constitutes the most significant statement of universally accepted general rights and obligation of states in the field of environment and development. It is partly a restatement of existing customary international law on matters of transboundary nature, and partly constitutes emerging principles of law in relation to the protection of the global environment; see Rio declaration on Environment and development, June 14, 1992, U.N. Doc. A/CONF. 151/5/Rev.1 (1992) (here in after Rio declaration); See also Birnie & Boyel, *supra* note 131, at 82.

[158] Vaughan, *supra* note 156, at 595.

[159] Rio declaration, *supra* note 157, at principle 12.

[160] Shrimp-Turtle (AB), *supra* note 9, at para 154.

The Rio-declaration recognises that some environmental standards set by countries may have unwarranted and inappropriate economic and social repercussion on other countries, especially developing countries.[161] The declaration emphasises on the need of environmental standard, management objectives and priorities to reflect the environmental and developmental context to which they apply.[162] It recognises the special situation and needs of developing countries, more particularly LDCs, and call for special priorities to be given to them.[163] It calls for cooperation between states towards capacity building for sustainable development, and technology transfer to alleviate environmental problems.[164]

Agenda 21 restated most principles of the Rio declaration which are relevant to reconcile trade and environment debates. It focused on possible mechanisms that can bring about significant out come in the effort to make trade and development mutually supportive through international trade.[165] An open international trading system can help to achieve efficient allocation and use of resources and thereby help to increase income and production and reduce demand on the environment.[166] A more liberal trade helps to provide additional economic resources for growth and development and improves environmental protection.[167] In addition to explicit recognition to the need to take trade measures to reinforce environmental objectives, Agenda 21 takes cognizance of the fact that environmental standards valid for developed countries may have unwarranted social and economic costs in developing countries.[168] It calls for consideration of special factors affecting environmental and trade policies of developing countries in the application of environmental standards and the use of trade measures.[169] Besides, it calls for avoidance of unilateral trade measures to deal with environmental challenges outside the jurisdiction

[161] Rio declaration, *supra* note 157, at Principle 11.
[162] *Ibid.*
[163] Rio declaration, *supra* note 157, at principle 6.
[164] *Ibid.*
[165] Agenda 21, *supra* note 151, at Para 2.19.
[166] *Ibid.*
[167] *Ibid.*
[168] Agenda 21, *supra* note 151, at Para 2.20.
[169] Agenda 21, *supra* note 151, at Para 2.22 (g).

of importing country.[170] In relation to transboundary and global environmental problems, agenda 21 encourages multilateral solutions through consensus.[171]

Agenda 21 proposes an integrated approach towards alleviating transboundary and global environmental challenges. Agenda 21 takes cognizance that the actions that developing countries should undertake to deal with global environmental problems entails costs that they may not be able to afford.[172] It calls for a substantial flow of new and additional financial resources to developing countries.[173] The need for transfer of environmentally sound know-how and technology to developing countries is emphasised in order to protect the global environment from repercussions caused during production, consumption and disposal.[174] In summery, Agenda 21 gives the massage that trade measure for environmental policy objective may not, in and of itself, achieve its purpose. Global environmental challenges can best be tackled through mutually supportive global efforts.

C. Within the WTO

At the Doha Ministerial conference, members recognise the fact that protection of the environment and promotion of sustainable development can and must be mutually supportive.[175] Numerous issues have been raised in the Doha ministerial conference, and agreement has been reached to embark on a new round of negotiation, including on certain aspects of linkage between trade and environment.[176] The declaration instructed the Committee on Trade and Environment (CET) to give particular attention to the effect of environmental measures on market access, in relation to developing countries, especially LDCs, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development.[177]

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[170] Agenda 21, *supra* note 151, at Para 2.22(i).
[171] *Ibid.*
[172] Agenda 21, *supra* note 151, at Para 1.4.
[173] *Ibid.*
[174] Agenda 21, *supra* note 151, at Para 34.4.
[175] *Ministerial Declaration, Fourth Ministerial Conference*, Doha, Qatar, adopted 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001(here in after Doha Declaration), para 6.
[176] World Trade Organization *Trade and environment in the WTO* (2004) available at <http://www.wto.org/English/tratop_e/envir_e/envir_wto2004_e.pdf > (Accessed 17 March 2008) 9.
[177] Doha declaration, *supra* note 175, at para 32(i).

Members also recognise the importance of technical assistance and capacity building in the field of trade and environment to developing countries, especially LDCs.[178] The declaration instructs the CTE to prepare a report on these activities for the fifth session, and to make recommendations, where appropriate, with respect to future action, including the desirability of negotiations.[179] The declaration also instructs that the out come of the trade-environment mandates of the CTE should take into account the needs of developing countries and LDCs.[180]

It is reflected in the CTE report that improved market access is a key to achieve sustainable development.[181] It also confirms principle 11 of the Rio declaration that environmental measures adopted by some countries could be inappropriate and of unwarranted social and economic cost to others, especially developing countries.[182] It is acknowledged that environmental standards could adversely affect exports.[183] It is recommended that striking a proper balance between safeguarding access to market and environmental protection requires the importing country to examine how environmental measures could be designed in a manner that (i) is consistent with the WTO rules; (ii.) is inclusive; (iii.) takes consideration of capability of developing countries; and, (iv.) meets the legitimate objectives of importing country.[184] The report shows proposal which highlights the importance of involving developing countries in the design and development of environmental measures to reduce the negative effects of those measures.[185] Once it is developed, flexibility of the application of measures, by way of exceptions in favour of developing countries, is also proposed.[186] Technical assistance, capacity building and transfer of technology are emphasised as key to help developing country exporters to meet environmental requirements.[187] It is believed to help

[178] Doha declaration, *supra* note 175, at para 33.
[179] See Doha declaration, *supra* note 175, at para 32 and 33.
[180] Doha declaration, *supra* note 175, at para 32.
[181] Committee on Trade and Environment: *report to the 5th session of the WTO Ministerial Conference in Cancun, WT/CTE/8, 11 July 2003*(here in after CET Report), Para 32(4).
[182] *Ibid.*
[183] CET Report, *supra* note 181, at para 32(5).
[184] CET Report, *supra* note 181, at para 32(6).
[185] CET Report, *supra* note 181, at para 32(7).
[186] *Ibid.*
[187] *Ibid.*

developing countries to generate resources that can be utilized to implement sound environmental policies.[188]

Although considerable efforts have been made to address the legal, economic and other issues related to trade and environment, developing countries remain deeply wary of the appropriateness and effectiveness of "greening of the trade rules" without practical implementation of the commitments that developed countries made in the UNCED to provide tangible assistance to developing countries through additional financing, technology transfer, and other development assistances.[189] Denying market access to poor countries through process-based trade measures tantamount to making them to pay the cost to correct wrongs done to the global environment. The reality of LDCs and most developing countries reflect that they can not afford to pay the cost. At this stage, it is overt that environmental problems are global concerns. A global and coordinated effort is required to alleviate global environmental problems.[190] The use of process-based trade measures alone can never be an effective and logical move in dealing with environmental problems.[191]

Conclusion

Relatively recent WTO jurisprudence, especially the Appellate Body's ruling in the Tuna-dolphin case, makes clear that process-based trade measure for environmental protection objective is not *a priori* inconsistent with the GATT. WTO members can take this kind of measure under limited circumstances with out defaulting on their obligation under the GATT. The issue as to whether members can justify their process-based trade measure under the general principles of GATT is approached in the negative in WTO jurisprudence. However, a measure, otherwise inconsistent with the substantive obligations of a member, can still be justified under the general exceptions of article XX of the GATT. In order to be justified under one of the general exceptions, a measure must fulfill both the requirements of the relevant paragraph(s) under article XX, and the chapeau.

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[188] *Ibid.*
[189] Vaughan, *supra* note 156, at 605.
[190] Weiss & Jackson (eds) *Reconciling Environment and Trade* (2001) 445.
[191] Tetarwal & Mehta, *supra* note 14, at 1.

Process based environmental measure, even if utilised for genuine policy considerations, can pose the risk of depriving developing countries of market access in developed countries' market, the ultimate effect of which may be reflected more on LDCs. Developing countries have an urgent need towards economic development that can be more reinforced by increasing their export capacities in the multilateral trading system. LDCs can not easily cope with more hindrances in the international trading system through process-based trade measures. This is primarily because these countries can hardly afford to employ environmentally friendly methods of productions. It does not, however, mean that process-based environmental measures should be totally outlawed from GATT rules. Process-based trade measure, with non-protectionist policy, and together with technical assistance, capacity building and technology transfer, may assist efforts of environmental protection and sustainable development. Besides, success in the field of environmental protection and economic development requires countries' environmental regulations to take into account the special contexts and needs of developing countries, especially LDCs.