ENVIRONMENTAL UNILATERALISM AND THE WTO/GATT SYSTEM

Ilona Cheyne*

I. INTRODUCTION

Unilateral trade restrictions employed for purposes of environmental protection have become an important issue in the trade-environment debate. They directly challenge the free trade principles of the WTO/GATT system and are likely to become more common as environmental concerns increase. When the first GATT panel report in the Tuna Dolphin dispute was released,1 environmentalists were outraged at its finding that the General Agreement on Tariffs and Trade [hereinafter GATT] could override environmental measures because of their trade-restricting effect.2 That report was never adopted, but a second GATT panel has recently considered

* Professor of Law, Newcastle Law School, University of Newcastle upon Tyne. The author would like to thank Professor Thomas J. Schoenbaum for his helpful comments on earlier drafts of this article.

1 Panel report on “United States - Restrictions on Import of Tuna”, General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents [hereinafter GATT, BISD] 39S/155, reprinted in 30 I.L.M. 1594 (1991) (not yet adopted) [hereinafter Tuna Dolphin 1]. The complaint was brought by Mexico, with ten other countries and the European Community submitting arguments. Id. at 161-91.

2 One commentator suggests that “the panel seemed to go out of its way to validate the popular caricature of the GATT as an inflexible, myopic, moss-grown institution inherently indifferent, if not downright antagonistic, toward ecological protection.” Steve Charnovitz, The Environment vs. Trade Rules: Defogging the Debate, 23 Envt’l L. 475, 482 (1993). But note that he later acknowledges that the danger posed to the environment by the GATT is exaggerated. Id. at 488.
the same issues in *Tuna Dolphin II*. In addition, there have been other important panel reports concerned with the same or parallel issues: the *U.S. Alcohol* and *U.S. Automobile Taxes* reports.

The *Tuna Dolphin* dispute concerned U.S. import bans under the Marine Mammal Protection Act (MMPA) of 1972 on tuna caught with purse seine nets; the bans had been put into effect because the high dolphin mortality caused by the method of capture was considered to be environmentally unacceptable. The measures complained of in the *U.S. Automobile Taxes* dispute also were based on the grounds of environmental protection. They consisted of a luxury tax imposed on the basis of price, a "gas guzzler" tax imposed on the basis of fuel consumption, and the Corporate Average Fuel Economy (CAFE) regulation, which required manufacturers to produce a specified average fuel economy across their domestic and exported fleets, enforceable by financial penalties. In a different vein, but raising similar issues, the *U.S. Alcohol* dispute was concerned with a variety of federal and state restrictions on the sale of alcohol, many of which were reputedly designed to control alcohol distribution and to protect human health and public morals.

All of these disputes were concerned with the validity of unilateral measures restricting trade. Even if the reports remain unadopted, they are part of the growing GATT jurisprudence on the interpretation and application of its provisions. The panel reports were clearly informed, not only by the arguments of the parties, but by the considerable academic literature which

---

3 Panel report on "United States - Restrictions on Imports of Tuna", 33 I.L.M. 839 (1994) (not yet adopted) [hereinafter *Tuna Dolphin II*]. The complaint was brought by the European Economic Community and the Netherlands on the basis of the same legislation, with some amendments, as complained of in *Tuna Dolphin I*.


6 *Tuna Dolphin I*, supra note 1, at 156-57.

7 *U.S. Automobile Taxes*, supra note 5, at 1400 ff.

8 *U.S. Alcohol*, supra note 4, at 206 ff.
followed the *Tuna Dolphin I* report and they will, in their turn, influence the future debate. This paper examines the extent to which these recent panel reports have developed the legal interpretation of Articles III and XX(b) and (g) of the GATT. Finally, it asks whether there is now any future for environmental unilateralism and, if so, to what extent it should be permitted and how it may be accommodated within the WTO/GATT system.

II. ARTICLE III OF THE GATT

Article III:1 of the GATT provides that internal taxes and other charges, and laws, regulations and requirements that affect the sale or distribution of products should not be applied so as to afford protection to domestic products. Those laws, regulations and requirements are also subject to a more stringent test under Article III:4 which provides that imported products

---


10 Article III:1 states:

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, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
must be given treatment no less favourable than that given to like domestic products. A similar sort of provision applies to taxes and other charges under Article III:2. The first sentence of that paragraph prohibits the imposition of direct or indirect charges on imported goods which are in excess of those imposed on like domestic products. The second sentence repeats the obligation contained in Article I:1 that taxes and charges may not be used to protect domestic production, but this is widened to include, not just 'like products', but products which are directly competitive or substitutable with each other.

As Professor John H. Jackson pointed out, Article III has such a direct effect on the internal policies of governments that "it becomes more quickly embroiled in domestic politics than any other GATT obligation." Equally, it has proved to be a major stumbling block with regard to unilaterally imposed environmental standards. Since the whole purpose behind such restrictions is to discriminate between products on the basis of their environmental impact, it is clear that Article III is going to be a point of conflict. This is particularly true because the principles on which environmental distinctions might be made are likely to be very different from those adopted in the WTO/GATT system for trade purposes.

At first reading, the test laid out in Article III falls into two parts. First, it must be decided whether the products being differentiated between are

---

11 Article III:4 states:
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.

12 Article III:2 states:
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.


14 JACKSON, supra note 13, at 274.

15 See Charnovitz, supra note 2, at 43-44; Charnovitz, supra note 9, text at nn.62-74.
'like products'. If they are not 'like', then any differentiation will be consistent with Article III. If they are 'like', then differentiation can only be consistent if it does not afford either protection to domestic production ('protective effect') or less favourable treatment to imported products.\footnote{16} However, this linear interpretation has caused difficulties when applied to domestic policies which do not have any overt protective aim or effect. It relies upon the question of whether products are 'like' before considering the effect of the measure, and can lead to a finding of inconsistency purely on the existence of differentiation, regardless of its intention. It may therefore preclude consideration of policies behind the differentiation even where there is no protective effect or less favourable treatment. As a result, it should be asked whether the test should be applied in an integrated and purposive manner, limiting its effect to overtly trade issues.\footnote{17}

The issue whether products are 'like' is central to the question of whether differentiation is consistent with Article III. It is convenient to consider three questions separately: 1) What is meant by 'like products'? 2) Should a distinction based on processing and production methods (PPMs) be allowed? 3) How important is the issue of protective effect in deciding whether differentiation is legitimate?

A. 'Like Products'

The importance of the concept of 'like products' has been somewhat obscured by the finding of the Tuna Dolphin I panel that Article III only applies to regulations affecting 'products as such' and not, for example, the circumstances of their production.\footnote{18} This interpretation has been followed, with varying degrees of explicitness, by the later panel reports concerned with Article III.\footnote{19} In that analysis, regulations which differentiate between products on the basis of factors other than their physical characteristics

\footnote{16} This is the analysis used in the Panel Report on "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wine and Alcoholic Beverages", GATT, BISD 34S/83, para. 5.5 [hereinafter Japan Alcohol].

\footnote{17} For example, the E.C. and Japan were in disagreement on this issue in the Japan Alcohol dispute. \textit{Id.} at paras. 5.3-5.4.

\footnote{18} \textit{Tuna Dolphin I, supra} note 1, at paras. 5.11-5.15.

\footnote{19} As Schoenbaum points out, this interpretation is in line with previous panel reports. Schoenbaum, \textit{supra} note 9, at 710. \textit{See also Tuna Dolphin II, supra} note 3, at paras. 5.8-5.9; \textit{U.S. Alcohol, supra} note 4, at para. 5.19; \textit{U.S. Automobile Taxes, supra} note 5, at paras. 5.52-5.54.
cannot fall within Article III on the basis that such regulations would, by
definition, be distinguishing between products that are 'like'.  
However, the question of 'likeness' bears further consideration.

On the face of it, the Tuna Dolphin I panel's interpretation when applied
to 'like products' is difficult to disagree with. 'Likeness' is usually
expressed by reference to physical similarity, components or function. In
this sense, tuna is tuna, no matter how it has been caught. The fact that
dolphins and other marine life were “incidentally” taken with the tuna does
not affect the essential nature of the tuna itself. If a product is defined by
reference to its function or physical design, then it would be difficult, if not
impossible, to suggest that tuna fish caught by one method is essentially
different from one caught by another. The result of the panel's reasoning is
that, even if the limits on dolphin kills had been applied identically to the
domestic and importing industries, there would still have been a finding of
discrimination between 'like products'.

But, as noted above, this precludes any further discussion of what might be considered 'like' by reference
to a particular aspect of the product and whether the measure does in fact
constitute protection of domestic producers or less favourable treatment of
imported products.

The term 'like products' (or its equivalent) is used throughout the GATT
for different purposes. As a result, there is no general definition of the term
and its meaning will depend upon the purpose of the provision in which it
is located. In addition, there is a tendency to define the term according
to the facts of each case. A general statement was made by the Working
Party on Border Tax Adjustments in 1970 to the effect that the term ‘like
products’ should be defined on a case-by-case basis, according to criteria
appropriate to it. It suggested some possible criteria: the product’s end-use
in the market, consumers’ tastes and habits, which change from country to
country, and the product’s properties, nature and quality.

In some cases, this test has been relatively easy to apply. In the

---

20 As a result, the MMPA regulations could not be brought under Article III; the
implication was that U.S.-caught tuna and Mexican-caught tuna were ‘like’ and that any
differentiation between them would be inconsistent with Article III.

21 This is apart from the possibility of showing that the effect is to protect domestic
production, perhaps because the required methods of capture are already possessed by the
domestic industry and would be expensive for the importing industry to acquire.

22 See, e.g., Japan Alcohol, supra note 16, at para. 5.6.


24 Id. at para. 18.
Superfund dispute, for example, the products being compared for purposes of import taxes consisted of different types of oil, gasoline and other liquid hydrocarbon products. The domestic and imported products in question were either identical with each other or had substantially the same end-uses, and the panel had little difficulty in categorizing them as 'like products' for the purposes of Article III:2. But in many cases, the issues are not so straightforward and the choice of grouping may be more difficult. A case in point is the Japan Alcohol panel report, which dealt with the problem of comparing different kinds of alcoholic drinks for purposes of taxation. The E.C. argued that they had been grouped together in such a way as to afford protection to domestic producers and with the result that charges were imposed on imported drinks that were in excess of those imposed on like domestic products. The products in that case included gin, vodka, whisky, grape brandy, fruit brandy, still wine and sparkling wine. The panel found that items that fell within each of these headings were 'like products' for the purposes of the first sentence of Article III:2 prohibiting internal taxes in excess of those imposed on like domestic products. However, the second sentence prohibits taxation being used in order to protect domestic production, not only with regard to "like domestic products", but also "directly competitive or substitutable" products. In applying this rule, the panel grouped the drinks differently. Gin, vodka and brandies were grouped together as imported and domestic distilled liquors. Imported and domestic unsweetened and sweetened still wines were put into a separate group, as were imported and domestic sparkling wines. The panel thus found that spirits competed directly against each other whereas still and sparkling wines did not.

On what criteria were these classifications based? It would, after all, be possible to say that all alcoholic drinks were in competition with each other, or that all wines were in competition, and so on. The panel recognized that even the more restrictive term, 'like products', could be interpreted in several different ways. In this particular case, they had been convinced by the

26 Id. at para. 5.1.1.
27 Japan Alcohol, supra note 16, at para. 3.A.
28 Id. at para. 5.6
29 Interpretative Note, supra note 13, at para. 2.
30 Japan Alcohol, supra note 16, at para. 5.7
similarity of end-use, objective criteria such as composition and manufacturing processes, and subjective criteria such as consumer tastes and consumption. Nonetheless, they were concerned that the linking of products by reference to criteria such as consumer preference could be used to encourage and fix those preferences through taxation. Existing patterns of consumption should not, therefore, always be decisive of what constitutes ‘like products’. Otherwise, products would be prevented from entering into genuine competition which might lead to a change in those patterns. This argument applies even more strongly when considering the classification of “directly competitive or substitutable” products. On the other hand, other criteria such as end-use should be treated cautiously where changing circumstances or technology may throw previously non-rival products into competition with each other.

The tension comes from the two opposing tendencies to draw on present trade patterns both to define ‘likeness’ and to allow for the possibility of change; it is exacerbated by the absence of any precise test. The arguments discussed above have been used primarily to achieve liberalization of trade by avoiding over-reliance on existing competitive patterns. However, they indicate that there is a strong relationship between the concept of ‘like products’ and the policy of preventing protective effects. Where a tax or regulatory grouping has a protective effect, it will be more likely to lead to a finding of ‘likeness’. On the other hand, these arguments may also be used to suggest a flexibility of interpretation which would permit the integration of important values and concerns arising from outside the context of trade where there is no protective effect. In particular, they suggest that the linear interpretation referred to above may be overly rigid and artificial.

Some evidence that the literalist approach in the GATT might be softened arose obliquely in the U.S. Alcohol panel report, in which the panel indicated reservations about interfering unduly with the internal regulatory independence of national governments. In particular, it expressed concern about the implications of classifying items as ‘like products’ and the basis on which that classification should be made. Specifically, it said, “The purpose of Article III is not to harmonize the internal taxes and regulations of

31 Id.
32 Id.
contracting parties. . . ."  

34 In other words, Article III should not be applied too literally, so as to have more wide-ranging effects on internal policies and laws than necessary beyond protecting the rights of other contracting parties to the GATT. In particular, it was “imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.”

One of the complaints raised in U.S. Alcohol related to restrictions on points of sale, distribution and labelling which applied differently to low-alcohol and high-alcohol beers. 36 Canada claimed that the effect of this differentiation, although it apparently applied equally to domestic and imported products, was to discriminate in fact against Canadian beer. 37 In its view, all beers should be classified as ‘like products’. The panel, on the other hand, found that it was possible to make a legitimate differentiation based on alcoholic strength. 38 As in Japan Alcohol, it was possible to say that all beer was the same or even to suggest a different basis for differentiation. The right to decide exactly how beer was to be grouped was given to the government in question, provided that there was no evidence of protective effect. Thus, the legitimacy of the differentiation was not derived from trade-related considerations such as end-use or consumer preference, but from a non-trade policy which had no discernible protective effect.

In the U.S. Automobile Taxes dispute, two of the measures at issue were taxes on luxury cars at or above a certain set price, and a progressive ‘gas guzzler’ tax on cars with fuel consumption falling below specified thresholds. 39 In the absence of evidence to substantiate claims by the E.C. that they had any protective intention or effect, 40 the panel was content to accept that the differentiation made by the taxes between products which might

34 U.S. Alcohol, supra note 4, at para. 5.71.
35 Id. at para. 5.72.
36 Id. at paras. 5.70-5.77. Another complaint related to a lower rate of taxation applied to wines, regardless of origin, provided they used a particular kind of grape. Because it only grew in the region of the state in question, there was no difficulty in identifying a protective effect against other North American wine producers and thus it was considered appropriate to group together wines made from different grapes as ‘like products’. Id. at paras. 5.23-5.26.
37 Id. at para. 3.120.
38 Id. at paras. 5.76, 6.1(r).
40 In the case of the gas guzzler tax, this was despite the panel’s acceptance of the fact that E.C. automobiles bore most of the tax. Id. at para. 5.22.
otherwise have been considered 'like products' was legitimate. The interpretation employed by the panel was therefore very similar to the integrationist approach of the *U.S. Alcohol* panel, and it explicitly refers to the latter's report in its reasoning.\(^4\) That is to say, it permitted governmental policy to determine the question of 'likeness' and the primary limitation became the question of whether there was protective effect.

The third measure considered by the *U.S. Automobile Taxes* panel caused more difficulties. The Corporate Average Fuel Economy (CAFE) regulation requires the payment of charges where the average fuel economy of the cars manufactured by a particular producer falls below a specified level.\(^4\) The panel examined the use of 'fleets averaging', which requires manufacturers to achieve average fuel consumption targets across the whole of their range of products.\(^4\) The E.C. had argued that this constituted less favourable treatment of their cars because it targeted their specialized manufacturers who were unable to average their high-consumption vehicles with low-consumption vehicles.\(^4\)

The panel did not examine this argument.\(^4\) Instead, it returned to the argument employed by the *Tuna Dolphin I* panel, referred to at the beginning of this section, that regulations under Article III must relate to 'products as such'. It found that the test of averaging across a whole fleet of cars is concerned with the activities of the producers, in the sense of their ownership and control arrangements, rather than with the product itself and, as a result, was inconsistent with Article III:4.\(^4\) The test of 'products as such' severely restricts the scope for interpreting the concept of 'like products' and, in particular, it excludes regulation on the basis of production and processing methods which will often form the basis of unilateral environmental measures.

\(^{41}\) *Id.* at para. 5.7, n.128.
\(^{42}\) *Id.* at paras. 2.14-2.24.
\(^{43}\) *Id.* at para. 2.16.
\(^{44}\) *Id.* at para. 3.266 ff.
\(^{45}\) *Id.* at para. 5.54.
\(^{46}\) *Id.* at para. 5.52. However, this criterion could be saved under Article XX(g) on the grounds that it was primarily aimed at making effective equivalent restrictions on domestic producers.
B. Production and Processing Methods

As stated in the previous section, much of the discussion on 'like products' is contingent on the finding of the Tuna Dolphin I panel that Article III only applies to 'products as such' and the consequent limiting of differentiation to physical characteristics of the product in question.\(^47\) This interpretation has been followed by panel reports after Tuna Dolphin I.\(^48\) It is largely derived from the fact that Article III consistently uses the term "product"; it follows that Article I only applies to taxes or regulations which concern 'products as such' and not other characteristics related to a product.\(^49\) However, this arguably imports too much significance into a literal reading of the provision. It permits the concept of "product" to preempt the purpose of the article as a whole, which is to prevent protection of domestic production and less favourable treatment of imported products, rather than allowing other tests to be used to achieve the same aim. Another ground for the 'product as such' test is an analogy with direct and indirect taxes in the practice of border tax adjustments under Article I, although there are variations that occur in that practice which would also support a less literal reading of paragraphs 2 and 4.\(^50\)

However, the most powerful justification for limiting differentiation to 'products as such' is concern that measures might otherwise be used to protect domestic producers or impair competitive conditions for imported products. The Tuna Dolphin II panel made this explicit by emphasizing that the measures in question were being applied indirectly, not to the product itself, but to the policies of other countries in an effort to force change in those policies.\(^51\) The coercive nature of the measures meant that the legitimacy of the policy purposes behind them was not even considered.\(^52\) The U.S. Automobile Taxes panel gave a different variation of this concern by referring to the need to ensure the security of tariff bindings made under

\(^{47}\) See supra note 18 and accompanying text.

\(^{48}\) See supra note 19 and accompanying text.

\(^{49}\) Tuna Dolphin I, supra note 1, at paras. 5.11-5.12, 5.15.

\(^{50}\) For a detailed discussion of this question, see Demaret & Stewardson, supra note 33, especially at 16-20, 23-29, and 58-61; Thaggert, 'Like Products': Product and Process Methods in the Trade and Environment Context, in TRADE AND THE ENVIRONMENT—THE SEARCH FOR BALANCE (James Cameron et al. eds., 1994).

\(^{51}\) Tuna Dolphin II, supra note 3, at para. 5.24.

\(^{52}\) The same argument was used with regard to Article XX, see infra.
The perceived threat was that the imposition of measures that distinguish on the basis of non-physical characteristics would open up the opportunity to circumvent previously agreed import arrangements. But this concern about indirect or disguised protectionism only requires a test to determine and avoid protective effects.\(^5\)

In other words, even though these concerns about protectionism are legitimate and fundamental to the proper working of the WTO/GATT system, the solution is not necessarily tied to 'products as such.' The essential requirements of a measure that differentiates between products in competition with each other should include the following: 1) it should employ an objective test for differentiation which satisfies the need for certainty and lack of arbitrariness; 2) it should have no protective intention; 3) it should have no protective effect. In the words of the *U.S. Automobile Taxes* panel, it should not create "categories . . . of inherently foreign or domestic origin."\(^5\)

But differentiation based on the physical characteristics of a product will not necessarily satisfy these requirements, and limiting permissible differentiation to this category may unnecessarily exclude other, non-protectionist measures. For example, regulating the sale of beef from cows treated with hormones may rely upon physical characteristics for differentiation but leaves unanswered the question of whether it has a protective aim or effect. Similarly, regulating the sale of pharmaceuticals produced with a particular manufacturing method which carries a risk of contamination, even where there is no physical trace in a given batch, could not be called uncertain or arbitrary and can still be exposed to the normal investigation for protective aim or effect. Thus the requirement that measures be concerned only with 'products as such' is not a sufficient test in itself and may be over-inclusive. In particular, it excludes the incorporation or accommodation of other, non-trade values even where they have no protective purpose.

In practice, the test of what measures apply to 'products as such' is already showing signs of ambiguity after the *U.S. Automobile Taxes* panel

\(^5\) *U.S. Automobile Taxes*, supra note 5, at para. 5.53. See also *Japan Alcohol*, supra note 16, at para. 5.5(b); Panel report on "Spain - Tariff Treatment of Unroasted Coffee", GATT, BISD 28S/102.

\(^5\) See, for example, the confident approach of the same panel to the question of whether the luxury and gas guzzler taxes had a protectionist aim or effect. It stated and applied such a test, presumably on the basis that it was both reliable and workable. See *U.S. Automobile Taxes*, supra note 5, paras. 5.9-5.15, 5.24-5.26, 5.29-5.32, discussed infra.

\(^5\) Id. at para. 5.25.
ENVIRONMENTAL UNILATERALISM

There is no particular difficulty in accepting that the fuel consumption of a particular car as measured for the gas guzzler tax relates to the physical characteristics, or performance, of the product in question. It is possible also to gloss over the fact that the tax is based on an evaluation of the model rather than of each individual automobile, on the grounds that this is necessary for the practical operation of the measure. However, it is more difficult to see why the factor of price, which is used to trigger the luxury tax, should represent a physical characteristic. It is a result of decisions on marketing strategies and production processes, and it is not clear why this should be distinguished from ownership or control arrangements of companies, on which the CAFE regulation was found to be inconsistent because it did not apply to the "product as such." To say that one relates to the product as such and that the other one does not, is to make an arbitrary distinction—it would be no more arbitrary to permit differentiation on non-physical grounds between products on objective, non-protectionist policies applied equally to domestic and imported products.

For example, it would be possible to rely less on what is physically part of a product and concentrate on what is inherent to it. A distinction could be made between, on the one hand, methods which form the economic or social backdrop to production, such as social security or national health provision and, on the other, methods which are intrinsically bound up with the collection, processing or production methods, such as the use of prison labor without adequate pay,\(^\text{56}\) fishing methods which inevitably cause dolphin deaths, or manufacturing processes which inevitably allow the escape of noxious substances into the atmosphere or seas. A distinction may be made between conditions which form a background or context to a production process, and conditions that are an inherent part of that production process.\(^\text{57}\) Such an approach would successfully incorporate the Montreal Protocol's potential ban on products manufactured with listed substances while ensuring that unilateral environmental measures based on PPMs would still be subject to appropriate limitations. It would permit the

---

\(^{56}\) See, e.g., Article XX(e), which permits restrictions on "products of prison labor".

\(^{57}\) This would be consistent with the findings in the Belgian Family Allowances Panel Report, GATT, BISD 1S/59. See also discussion of direct and indirect taxes for purposes of border tax adjustment in Demaret & Stewardson, supra note 33. Clearly there would be increased difficulties in administering and applying a test that would be less clearcut than one relying purely on physical characteristics of a product, though the burden of proof would lie on the party claiming the right to differentiate.
emphasis to shift from the mechanistic test of 'like products' and 'products as such' to the test which lies at the heart of Article III, that of protective effect or less favourable treatment.

C. Domestic Protection or Less Favourable Treatment

Whether differentiation between 'like products' is in itself a violation of Article III or whether there must also be shown protective effect or less favourable treatment depends both on the purpose of the specific provision and the principles of the GATT as a whole. If differentiation in itself constitutes a violation of Article III, the question of 'likeness' becomes the crucial and pre-emptive part of the test. However, if protective effect or less favourable treatment must also be shown, then there is some room for accommodating unilateral environmental measures without destroying the purpose or effectiveness of Article III.

Despite the important relationship between 'likeness' and protective effect, the panels have not consistently defined its role in the operation of Article III as a whole. In the Tuna Dolphin I panel report, the measure at issue was a ban on imports and therefore of sales of tuna. Since the import ban operated directly against foreign caught tuna, less favourable treatment could be assumed, although no finding was made on this point. However, in the later cases, the measures much more clearly applied equally to both domestic and foreign products because they governed products once they had entered the domestic market. The Japan Alcohol panel had examined the issues in two separate stages: first, whether the products involved were 'like products' or directly competitive, and only secondly, whether the taxes were discriminatory or protective. In U.S. Alcohol, however, the panel emphasized that the purpose of Article III was to prevent protection of domestic production and not to prevent the use of internal fiscal or regulatory powers for other purposes. The limitations should be found by reference to the purpose of Article III.

Since the primary purpose of Article III is to promote competitive openness, the act of defining 'like products' should take into account the question of protective effect. This argument is similar to that used in Japan Alcohol in the sense that the 'likeness' of products ultimately relates to the question of whether they compete against each other and thus should not be

58 Tuna Dolphin I, supra note 1, at para. 5.16.
59 Japan Alcohol, supra note 16, at para. 5.5(d).
construed so narrowly that they must be identical. But the panel in *U.S. Alcohol* goes further—it moves away from the linear interpretation adopted in the earlier panel report and toward a more integrated and purposive approach. It finds an inherent link between the definition of 'like products' and the purpose behind the differentiation between products, rather than treating them as separate and consecutive questions.

Although the *U.S. Alcohol* panel was clearly aware of the importance of this relationship, it is not clear from its findings whether it considered that the definition of 'like products' should be contingent upon the existence of a protective effect, or whether it is a separate definition which is subordinate to the test of protective effect. At one point, the panel appears to be arguing that, once 'likeness' is established, any differentiation is illegal whether or not there is a protective effect. It accepts that any differentiation between 'like products' based on standardization, environmental purposes or other similar policies will be inconsistent with Article III. As a result, the panel argues that the determination of 'likeness' should be made so as to avoid "unnecessary" encroachment upon "the regulatory authority and domestic policy options" of contracting parties.

However, even if a finding of 'likeness' is avoided, evidence of a protective effect resulting from differentiation between similar products will be sufficient to fall foul of Article III and will lead itself to a finding of 'likeness' for the purposes of that article. It is not clear whether this is entirely separate from the 'like product' question, or whether it is an implicit answer to it since the panel did not give a definitive explanation. Instead, it finally asked and answered both questions. It dealt firstly with the question of whether high and low alcohol beers should be considered 'like products', and found that domestic policy could legitimately distinguish between them. This was confirmed by the answer to the second question of whether there was protection of domestic production; the panel found that the regulations applied to beer whether imported or domestically produced and thus there was no protection of domestic production and no inconsistency with Article III.

---

60 *U.S. Alcohol*, supra note 4, at para. 5.72. The panel in *U.S. Automobile Taxes*, supra note 5, shows some ambivalence on this point at paras 5.6-5.9, 5.54-5.55.

61 *U.S. Alcohol*, supra note 4, at para. 5.72.

62 *Id.* at paras. 5.73.

63 *Id.* at paras. 5.74-5.75.

64 *Id.* at para. 5.73, 5.77.
The reasoning of the *U.S. Alcohol* panel suggests that, if it could be shown that there was no protection of the domestic industry and that imported products were subject only to indirect differentiation through the implementation of a non-trade policy, the policy discretion of the state should be allowed to determine the question of whether products are ‘like’. Thus, lack of protective effect becomes operative in the determination of ‘likeness’. This argument would apply even more forcefully under the second sentence of Article III:2, with its wider test of “directly competitive or substitutable” products. It allows us to pursue the idea that a linear interpretation of Article III is no longer appropriate and that the question of ‘likeness’ may be determined by the non-trade and non-protective policy of a government.

These are merely hints in *U.S. Alcohol* that the use of purposive interpretation and the need to protect internal regulatory autonomy might be used to soften the effect of findings such as *Tuna Dolphin I*. Such a softening would give explicit recognition to the need to protect the right of contracting parties to introduce different rules concerning non-trade issues, notwithstanding their incidental trade-restricting effects. Some adoption of this reasoning can be seen in the *U.S. Automobile Taxes* panel report. With regard to the luxury tax, the panel had accepted that products could not be identical and that the real question was to identify the differences which, if used to differentiate between products, would lead to less favourable treatment. It identified the avoidance of protection to domestic production as the “central purpose” of Article III. Except in the most obvious of cases, the question of ‘likeness’ “should be analyzed primarily in terms of whether less favorable treatment was based on a regulatory distinction taken so as to afford protection to domestic production.” Any investigation into protection of domestic production should include examination of any

---

66 The panel in *U.S. Automobile Taxes, supra* note 5, adopts this line of reasoning in relation to the luxury and ‘gas guzzler’ taxes at paras. 5.7-5.8, 5.23.
67 Note that the European Court of Justice has followed this reasoning in order to allow national regulatory disparities to remain despite their incidental trade effects if intended to fulfill an approved policy objective (‘mandatory requirement’). This is subject to the right of the E.C. to substitute a comprehensive harmonization scheme. *See*, e.g., *Cassis de Dijon Case, Case 120/78*, [1979] ECR 649; *Danish Bottles Case, Case 302/86*, [1988] ECR 4607.
68 *U.S. Automobile Taxes, supra* note 5, at para. 5.6.
69 *Id.* at para. 5.7.
70 *Id.* at para. 5.9
protective aim and protective effect.\textsuperscript{71} Thus the panel identified and applied a test which related primarily to the protective nature of a measure in order to determine ‘likeness’ for the purposes of Article III.\textsuperscript{72}

However, this approach was not applied uniformly with regard to the CAFE regulation. This regulation requires the payment of charges where the average fuel economy of the cars manufactured by a particular producer falls below a specified level. The panel examined two aspects separately. One aspect was the use of ‘separate foreign fleet accounting’ which requires manufacturers to satisfy the fuel economy requirements for its domestic and foreign car fleets separately.\textsuperscript{73} The panel found that this requirement prevented foreign manufacturers from using their domestic and foreign cars to balance each other out in the same way as U.S. producers could.\textsuperscript{74} As a result, it constituted less favourable treatment and was therefore inconsistent with Article III:4.\textsuperscript{75} The question of ‘like products’ was not an issue because it was assumed that the requirement affected the cars “as products.”

The crucial test was therefore whether there was less favourable treatment. However, when the panel examined the second aspect of the CAFE regulation, that of ‘fleet averaging’ (which calculates fuel consumption across the range of a manufacturer’s products), it used a different approach. It applied the ‘product as such’ test and found that the basis of differentiation concerned the activities of the producers and not the products themselves.\textsuperscript{76}

As a result, it found that it was inconsistent with Article III.\textsuperscript{77}

This part of the finding is not without ambiguity. In the next paragraph, it refers to the test as being applied to less favourable treatment of an imported product.\textsuperscript{78} It makes this clear by saying that, to the extent that the CAFE measure differentiated on the basis of factors relating to producers and importers rather than to the ‘product as such’, “it could not in accordance with Article III:4 be applied in a manner that also accorded less favourable treatment to products of foreign origin.”\textsuperscript{79}

\textsuperscript{71} Id. at para. 5.10.
\textsuperscript{72} It employed the same reasoning with regard to the gas guzzler tax. Id. at para. 5.23. See generally, id. at paras. 5.9-5.15, 5.24-5.26, 5.29-5.32.
\textsuperscript{73} Id. at para. 5.47.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at para. 5.49.
\textsuperscript{76} Id. at para. 5.50.
\textsuperscript{77} Id. at para. 5.52.
\textsuperscript{78} Id. at para. 5.53.
\textsuperscript{79} Id. at para. 5.54 (emphasis added).
The need to show less favourable treatment seems to be part of the test to be applied. However, the panel merely points out that the requirement as it related to non-product factors “could thus result in treatment less favourable” to imported products, and does not consider whether the effect of the CAFE regulation does in fact have this result. Thus the panel appears to be accepting that there must be protection of domestic production of less favourable treatment of imported products in order to find inconsistency with Article III, but is content to assume that this will occur whenever differentiation is made on the basis of criteria separate from the product itself.

D. Summary

After examining these three separate, but interlinked, questions, it may be seen that the relationship between ‘like products’ and the need to prevent protective effects of unilateral measures is complex and not yet definitively explained. At present, the debate is largely confined by the issue of ‘products as such’, but this imposes an inappropriately narrow limitation and unnecessarily excludes unilateral measures which constitute neither protection of domestic producers nor less favourable treatment of imported products.

In other respects, the question of ‘likeness’ between differentiated products should be examined in relation to the second question of whether there is protective effect or less favourable treatment before deciding whether a measure is inconsistent or not. But, by insisting on the ‘product as such’ test, mere differentiation between what are deemed to be ‘like products’ becomes sufficient to find inconsistency without any consideration of the second part of the test regarding protective effect or less favourable treatment. Instead, the policy of Article III, which is to prevent protection and less favourable treatment, should be emphasized and the definition of ‘like products’ should be extended on a case-by-case basis without the limitation of the ‘product as such’ test. ‘Likeness’ should include consideration not only of physical characteristics of a product, but also of characteristics inherent in its production.

Finally, it might be argued that Article III should be interpreted as strictly as possible and that the linear and literal interpretation is both appropriate and intended by the founding states. This argument would rely upon the existence of the exceptions established in Article XX. As a matter of drafting and treaty interpretation, this position is certainly tenable, but it

---

80 Id. at para. 5.55.
ignores the need to incorporate and accommodate urgent policies unrelated to trade. To interpret a prohibition broadly is to increase the burden of a contracting party relying upon the exception which will, in any case, be interpreted narrowly. It permits the nature of the dispute settlement forum to dictate the limits of the argument, in this case firmly within the confines of trade liberalization and without reference to other legitimate interests of the contracting parties.

III. ARTICLE XX OF THE GATT

Under the reasoning discussed above, unilateral environmental measures may be found to be inconsistent with Article III\(^1\) and, as a result, much will depend on the possible application of the exceptions contained in Article XX.\(^2\) Since they are defenses, the burden of showing that Article XX applies belongs to the respondent state\(^3\) and the protection it offers is to be construed as narrowly as possible within the meaning of the words.\(^4\) This is reinforced by the preambular conditions that exceptions must not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," nor be "a disguised restriction on international trade."\(^5\)

Article XX(b) provides that trade-restricting measures may be employed where they are "necessary to protect human, animal or plant life or health." Article XX(g) provides that measures may be taken "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or

---

\(^1\) Where they constitute import restrictions, they will also be found to violate Article XI, as in Tuna Dolphin I, supra note 1, and Tuna Dolphin II, supra note 3.


\(^3\) See Panel report on "Canada - Administration of the Foreign Investment Review Act", GATT, BISD 30S/140, para. 5.20; Panel report on "United States - Section 337 of the Tariff Act of 1930", GATT, BISD 36S/345, para. 5.27 [hereinafter Tariff Act].

\(^4\) See Tuna Dolphin I, supra note 1, at para. 5.22; U.S. Alcohol, supra note 4, at para. 5.41.

\(^5\) GATT, art. XX. See Panel report on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", GATT, BISD 29S/91, para. 4.8 [hereinafter Canada Tuna]; Panel report on "United States - Imports of Certain Automotive Spring Assemblies", GATT, BISD 30S/107, paras. 54-56 [hereinafter Spring Assemblies].
consumption.” The *Tuna Dolphin* panels considered both paragraphs, although they each conflated much of their reasoning.\textsuperscript{86} Article XX(g) was also considered by the *U.S. Automobile Taxes* panel.\textsuperscript{87} The *U.S. Automobile Taxes* panel found that the CAFE regulation could be partly saved under Article XX(g),\textsuperscript{88} whereas the *Tuna Dolphin II* panel found that the MMPA measures could not be brought under either Article XX(g) or (b).\textsuperscript{89}

The panels in *Tuna Dolphin II* and *U.S. Automobile Taxes* began by considering whether the measure was intended to implement a policy falling within the relevant paragraphs. They then examined whether the measures were either “relating to” or “necessary” for its objective under paragraphs (g) and (b) respectively. Since their findings on these points were conclusive, neither panel considered the question of whether the measures were also “arbitrary or unjustifiable discrimination” or “a disguised restriction on international trade.” In essence, the reasoning of the *Tuna Dolphin II* panel on Article XX pivoted on the issues of extraterritoriality, directness and coercion. However, it should also be asked whether more weight should have been given to the preambular conditions by considering whether the measures under the MMPA were in fact discriminatory or disguised trade restrictions.

A. Extraterritoriality

One of the key issues in the *Tuna Dolphin II* dispute was whether a country was entitled to invoke Article XX(b) or (g) with regard to animals or exhaustible natural resources lying outside its territorial jurisdiction. The *Tuna Dolphin I* panel had found that only those resources lying within the jurisdiction of the country concerned could be covered by the defense.\textsuperscript{90} This was one of the more controversial findings of that panel, since it appears to exclude any trade measures designed to protect resources in the global commons and, accordingly, the *Tuna Dolphin II* panel considered the question in some detail.

It should be emphasized that the first panel did not use the term ‘extraterr-

\textsuperscript{86} *Tuna Dolphin I*, supra note 1, at paras. 5.22-5.34; *Tuna Dolphin II*, supra note 3, at paras. 5.11-5.39.

\textsuperscript{87} *U.S. Automobile Taxes*, supra note 5, at paras. 5.56-5.66.

\textsuperscript{88} Id.

\textsuperscript{89} *Tuna Dolphin II*, supra note 3, at para. 6.1.

\textsuperscript{90} *Tuna Dolphin I*, supra note 1, at para. 5.30.
itorial'; rather, it referred to the question of the 'extrajurisdictional' application of Article XX(g). The Tuna Dolphin II panel adopted the distinction, although it developed the argument more explicitly. It appears to accept that Article XX(g) can have extraterritorial reach, but only insofar as international law permits governments to exercise jurisdiction over their nationals and vessels outside their territory. Thus, measures could apparently be extraterritorial but not extrajurisdictional.

Both of the Tuna Dolphin panels acknowledged that the wording of Article XX was not conclusive on this point. The Tuna Dolphin II panel was therefore required to examine other evidence as to the intentions of the parties. Some evidence could be derived from the fact that, at the time of the GATT's creation, states were already familiar with extraterritorial trade-restricting measures designed to protect environmental interests. As a result, it has been argued, there can be no assumption that Article XX(g) was intended to exclude such measures. This is essentially a negative argument rather than a positive one; it can only suggest that extraterritoriality is not excluded by Article XX(b), rather than that it is positively included.

The Tuna Dolphin II panel addressed these arguments by considering the application of the Vienna Convention on the Law of Treaties on the use of preparatory work, subsequent practice and supplementary means of interpretation. It found that many of the treaties which provided for the protection of environmental resources outside extraterritorial jurisdiction through trade and other measures were not relevant because they were concluded prior to the GATT or were not specifically concerned with the subject matter of the GATT. Prior treaties clearly cannot be used as

---

91 Id. at para. 5.33.
92 The panel noted that two previous panels had dealt with migratory fish without distinguishing between fish caught within territorial jurisdiction. Tuna Dolphin II, supra note 3, at para. 5.15.
93 Id. at para. 5.20.
94 Id. at para. 5.20.
95 Tuna Dolphin I, supra note 1, at para. 5.25; Tuna Dolphin II, supra note 3, at paras. 5.15, 5.31.
96 See Charnovitz, supra note 82, at 39-41, 52 (criticizing this finding on the basis of the history of international agreements intended to protect non-domestic interests); Dunoff, supra note 9, at 1416-18 (making same argument). But other writers have interpreted the historical evidence differently. See Charnovitz, supra note 2, at 497 n.93; Jackson, supra note 9, at 1341-42.
98 Id., Article 32.
99 Tuna Dolphin II, supra note 3, at paras. 5.19-5.20.
subsequent practice, but it does seem curious that the panel did not consider the position of later treaties such as the Basel Convention,\textsuperscript{99} Montreal Protocol\textsuperscript{100} and CITES;\textsuperscript{101} they were raised by the United States as examples of treaties employing trade measures in order to protect global environmental interests\textsuperscript{102} and have been widely ratified by countries that are also party to the GATT. It is by no means clear that such agreements are entirely separate from the interpretation or application of the GATT rules on import restrictions. They explicitly provide for measures which constitute exceptions to the rules of the GATT, something which is certainly very close to interpreting and applying them. Of course, if such treaties were to be used as interpretative tools, they would be limited to their specific subject matter and would not have affected the issues at stake in the \textit{Tuna Dolphin} dispute. But, in a general sense, they certainly invite the possibility that extrajurisdictional interests may be brought within Article XX.\textsuperscript{103}

Within the provisions of the GATT itself, the \textit{Tuna Dolphin II} panel also referred to the existence of other parts of Article XX which incorporate extraterritorial issues, namely paragraph (e), which permits trade restrictions to be imposed on products of prison labor.\textsuperscript{104} From that, it concluded that the GATT did not prohibit absolutely measures with extraterritorial effect, but no other inferences were drawn.\textsuperscript{105} But paragraph (e) is not just extraterritorial in its reach; it is also extrajurisdictional. The panel failed to examine the full implications of this.

On its reading of the evidence, however, the panel chose to limit the legitimate policies under paragraphs (b) and (g) to those within a country's jurisdiction over its nationals and vessels. This finding invites a discussion of the concept of jurisdiction and the limitations imposed upon it by

\textsuperscript{100} Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1541 (1987).
\textsuperscript{102} See, e.g., \textit{Tuna Dolphin II}, supra note 3, at paras. 3.14, 3.21-3.23.
\textsuperscript{104} \textit{Tuna Dolphin II}, supra note 3, at para. 5.16.
\textsuperscript{105} \textit{Id.}
The panel's reasoning is based, in effect, on the theory of active personality jurisdiction. This is best known in relation to the exercise of criminal jurisdiction, which is limited because its exercise over foreign nationals may interfere with the sovereign rights of other states to control the activities of their own citizens. Even so, there is some state practice supporting objective territorial jurisdiction where the effect of the crime occurs within a state,\footnote{See the \textit{Lotus} Case, P.C.I.J. (ser. A) No.10 (1927).} passive personality jurisdiction arising where the victim rather than the perpetrator of the crime is a national,\footnote{See \textit{Joyce v. Director of Public Prosecutions} [1946] A.C. 347.} and, more commonly, protective jurisdiction where there is a risk to the security of the state.\footnote{See \textit{Timberlane Lumber Co. v. Bank of America}, 549 F.2d 597 (9th Cir. 1976).} In addition, there are increasing examples of universal jurisdiction, arising purely from the nature of the act.\footnote{See, e.g., \textit{Brownlie}, \textit{supra} note 106, at 307-11.}

In the field of commercial law, there is some state practice supporting the "effects" doctrine, giving jurisdiction to a state based on acts occurring outside its territory but which have direct and substantial effects in that state.\footnote{See, e.g., \textit{Geneva Convention on the High Seas} 1958, Article 19 (jurisdiction over piracy on the high seas); Hague Convention on the Suppression of Unlawful Seizure of Aircraft 1970; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973.} Although this is a controversial area to say the least, much of the debate is about the limitations on, rather than the right to, the exercise of such jurisdiction.\footnote{See, e.g., \textit{Brownlie}, \textit{supra} note 106, at 307-11.} In general, the international law principles of non-intervention, the need for a genuine link between the state and the subject of its jurisdiction, the prohibition on abuse of jurisdiction, comity and proportionality are the principal limitations. The U.S. courts, in particular, have also developed a judicial rule of reason to accommodate the need to balance the interests of the states involved.\footnote{See, e.g., \textit{Brownlie}, \textit{supra} note 106, at 307-11.}

Finally, in the field of state responsibility, there is a well-established
principle that a state may not permit its territory to be used in such a way as to injure another state.\textsuperscript{114} This would logically extend to the acts of nationals even outside the territorial jurisdiction of that state. The right of the injured state to respond by seeking reparation is undoubted. Likewise, a trade measure used in response to injurious acts could be justified.\textsuperscript{115}

Unilateral environmental trade measures do not deal with the exercise of criminal jurisdiction, but there is an attempt to protect interests, both domestic and shared, which could be covered by state practice in the exercise of extraterritorial jurisdiction. This would be most clearly seen when the aim of the measure was to prevent damage which would directly affect the health within the country itself, such as transboundary pollution or damage to the ozone layer. But it would also apply to cases where there was danger to a shared resource, such as a fish stock. Here, the interests of the state are brought directly into play and the exercise of jurisdiction would be in line with much of state practice.

Should a distinction be made between unilateral measures which are used to prevent harm to direct economic interests and others which are used to enforce a choice of values, assuming that such a division of interests can be satisfactorily defined? In the \textit{Tuna Dolphin II} dispute, it had been argued that the only resources that could be protected as "exhaustible natural resources" under paragraph (g) were those which needed conservation, that is, which were already endangered. The panel found, however, that it was sufficient if the resource was \textit{potentially} exhaustible.\textsuperscript{116} The \textit{Tuna Dolphin II} panel was perhaps too generous in assuming that an "exhaustible natural resource" includes a species which is still self-propagating and not presently in danger of extinction. The unnecessary or incidental killing of dolphins is repugnant to many people, but ultimately it can be seen as a question of values as to whether it should be permitted to continue. Where a species is in actual danger of becoming extinct, there is a much greater interest on the part of all states because of the economic effects that may accrue directly or because of the unknown effects of extinction on the ecosystem inhabited by that species. It may then fall into the same category as damage being done

\textsuperscript{114} Trail Smelter Arbitration, 3 R.I.A.A. 1905; Corfu Channel Case, I.C.J. Rep. 4 (1949).

\textsuperscript{115} See Petersmann, \textit{supra} note 103, at 70.

\textsuperscript{116} Tuna Dolphin II, \textit{supra} note 3, at para. 5.13. Similarly, the panel in \textit{U.S. Automobile Taxes} found that gasoline was derived from petroleum which was an exhaustible natural resource and therefore that a policy to conserve gasoline fell within the meaning of Article XX(g). \textit{U.S. Automobile Taxes, supra} note 5, at para. 5.57.
to the ozone layer or the creation of atmospheric pollution. A question of values may be reasonably confined to the sphere of multilateral negotiation and persuasion; the direct involvement of the economic interests of other states justifies a response beyond mere “active personality” jurisdiction and can be incorporated into the logic of the Tuna Dolphin II panel’s reasoning.\(^{117}\)

However, all of this discussion is in danger of being moot. The question remains of exactly what the panel meant by saying that policies that fall within the jurisdiction of a state over its nationals and vessels will also fall within the scope of Article XX(b) and (g). It appears to refer not merely to domestic territorial interests, but also to shared extraterritorial resources exploited by those nationals and vessels. Further, it appears to relate to domestic and shared resources that may be protected by restraints on those nationals and vessels. Logically, this would mean that protection of such animals or exhaustible resources must fall under Article XX(b) and (g).

For example, the Tuna Dolphin II panel explicitly accepted that the policy “to conserve dolphins in the eastern tropical Pacific Ocean” pursued by the United States fell within paragraph (g).\(^{118}\) However, this does not seem to be borne out by the other arguments used by the panel on the question of whether the interests that might be protected under Article XX(g) should be limited to the essentially domestic sphere. Both the Tuna Dolphin II and U.S. Automobile Taxes panels accepted that the policies being implemented by the measures in question fell within the scope of Article XX(g). But they both took a restrictive view in the second stage of their analysis.

The second question concerning Article XX(g) was whether the measures complained of could be considered as “relating to” the conservation of an exhaustible resource “in conjunction with” domestic restrictions. Previous panels had found that “in conjunction with” meant “primarily aimed at” the purpose of conservation and “primarily aimed at” making equivalent domestic restrictions effective.\(^{119}\) The phrase “in conjunction with restrictions on domestic production or consumption” has been interpreted not only

\(^{117}\) Ultimately, although this deserves a fuller discussion than is possible in this paper, the question should be asked whether unilateral trade restrictions are in fact the exercise of jurisdiction over activities outside the state. The acts considered by these GATT panels were concerned with entry into and sale within the territorial jurisdiction of the state. See Petersmann, supra note 103, at 69 n.50.

\(^{118}\) Tuna Dolphin II, supra note 3, at para. 5.20.

\(^{119}\) Panel report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”, GATT, BISD 35S/98, para. 4.6; Tuna Dolphin I, supra note 1, at para. 5.31.
as meaning that the import restriction must be reflected by a corresponding restriction on domestic producers, but also that it must be designed and intended to make those domestic restrictions effective. This interpretation was accepted by both panels.

Therefore, the measure to be brought under Article XX(g) must be given a supporting role only; the emphasis is placed firmly on the domestic nature of the policy, and therefore of the interest to be protected. The Tuna Dolphin I panel accordingly found Article XX(g) inapplicable to the MMPA measures. It argued that a country can only effectively control production and consumption in so far as it falls within its jurisdiction, and therefore the paragraph could only apply to policies within the jurisdiction of the country concerned.

However, there appears to be a danger of overemphasizing the domestic restriction aspect of this test. It is clear from the wording that there must be an equivalent restriction of domestic production or consumption. But trade measures might be "primarily aimed at" making domestic restrictions effective by ensuring that reciprocal measures are taken by others and thus that domestic producers are not forced to trade in unfavourable competitive conditions. Thus it is not clear that the phrase "in conjunction with" is intended to mean that the trade measures must be intended specifically to enforce, rather than to reinforce, the domestic restrictions.

The idea of reinforcement rather than enforcement might be seen in the finding of the panel in the U.S. Automobile Taxes dispute, although it adopted on its face the same interpretation as the Tuna Dolphin panels. Since it identified the aim of the CAFE regulation as being to "promote fuel efficiency of cars circulating in the United States," it found that it was necessary to impose restrictions on the fuel consumption of imported cars in order not to prejudice that aim. As a result, it would have allowed fleet

---

120 Canada Tuna, supra note 85, at 108-9.
121 Id. at para. 4.6.
122 Tuna Dolphin II, supra note 3, at para. 5.22 (adding that not only the purpose but also the effect of a measure should be "primarily aimed at"); U.S. Automobiles Taxes, supra note 5, at para. 5.29.
123 Tuna Dolphin I, supra note 1, at para. 5.34.
124 Id. at para. 5.31.
125 The panel acknowledged that fleet averaging, which was inconsistent with Article III because it differentiated on the basis of the ownership or control of producers, was not the only measure available to achieve the aim of fuel conservation. This was not relevant because the test in Article XX(g) is that the measure must be "relating to" conservation, not
averaging of fuel economy under Article XX(g) even though it was based on activities of producers outside U.S. jurisdiction, presumably because the conservation policy being implemented applied within the territory of the United States.

But, arguably, this approach should also apply to the free-rider problem that typically arises in the conservation of common resources in areas of res communis. To interpret otherwise would mean that only those resources falling within the exclusive (i.e., territorial) jurisdiction of a country would be relevant, and that the finding by the Tuna Dolphin II panel that Article XX(g) covers policies falling within the jurisdiction of a country over its nationals and vessels is meaningless.

**B. Directness and Coercion**

In addition to the reasoning discussed above, the Tuna Dolphin II panel found that the measures could not be "primarily aimed at" their objective under Article XX(g) because they were indirect and coercive. It applied the same arguments to deny that they were "necessary" under Article XX(b). The panel accepted the definition of "necessary" given by previous panels, to the effect that there must be no alternative measure consistent with the GATT available and that the least inconsistent alternative should be employed. However, its finding that the MMPA measures that it must be "necessary". U.S. Automobile Taxes, supra note 5, at para. 5.63.

126 Tuna Dolphin II, supra note 3, at paras. 5.24-5.27. The panel also denied that the U.S. measures were primarily aimed at conservation because the levels of permissible dolphin taking were calculated according to the quantity taken by the U.S. fishing industry. Since the Mexican fishing industry could not know at any given time whether they were conforming to the required levels, the resulting unpredictability could not be considered to be "primarily aimed at" conservation. Id. at para. 5.33.

127 Id. at paras. 5.37-5.39.

128 Id. at para. 5.35. See Tariff Act, supra note 83, at para. 5.26; Panel report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", GATT, BISD 37S/200, paras. 5.36-5.39; Tuna Dolphin I, supra note 1, at para. 5.27. See also U.S. Alcohol, supra note 4, at paras. 5.40-43, 5.52; Chapter 17 of Agenda 21 of the Rio Conference, U.N. Doc. A/Conf.151/4 (1992) (stating that trade measures should be "the least trade-restrictive necessary to achieve the objectives," id. at 2.22(i)); WTO Agreement, Annex 1A, Agreement on the Application of Sanitary and Phytosanitary Measures, art. 5.6 (requiring that sanitary or phytosanitary measures not be "more trade-restrictive than required to achieve their [objective]"); Agreement on Technical Barriers to Trade, arts. 2.2-2.3 (requiring restrictions to not be "more trade-restrictive than necessary to fulfill a legitimate objective" and
were not "necessary" was based entirely on the question of directness and coercion, and there is no attempt to incorporate the definition into its reasoning.

The panel found that the import restrictions were too indirect in the sense that they could not, by themselves, achieve the objective sought since it was dependent upon another contingency, that of the policies and practices of other countries being changed. Indirectness was particularly clear in the case of the intermediary ban, where the restrictions were being imposed on countries whose fishing practices already presumably complied with those of the United States and thus the policies to be changed were those of third countries. But the panel also applied this reasoning to primary bans, where the measures acted directly against the offending countries.

The panel reasoned that a coercive measure cannot, by definition, be sufficiently direct. However, the panel considered the question further by reference to the object and purposes of the GATT. It found that, since the GATT's primary purpose is to provide "a multilateral framework for trade among contracting parties," to permit unilateral acts designed to force other countries to change their policies would be to destroy the purpose of the GATT as a whole. This point was also made in Tuna Dolphin I, but is here stated more clearly and more emphatically.

The argument of the Tuna Dolphin II panel that the measures could not be "necessary" or "relating to" because they were indirect and coercive needs to be examined further. The panel presumes that indirect measures can never be necessary or relate to their objective. This is a questionable presumption,

prohibiting measures that "can be addressed in a less trade-restrictive manner").

Tuna Dolphin II, supra note 3, at paras. 5.23-24.

Id. at para. 5.26. Note that this concern is also expressed in Principle 12 of the Rio Declaration on Environment and Development which emphasizes the need to approach environmental protection through economic growth and sustainable development. It states, inter alia, that "[u]nilateral actions to deal with 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 an international consensus." U.N. Doc.A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874, 878 (1992) and in "Note by the Secretariat on the United Nations Conference on Environment and Development", GATT, BISD 39S/303, at 313-14. See also criticisms made by less developed countries that unilateral environmental measures are used for trade protectionist purposes, e.g., Kriangsak Kittichaisaree, Using Trade Sanctions and Subsidies to Achieve Environmental Objectives in the Pacific Rim, 4 COLO. J. INT'L ENV'T'L. L. & POL'Y 296 (1993).

Tuna Dolphin I, supra note 1, at paras. 5.27, 5.32.
as it unreasonably restricts the kind of measures which may be employed under Article XX. There are some situations where trade restrictions are necessary. For example, they may be necessary because domestic restrictions will be ineffective or at least lead to economic hardship if foreign competitors are allowed to benefit from their lack of regulation. They may be necessary because resources located extraterritorially are part of the global commons, and because the free-rider problem must be dealt with in order to protect them.

Where countries have an economic interest in a resource which they exploit outside their territorial jurisdiction, it makes a great deal more sense to suggest that they will have the same incentive to conserve as they would within their territory. However, when the object of a measure is to implement a policy falling within the extraterritorial jurisdiction, all trade measures will be a means of persuading or coercing producers to modify their behavior. Thus the panel's interpretation of directness automatically negates the value of its previous finding that extraterritorial policies may be covered by Article XX(b) and (g) provided they fall within a state's jurisdiction over its nationals and vessels.

The fundamental reason for the Tuna Dolphin II panel's finding, however, is not so much based on a semantic interpretation of Article XX as the fear that an acceptance of unilateral, coercive measures would mean that the GATT could no longer serve as a multilateral framework for international trade. While the concern over coercion is clearly legitimate, it may be wondered whether it need be expressed in such absolute terms. To draw the line in Article XX so that no coercive measures may be permitted is to play very safe in terms of protecting the GATT principles of free trade. Earlier in its report, the panel recognized that paragraph (e) of the same article permits effectively the same kind of measure in relation to prison labor.

It may be argued that restrictions on the product of prison labor are merely a protection against the use of presumably unpaid or underpaid workers. Such measures can be categorized as a legitimate exception which permits

---

132 See, e.g., Schoenbaum, supra note 9, at 723 (arguing that to permit unilateral measures "would invite chaos and retaliation" and "would reduce international trade to a power-based regime that would have no stability or rationality"); Jackson, World Trade Rules and Environmental Policies, supra note 9, at 1240 (discussing the slippery slope problem involved in permitting unilateral, extraterritorial environmental measures).

133 Tuna Dolphin II, supra note 3, at para. 5.16.

134 See argument by the EEC and the Netherlands on this point. Id. at para. 3.35.
contracting parties to protect themselves against unfair competition. But the same is also true of legislation such as the MMPA, which may also be categorized as protecting domestic industry against a foreign industry and may therefore be considered as unfair. In that sense, the import restrictions are genuinely intended to make domestic restrictions on production and consumption effective as provided for in paragraph (g). To put it the other way round, it is just as easy to categorize paragraph (e) as coercive. Such an argument does not necessarily lead to the conclusion that paragraph (g) permits coercive measures, but it does call into question the statement that such an interpretation would signal the effective death of the GATT as a multilateral framework for international trade.

C. Arbitrary or Unjustified Discrimination and Disguised Trade Restrictions

The preamble of Article XX has received relatively little attention in panel reports and, to the extent that it has been considered, has been relegated to a nominal last resort. The phrase "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" has been interpreted as being satisfied provided the restrictions in question are applied equally to products from other countries.\(^\text{135}\) This seems quite uncontroversial, but the interpretation of the other phrase in the preamble, that measures should not constitute "disguised restriction on international trade", is more difficult to explain. So far it has been found to be sufficient if the measure has been publicly announced\(^\text{136}\) and where the substantive and procedural requirements of the measure have been complied with.\(^\text{137}\) The ease with which the test may be satisfied seems strange in the light of the apparent meaning of the words, which would suggest an intention to investigate and exclude measures which, on their face, satisfy one of the paragraphs of Article XX but in fact are being used for trade-restricting or protectionist purposes.\(^\text{138}\) There is evidence from the drafting history that this was precisely the

---

\(^{135}\) *See Spring Assemblies, supra* note 85, at paras. 54-55; *Canada Tuna, supra* note 85, at para. 4.8.

\(^{136}\) *See Spring Assemblies, supra* note 85, at para. 56; *Canada Tuna, supra* note 85, at para. 4.8.

\(^{137}\) *See Spring Assemblies, supra* note 85, at para. 56.

\(^{138}\) This is the interpretation used by a United States-Canada Free Trade Agreement panel when considering an equivalent provision. In the Matter of Canada’s Landing Requirement for Pacific Coast Salmon and Herring Panel Report, Oct. 16, 1989, at paras. 7.04, 7.11.
intention.¹³⁹

Despite the sketchy and tentative approach to the preamble made by GATT panels so far, there is clearly scope for a WTO/GATT panel to enquire into the intent and effect of any measure which otherwise satisfies one of the categories of exceptions in Article XX. Arguably, this would relieve some of the weight presently placed on the questions of extraterritoriality and directness, and permit a shift of emphasis toward the prevention of protectionist measures which is the most important aspect of Article XX and the WTO/GATT system as a whole.

IV. CONCLUSION

Running through the Tuna Dolphin IH panel's discussion of Article III and the extraterritorial scope of Article XX was concern about the use of unilateral trade measures which would unduly interfere with the freedom of action to which other states were entitled under the GATT. Under Article III, unilateralism was primarily restricted by the use of the 'product as such' test. With regard to Article XX, the first step in dealing with this concern was to find that the policies permitted under paragraphs (b) and (g) were confined to matters falling within a country's jurisdiction over its nationals and vessels and that paragraph (g) was concerned with making effective domestic restrictions and therefore protecting domestic interests. The second step was to require a very close degree of directness between a measure and its objective and to exclude any element of coercion under both paragraphs, thus limiting their scope essentially to the domestic sphere. The U.S. Automobile Taxes panel did not challenge this reasoning, although it applied it in a more liberal fashion. It also showed the same concern as the panel in U.S. Alcohol about an unnecessarily intrusive interpretation of Article III and the need to concentrate on the policy of preventing protectionist measures. The question remains, however, whether the reasoning of the Tuna Dolphin panels should continue to be accepted or whether there should be some more flexible, though still principled, accommodation of environmental concerns expressed through unilateral acts.

The reasoning of both Tuna Dolphin panels is based on the purposive interpretation of the GATT. Their findings that the MMPA measures were inconsistent with Article III and could not be saved under Article XX rely

heavily on the assumption that unilateral and coercive trade measures will destroy the object of the GATT as a whole.\textsuperscript{140} It is clear that multilateral agreements have considerable advantages over unilateral acts; there is far less suspicion of protectionist motives where a significant number of states have adopted a common standard than when it is imposed by only one, even where a convincing non-trade policy purpose exists.

However, the existence of multilateral treaties by themselves cannot be used as a substantive defense except between states already party to them. In addition, progress in achieving legal undertakings and wide ratification can be achingly slow, while the free-rider problem in global environmental schemes requires some response. Where an environmental problem is perceived to be urgent and, in particular, where there are actual and potential effects on individual states, the pressure to employ unilateral trade measures will remain.

If unilateralism is likely to continue and even become more common than at present, then the WTO/GATT system must find some way of accommodating it in a way that safeguards its own purposes, while at the same time acknowledging legitimate, non-trade concerns of its member states. As reasoned above, one step would be to soften the 'product as such' test by relying on a test of protective effect or intention, thereby concentrating on the fundamental purpose of Article III, the prevention of protectionism under the guise of achieving non-trade policies. In addition, the extraterritorial reach of Article XX (b) and (g), which are most likely to be invoked in aid of environmental measures, could be extended to measures where the needs of the regulating state need to be balanced with the needs of other states without undue interference within the territorial jurisdiction of the latter. Notably this would occur where injury occurred through transboundary effects, such as air pollution, or in the global commons where the activities of one state may have a direct effect on another, such as damage to the ozone layer or deprivation of resources caused by the endangerment of a species. The question of indirectness would also have to be re-examined, to permit trade measures which would be used to reinforce, as well as enforce domestic restrictions. The concerns of preventing protectionism could be adequately met by relying more heavily on the preambular conditions that trade measures must not be "arbitrary or unjustifiable discrimination" or "disguised restrictions on trade". This would provide a more coherent interpretation of the GATT as a whole, and would provide greater room for

\textsuperscript{140} See Schoenbaum, supra note 9, at 720-23; Black, supra note 9, at 145-52.
accommodating non-trade policies provided their trade effects were incidental.

The WTO/GATT system cannot, and should not, squeeze out unilateralism altogether; it is neither designed nor at present willing to incorporate values other than those of free trade. The 'legalization' of the dispute settlement procedures under the WTO Agreement offers an opportunity to pursue a balanced and proportionate interpretation of the GATT rules,¹⁴¹ and ultimately the harmonization of standards and legal rules will be necessary to eliminate the most troublesome disparities. In the meantime, however, the issues of environmentalism will not disappear. The WTO/GATT system is right to think that multilateral agreements are the better solution, but it cannot disregard the urgency of unilateral standards which are designed, not to be protectionist, but to protect important non-trade values.
