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International trade rules and environmental protection measures

Import restrictions and process and production methods (PPMs) under the General Agreement on Tariffs and Trade

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Introduction

Import restrictions allow countries to monitor, regulate and control what products cross their borders and become available on their markets. Requiring imports to fulfil certain criteria and meet specific standards – and preventing the import of those that do not – is an important and valuable tool for domestic policymakers. In the light of the climate and ecological crises, trade policy must be made compatible with environmental action. This means trade policy that is premised on minimising consumption-based emissions, the subsidiarity of trade and investment rules to progressive domestic environmental protection and the incentivising of high environmental standards internationally. As such, a range of mechanisms will be needed to encourage trade that furthers environmental ambition and to prevent trade that undermines it.

Import restrictions can serve a number of important purposes. They enable countries to protect the health of their consumers as well as their domestic natural environment from potential harm that might be caused through the import of lower standard products, such as diseased animal products or goods containing dangerous chemicals. They enable countries to promote and act on their environmental and climate ambition, reducing their global environmental footprint and supporting good environmental practice around the world including exporting countries looking to meet higher standards. They also help to maintain high domestic standards by removing the risk of lower-standard imports putting commercial pressure on similar domestic products produced to higher environmental standards.

A reformed and revised approach to trade that is reflective of modern environmental understanding and needs, and responsive to long-standing criticisms of existing models is long overdue. Sensible, legitimate and progressive use of import restrictions should be part of this. Practices that risk offshoring emissions and creating false economies must be phased out. Whilst import restrictions are not the only type of measure that could be used to achieve this, they have historically been treated with some caution due to sensitivities including conflict (actual and perceived) with trade rules.

Designing and implementing import restrictions for environmental reasons requires care and consideration to ensure they are legitimate and not disguised forms of protectionism and, therefore, not susceptible to successful challenge under international trade rules. Multilateral and bilateral trade agreements put in place some limitations on the measures that states can take with respect to import restrictions. This is because import restrictions are a form of trade barrier and barriers are generally inconsistent with the primary objective of trade rules and agreements: to liberalise and facilitate trade.

This paper sets out how well-designed import restrictions are possible under existing World Trade Organization (WTO) rules, and what can be done to adopt a more progressive policy in this space. In particular, it considers what rules apply to measures that differentiate between products based on the process and production methods (PPMs) through which they are made. From an environmental perspective, PPMs are often incredibly important. The way in which a product is manufactured, or how a crop is grown, or an animal is raised can make all the difference: for instance, between high or low carbon output; between intensive, polluting agricultural practices or more sustainable forms of farming.

Section I describes some specific types of import restriction. Section II then outlines important WTO rules and principles applicable to import restriction measures and demonstrates that, despite some perceptions to the contrary, PPM restrictions can be legitimate provided they are properly designed and non-discriminatory.

Section III details crucial carve-outs that can be relied upon to introduce environmental protection measures even if they would otherwise fall foul of WTO requirements. While these carve-outs should be improved and their scope increased to better reflect our current understanding of environmental needs, they do provide room for positive action today. Section IV explores how free trade agreements (FTAs)

should be designed to clarify and confirm that import restrictions legitimately designed to further the parties' environmental and climate ambition are permitted.

I. Types of import restrictions

The WTO's main objective is to help international trade flow as smoothly and as freely as possible. To achieve this, it has established a body of trade rules and principles – determined following negotiation between WTO member states. For current purposes, it is sufficient to recognise that one effect of these rules is to limit the extent to which member states can introduce import restrictions. There is a variety of ways in which states can seek to restrict imports – set out below is a high level summary of the most common types of measure.

Tariffs

A tariff is a tax imposed on imports. In theory, tariffs could in certain circumstances be a useful tool for discouraging and reducing trade in environmentally harmful products.

Quotas

A quota is a restriction on the amount of a product that can be imported into, or exported from, a country. They are also referred to as 'quantitative restrictions'.

Tariff-rate quotas (TRQs)

TRQs combine two types of restrictions: tariffs and quotas. The amount of tariff varies according to the import quantity. Within the quota, a zero or preferential-rate tariff applies. Above the quota, the tariff is higher.

Non-tariff measures (NTMs)

An NTM is a measure that may have the effect of restricting imports but does not involve tariffs. This is a broad definition, and NTMs encompass a number of measures including bans, labelling requirements, geographical restrictions and anti-dumping duties.¹ These can vary in form, content and severity. For instance, an import ban that prohibits the import of a particular item completely is an NTM.² So is a labelling requirement that food product packaging must display a full list of ingredients.

Border tax adjustments

A border tax adjustment is a mechanism that seeks to ensure that imports face tax levels equivalent to those applied to similar domestic products. For instance, VAT – a domestic tax – can be charged on imports in addition to any applicable customs duties.

¹ UNCTAD, [International Classification of Non-Tariff Measures: 2019 version](#) (accessed October 2020).

² A ban on the import of poultry from areas affected by bird flu is one example.

The EU has proposed the introduction of a carbon border adjustment (CBA) mechanism as part of its European Green Deal.³ This may take the form of a border tax adjustment. The Commission's Communication on the Green Deal states:

Should differences in levels of ambition worldwide persist, as the EU increases its climate ambition, the Commission will propose a carbon border adjustment mechanism, for selected sectors, to reduce the risk of carbon leakage. This would ensure that the price of imports reflect more accurately their carbon content.⁴

The EU's proposal is considered further in Section II below.

II. Compatibility with WTO rules and principles

The WTO Agreements establish rules and principles that underpin the multilateral trading system. Amongst other things, these agreements cover goods, services and intellectual property. They also make provision relating to members' introduction of sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT). This paper's focus is the General Agreement on Tariffs and Trade (GATT) as it is this Agreement that establishes the basic principles for trade in goods. As such, it is an important starting point for analysis. Whilst our analysis may be applicable more widely, the specific rules contained within the SPS Agreement and TBT Agreement also require specific consideration in their own right.

WTO rules seek to ensure that international trade is predictable and flows smoothly and freely, that competition is fair and non-discriminatory, and the maintenance of a better-functioning market. To facilitate this, a number of key concepts have been enshrined and developed that are relevant to the present issue: these are introduced below.

Ban on quantitative restrictions

Article XI of GATT creates a general prohibition on quantitative restrictions (i.e. quotas or other such limits on the quantity or value of goods that can be imported/exported). A ban on products based on their environmental criteria or credentials may seem likely to fall foul of this rule, but such restrictions are permissible in certain circumstances, in particular when relying on one of the general exceptions discussed further in Section III below.

National treatment and 'likeness'

The principle of national treatment is established in Article III of GATT. It seeks to avoid domestic protectionism by requiring that 'like' products are treated equally – and not 'less favourably' – regardless of whether they are domestic (originating from within a contracting party's own territory) or imported.⁵ In

³ This proposed mechanism will not necessarily constitute a 'tax' – it might be something else such as the extension of the EU Emissions Trading Scheme. For our purposes, we are most interested in the financial adjustment version of the mechanism.

⁴ European Commission, *The European Green Deal*, COM(2019) 640 final, 2.1.1.

⁵ 'Likeness' is a crucial concept but it is not the only important step in the analysis of the legitimacy of potentially restrictive measures. Where likeness is established, it is necessary to ascertain whether like imported products are in fact being treated less favourably than like domestic products (on which, see Appellate Body Report, *EC – Measures prohibiting the importation and marketing of seal products*, WT/DS400/AB/R; WT/DS401/AB/R, adopted 16 June 2014, [5.101]). This means not just that the imports are being treated differently – but that they are at a competitive disadvantage vis-à-vis the domestic product. If the restriction does not result in less favourable

other words, governments are free to introduce regulations provided the rules apply to domestic products as well as imports. The national treatment requirements of Article III can be further broken down:

- Article III:2 and the application of charges to imported products. Article III:2 covers two different categories of goods:
 - The first sentence of Article III:2 relates to imports that are ‘like’ domestic products – it prohibits the application of taxes to imports in excess of taxes applied to ‘like’ domestic products.
 - The second sentence of Article III:2 relates to imported products that are not ‘like’ but, instead, are directly competitive with, or substitutable for, a domestic alternative. The obligation here is correspondingly looser: a WTO member may impose a tax on an import in excess of the domestic tax on a directly competitive or substitutable product, provided that the two taxes are ‘similar’ and the higher tax is not applied ‘so as to afford protection’ to the domestic product.

- Article III:4 and the application of domestic laws and regulations.
 - Article III:4 prohibits less favourable treatment under domestic law for imported products when compared to the treatment of ‘like’ domestic products. Importantly, the class of products that are ‘like’ for the purpose of Article III:4 is broader than those that are ‘like’ for the purposes of the first sentence of Article III:2. It is however equivalent to the combined scope of ‘like’ and ‘directly competitive or substitutable’ products under both sentences of Article III:2 taken together.⁶

Example: Japan - Alcoholic Beverages II: In the context of the first sentence of Article III:2, shochu (a white spirit made from various ingredients) was found to be ‘like’ vodka. But it was not ‘like’ gin or liqueurs (due to additives), rum (due to ingredients) nor whisky (due to appearance).

However, shochu was ‘directly competitive or substitutable’ with or for all of these other spirits. This means that these spirits would also have been considered ‘like’ under the lower threshold of Article III:4.⁷

‘Likeness’ is an incredibly important concept. Whether or not products are considered to be ‘like’ in a WTO sense can have profound impacts for the way in which they can be treated. Where a trade restriction is applied to a product based on its PPM(s), it is critical for the regulating government to show that the use of the PPM in question is a legitimate basis for distinguishing the product from other, similar products not produced using the relevant PPM.

Determining the broader form of likeness for the purpose of Article III:4 (regulatory measures) requires examination of the below factors. Importantly, these factors provide a non-exhaustive framework for analysing likeness. WTO dispute settlement bodies approach this assessment on a case-by-case basis⁸ and recognise the interrelationships between the different criteria.⁹ The factors are:

- (i) physical properties (and similarity) of the products;

treatment, there is no issue. Even if it does, the measure may be justifiable under a general exception (see further in Section III).

⁶ Appellate Body Report, *EC – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001 [100].

⁷ Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R; WT/DS10/R; WT/DS11/R, adopted 1 November 1996 [6.23].

⁸ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R; WT/DS11/AB/R, adopted 1 November 1996, p 20.

⁹ *EC – Asbestos* (n 6) [102].

- (ii) extent to which the products are capable of serving the same or similar end-uses;
- (iii) consumers' preferences, perceptions and behaviour; and
- (iv) tariff classification.¹⁰

Where products are identical in physical composition, they will normally be considered 'like', both under the first sentence of Article III:2 (taxes) and Article III:4 (regulations).¹¹ In theory, it may be possible for physically identical products to be rendered unlike following consideration of the other factors, provided the products are not in a competitive relationship. The threshold is high however. For instance, in order for the consumer preference factor (alone) to render the physically identical products 'unlike', all (or almost all) consumers would need to hold this view.¹²

Where products are not physically identical, it is important to consider the factors in the round. Socio-political priorities – such as health risks – should form a part of this assessment and be considered as relevant within the existing framework.¹³

- (i) **physical properties:** the degree of similarity of products' physical properties is an important factor which requires full examination. The physical differences might be relatively minor and might flow from a product's PPMs. However minor the difference, if it is likely to influence the competitive relationship between the products, then it should be taken into account. In certain cases, the analysis should take into account any wider public policy issues that are related to or result from the physical properties of products. This is an important development: in earlier WTO jurisprudence, public policy issues were only taken into account in relation to consideration of the general exceptions (see Section III below). But they now form part of the core assessment of likeness where the issue has a potential bearing on competitiveness.

This analysis must therefore take into account relevant scientific evidence. WTO decisions suggest that "heavily corroborated scientific research on potential health or environmental risks (combined with evidence that consumer markets are likely to respond to such risks), *could* provide a basis for characterizing products as unlike their counterparts based on their PPMs alone".¹⁴

Example: EC – Asbestos: the Appellate Body considered that asbestos fibres were not 'like' equivalent non-asbestos fibres. In considering the products' physical properties as part of their assessment, it found "[t]his carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibre".¹⁵

Example: Indonesia – Chicken: the Panel considered that frozen and fresh chicken were not 'like' products. In considering the products' physical properties, they found that "the difference in

¹⁰ EC – Asbestos (n 6) [101].

¹¹ When products are considered 'like' under the first sentence of Article III:2 there is no need to inquire into whether they can be considered 'directly competitive or substitutable' under the second sentence of Article III:2

¹² This follows from Appellate Body Report, *Philippines – Distilled Spirits*, WT/DS396/AB/R WT/DS403/AB/R, adopted 20 January 2012. The case involved a tax measure. In this case, the relevant products were considered 'like' even though it was argued that at least 85 percent of the population would not be able to afford them and so did not treat them as substitutable. Before this ruling, some had argued that a marginal consumer preference for one product over another would be sufficient for them to be 'unlike'.

¹³ EC – Asbestos (n 6) [113].

¹⁴ International Institute for Sustainable Development (IISD), *The Legality of PPMs under the GATT* (2008) p 30.

¹⁵ EC – Asbestos (n 6) [114].

*health risk arising from previously frozen/thawing chicken and fresh chicken presents a difference in physical properties that indicates non-likeness”.*¹⁶

- (ii) **end uses:** the end uses (including substitutability) of products is also relevant. In considering this, the WTO Appellate Body has remarked that “a complete picture of the various end-uses of a product” should be formed.¹⁷

*Example: EU - Energy Package: liquid natural gas was considered ‘unlike’ non-liquid natural gas because it cannot be used for the same purposes without first being ‘regasified’.*¹⁸

- (iii) **consumers’ preferences, perceptions and behaviour:** consumer preference is a core part of the framework for assessing likeness. Inevitably, a growing range of issues and priorities increasingly weigh heavily on consumer preference.¹⁹ As such, these issues can be an important factor in the examination of likeness and whether products can be distinguished.

*Example: EC – Asbestos: neither party submitted argument or evidence relating to consumer preference. On this basis, the Panel did not consider this issue. The Appellate Body subsequently criticised this approach and, instead, included its own analysis of consumer preference. The Appellate Body found, for instance, that “consumers’ tastes and habits...are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic. A manufacturer cannot...ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product.”*²⁰ In this way, the Appellate Body sought to interpret consumer preference normatively.²¹

The above discussion and examples show that an increasing and flexible set of factors can be relied upon to demonstrate that products are not ‘like’. Physical similarity is just one aspect and it will be considered alongside arguments about a product’s physical properties as they relate to relevant public policies; consideration of whether the products have different functions or require the application of different processes to be used in the same way as one another and whether consumers make a distinction in their preferences and tastes. Although this assessment is underpinned by a fundamental question of competitiveness, recently, WTO dispute settlement bodies have adopted a broader approach to these analyses, incorporating consideration of public policy issues within the established framework.

Most-favoured nation

The most-favoured nation (MFN) principle is established in Article I of GATT. It requires that any advantage or favour granted to a product from another country must also be granted to like products from all other WTO contracting parties.²² This seeks to ensure that members do not discriminate between other members.

¹⁶ Panel Report, *Indonesia – Chicken*, WT/DS484/R, adopted 22 November 2017 [7.317].

¹⁷ *EC – Asbestos* (n 6) [119].

¹⁸ Panel Report, *EU – Certain measures relating to the energy sector*, WT/DS476/R, circulated 10 August 2018.

¹⁹ Consider, for instance, some of the well-established markets for products certified as (more) sustainable and / or ethical: Forest Stewardship Council certification; free-range eggs and Fairtrade chocolate.

²⁰ *EC – Asbestos* (n 6) [122].

²¹ Emily Barrett Lydgate ‘Consumer preferences and the National Treatment Principle: emerging environmental regulations prompt a new look at an old problem’ *World Trade Review* (2011), 10: 2, 165–188.

²² What constitutes ‘likeness’ and ‘discrimination’ for the purposes of Article I is the same as for Article III:4 (for domestic regulatory measures).

The MFN obligation is potentially onerous and detailed analysis of the international export market may be required in order to avoid falling foul of it. An example: a WTO member, State A, wishes to support the production of steel using renewable energy inputs. To achieve this, it seeks to reduce import duties on renewable energy steel and raise them on non-renewable energy steel. However, if just one other WTO member exports a higher proportion of non-renewable energy steel than another exporting member to State A, State A's proposed new duties regime may prejudice the member exporting the higher proportion of non-renewable energy steel and, as such, conflict with the MFN rule. As with the other obligations, however, this type of measure may be possible if it can be justified under another rationale or the general exceptions.

Inputs and constituent parts

As noted above, border tax adjustments are permissible under WTO rules. In particular, border tax adjustments can be imposed based on products as a whole, but they can also be based on their 'inputs or constituent parts'. For example, states that tax domestic products containing alcohol can also tax imports containing alcohol. This follows from Article II:2(a) GATT which states that:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product ... a charge equivalent to an internal tax ... in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part...

It thus specifically allows for the imposition of a tax 'in respect of **an article from which** the imported product has been manufactured or produced'. In *US - Superfund*, for instance, a tax imposed on imports containing certain chemicals equivalent to a domestic sales tax imposed on the same chemicals was permitted.²³

This concept is important because of how it could be applied to a carbon border tax. The primary purpose of such a mechanism is to reduce 'carbon leakage', arising through diverging approaches to climate action. A state which has restricted or discouraged carbon intensive production through regulation may wish to tax the 'carbon content' of imports in an attempt to re-balance the scales and ensure like products are treated in the same way by creating broadly equivalent disincentives to high emissions regardless of production location.

Pertinently, the term 'article from which the imported product has been manufactured' in Article II:2(a) can be read to include the emissions created in the production of an imported product (in the EU CBA proposal context, this is the carbon content of the product). Such a reading is compatible with existing WTO rules under the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), under which indirect taxes on 'energy, fuels and oils used in the production purpose' have been included in the list of taxes which can be rebated. If such taxes can be rebated on export, then they should also be capable of being imposed on import.²⁴

²³ GATT Panel Report, *US - Superfund*, L/6175, adopted 17 June 1987.

²⁴ SCM Agreement, Annex II, para 1 states that "[i]ndirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste)". The footnote to Annex II describes the relevant inputs as "[i]nputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product". Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice and Policy*, 3rd ed (Oxford, 2015), 766.

Example: EU's CBA proposal

The EU's CBA proposal is at a very early stage – a public consultation is open until 28 October 2020.²⁵ It is not yet clear exactly what form the CBA mechanism will take. The EU is currently considering three options: 1) a carbon tax equally applicable to domestically-produced and imported products; 2) a new carbon customs duty or tax on imports; or 3) the extension of the EU Emissions Trading Scheme to imports.

The EU has acknowledged the legal and technical complexities associated with establishing a CBA mechanism and noted in its Inception Impact Assessment that “[t]he measure would need to be designed to comply with World Trade Organization rules and other international obligations of the EU.”²⁶ It is possible that, in order to ensure WTO compliance, a carbon tax would be interpreted as a tax on an input (carbon). In other words, a tax on “an article from which the imported product has been manufactured or produced.”²⁷

Summary

Measures that restrict a product's import based on PPMs can be justified with reference to a variety of reasons including consumer preference, different end uses, and according to other socio-political priorities such as environmental protection and the reduction of risk to human health. Although these measures have historically been controversial under WTO law, it is simply not the case that they are prohibited *per se*.²⁸

In designing such measures, however, care is crucial – the form and content matter. At a basic level, it must be clear that the objective being pursued is an environmental one, rather than a protectionist one. As such, certain general principles can be distilled, such as avoiding PPM measures that centre on the country of production and basing rules instead on the manner of production. Adopting the latter approach is likely to demonstrate more clearly the link between the measure itself and the environmental objective sought.²⁹ Further, a measure expressed in terms of environmental performance or outcome rather than a specified method or input might be less likely to fall foul of WTO rules.

Overall, the key is to avoid introducing measures that distinguish between ‘like’ products (or that treat ‘like’ imports less favourably). As noted above, WTO dispute settlement bodies assess the issue of ‘likeness’ in fact-specific contexts on a case-by-case basis, and a broadening can be seen in the approach taken, noting in particular the incorporation of consideration of public policy issues within the framework. Furthermore, the concept of likeness will be influenced by the “context and the circumstances that prevail in any given case”.³⁰ The existing context – that of the climate and ecological crises we face – may well prove a relevant and important consideration, particularly in the light of the founding objective contained in the preamble to the WTO Agreement of “sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so...”. The

²⁵ ClientEarth submitted joint feedback with Ember on the European Commission's Roadmap on this initiative in April 2020.

²⁶ European Commission, Inception Impact Assessment: carbon border adjustment mechanism, March 2020.

²⁷ GATT 1994; Article II:(2a).

²⁸ Steve Charnovitz ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’ (2002) 27 The Yale Journal of International Law, 59.

²⁹ Ibid. Charnovitz argues that “...form matters and that how-produced standards are preferable to government policy and producer characteristic standards”, 68.

³⁰ *Japan – Alcoholic Beverages* (n 8) p 21.

key point is that, as already noted by the Appellate Body, the WTO rules themselves should be interpreted as “by definition, evolutionary” rather than “static”.³¹

This developing and increasingly progressive interpretation of the rules, combined with the founding objective of the WTO; the recognised need for context-specific assessment; and the WTO’s own recognition of the discretion to be afforded to domestic policymakers³² should provide significant comfort to those seeking to take positive action to protect the environment through import restrictions. In addition, it is pertinent that WTO dispute settlement bodies’ decisions do not set binding precedent for the determination of future disputes.³³ Although adopted reports should be taken into account where relevant, future panels are not restricted in their interpretation of the rules by previous decisions. This is an important and relevant factor for governments considering introducing potentially trade restrictive environmental measures. Given all of this, the space and opportunity to introduce ambitious and important environmental measures is there to seize.

III. General Exceptions

While WTO rules and principles do create some limits on the introduction of measures which restrict imports, such measures are by no means impermissible. The key issue is that measures must treat like products alike. While it is possible to make the case that goods with different PPMs and environmental impacts are not like, there is further room for clarity and improvement to make sure that trade rules are compatible with today’s widespread acknowledgement of the need for environmental action.

In any event, and perhaps most importantly, GATT contains general exceptions to the limits on import restriction measures – including those that distinguish between like or directly competitive products. These exceptions mean that measures that would otherwise violate rules against quantitative restrictions or non-discrimination can be justified in certain circumstances.

Article XX of GATT establishes the general exceptions to the usual rules. The most important for current purposes are highlighted in bold below.

³¹ Appellate Body Report, *US – Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, adopted 6 November 1998 [130].

³² Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p 30: “WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.”

³³ WTO, [Legal effect of panel and appellate body reports and DSB recommendations and rulings](#) (accessed September 2020).

Article XX GATT

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

(a) necessary to protect public morals;

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

...

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

...

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

...

The exceptions enable WTO members to enact measures for public policy reasons, including where such measures may otherwise fall foul of the rules outlined above. The exceptions create space for a much wider range of measures to be considered permissible under WTO rules.

In order to successfully engage an exception, certain criteria – outlined below – must be satisfied. Alongside these, the key to successfully engaging a general exception is to ensure that the purpose, design and application of a new measure is motivated by the relevant public interest concern (e.g. nature conservation or reduction of carbon emissions). Protection of domestic like products might be a side effect but must not be the objective or drive.³⁴

First: a specified degree of connection between the measure and a policy objective must be established. The degree of the connection required differs between the exceptions. For example, it is sufficient that a measure adopted to protect public morals is not incapable of achieving that objective.³⁵ While a measure adopted to protect human health must be “apt to make a material contribution to the achievement of” that objective.³⁶ And a measure adopted to conserve exhaustible natural resources must have “a close and genuine relationship of ends and means”.³⁷ As such, any measure that risks discriminating between like products must be tailored to address the specific objective pursued.

Second: for some of the exceptions,³⁸ it is necessary to demonstrate that the measure adopted is *necessary* to protect the specified objective. This is a comparative test which requires ascertaining whether there is any *other* reasonably available measure that would (i) contribute to achievement of the

³⁴ Dr Jessica C. Lawrence and Dr Laurens Ankersmit ‘Making EU FTAs ‘Paris Safe’: Three studies with concrete proposals’ (March 2019).

³⁵ Appellate Body Report, *Colombia - Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, adopted 22 June 2016 [5.68].

³⁶ Appellate Body Report, *Brazil – Measures affecting imports of retreaded tyres*, WT/DS332/AB/R, adopted 17 December 2007 [150].

³⁷ *US – Shrimp* (n 31) [136].

³⁸ Article XX(a), (b), and (d) but, significantly, not (g).

objective to the *same degree* and (ii) that would be less restrictive of international trade.³⁹ This requirement – whilst potentially complex to demonstrate – is by no means insurmountable. In *EC – Seal Products*, for example, the EU demonstrated that there was no other reasonably available less trade restrictive measure that would reduce (immoral) seal deaths to the same degree as its prohibition on sale and import of seal products.⁴⁰

Notably, measures aimed at conserving exhaustible natural resources are **not** subject to this particular hurdle. It is clear from the wording of Art XX(g) that such measures do not have to pass a ‘necessity’ test. Instead, the measure need simply ‘relate to’ the conservation of exhaustible natural resources.

Third: to fall under a general exception, a measure must meet two additional requirements set out in the opening paragraph of Article XX (the chapeau).⁴¹ First, any measure adopted must not constitute ‘arbitrary or unjustifiable discrimination’ against foreign products from countries ‘where the same conditions prevail’. Those prevailing conditions are determined by the objective of the measure.

Example: prevailing conditions

*In respect of a measure designed to protect seals by banning the imports of seal products, a country where seals are located would have different prevailing conditions to a seal-less country. In contrast, two countries that both have seal populations – and so share a risk of harm to seals – are considered to have the same conditions prevailing. This is so even if the degree of the risk varies between them.*⁴²

The requirement that the measure must not constitute ‘arbitrary or unjustifiable discrimination’ means that the *discrimination* (i.e. as opposed to the *measure* as previously considered above) must be ‘necessary to achieve a legitimate public policy objective’. Again, ‘necessary’ is used here as a term of art: there must be no other less discriminatory way of pursuing the legitimate public policy objective than the specific restriction adopted. There have been numerous disputes in which the measures at issue have fallen at this hurdle. For instance, in *US – Shrimp*, the US could have protected sea turtles to the same degree in a less discriminatory way by introducing a clearer process tailored to the relevant exporting jurisdictions; in *EC – Seal Products*, the EU could have protected seals to the same degree in a less discriminatory way; and in *US – Tuna II*, the US could have protected dolphins in a less discriminatory way. However, it is important to note that, following each of these cases, the regulating country was able to revise its measures to achieve the desired objectives in a manner that complied with the chapeau.

The second chapeau requirement is that any measure adopted must not be a ‘disguised restriction on international trade’. The purpose of this requirement is to prevent states from claiming that a measure is for a legitimate reason when it is actually for an illegitimate (in trade and competition terms) reason.⁴³

³⁹ This limb can be contrasted with the EU’s proportionality test which would encompass analysis of the goals of the measure against the effects (the restrictions) to which it leads.

⁴⁰ While the EU won on the ‘necessity’ test, it lost on the ‘arbitrary or unjustifiable discrimination’ test and eventually lost the case.

⁴¹ Lorand Bartels ‘The Chapeau of the General Exceptions in the WTO GATT 1994 and GATS Agreements: A Reconstruction’ (2015) 109 *American Journal of International Law* 95.

⁴² Appellate Body Report, *US – Tuna II (Art 21.5 – Mexico)*, WT/DS381/AB/RW, adopted 3 December 2015 [7.307].

⁴³ Lorand Bartels (n 41).

IV. Using Free Trade Agreements to modernise trade and support environmental ambition

While existing WTO rules do provide room for states to introduce environmental protection measures, there is clear room for improvement. The original GATT was drafted over seven decades ago in 1947, yet its provisions are incorporated almost unchanged in the current GATT agreed in 1994.⁴⁴ When the original 1947 GATT was agreed, both understanding of the scale and severity of widespread environmental problems, and consensus as to the need for domestic and global action, were considerably weaker. Very few countries had recognised the need for co-operative action on environmental issues – this has now changed and is reflected in the proliferation of multilateral environmental agreements (MEAs). The WTO Agreements need to be updated. But, whilst this is outstanding, states can rely – and indeed have already relied – on the freedom they have in negotiating bi- and multilateral FTAs to clarify and develop the legitimate regulatory space they should enjoy to introduce environmental protection regulations.

Replicating and enhancing Article XX GATT

The general exceptions provision is replicated or incorporated, sometimes with minor clarifications, in virtually all FTAs. This is a good starting point, but should be developed to ensure that the extent of parties' freedom to introduce domestic environmental protections is clarified in a way that is more progressive than certain interpretations of existing rules.

At a basic level FTAs should clarify and confirm the scope of existing GATT exceptions: for example, clearly setting out that they apply to environmental protection measures including measures that cover clean air and the atmosphere, and that 'exhaustible natural resources' (Article XX(g) GATT) includes living resources.⁴⁵ As an example, the EU-Canada Comprehensive Economic and Trade Agreement states that *environmental* measures are covered under Article XX(b) and that the reference to "exhaustible natural resources" in Article XX(g) covers living, as well as non-living, resources.⁴⁶

More generally, FTAs should recognise a broad range of socio-political policy objectives that create exceptions and should expressly clarify that any written list is non-exhaustive. A similar approach is already found in the TBT agreement and EU internal market rules.⁴⁷ In order to help clarify what this means, reference to environmental norms and principles may help – for example by confirming that measures taken to comply with international law (including soft law), or measures taken pursuant to environmental principles such as precaution, prevention etc. could be clearly legitimised.

Building on this, FTA exceptions could confirm that parties have the right to adopt measures affecting products made using certain PPMs regardless of whether these products are 'like' or 'directly competitive or substitutable'. This could be achieved by expanding on the general exceptions by clarifying that measures taken for the purposes of protecting the environment⁴⁸ can apply to an extraterritorial activity or impact. In *US – Shrimp*, the Appellate Body observed that a "sufficient nexus" existed between the

⁴⁴ Subject to some clarifications on the nature and extent of some of the GATT 1947 obligations.

⁴⁵ UNEP and IISD, *A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda*, available at <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/3-environmental-provisions/3-6-environmental-exceptions/>.

⁴⁶ Article 28.3 (General exceptions).

⁴⁷ Dr Jessica C. Lawrence and Dr Laurens Ankersmit (n 34).

⁴⁸ Here understood as encompassing human, animal or plant life or health and the conservation of exhaustible natural resources.

regulating state and the subject of protection⁴⁹ and, on the basis that equivalent measures applied to US shrimp trawl vessels, the measure directed at importers was “in principle... even-handed”.⁵⁰ To be sure, regulating states should ensure that environmental protection measures apply domestically as well as externally to avoid falling foul of any territorial limitations.⁵¹ At times, it may be sensible and appropriate for FTAs clarify that particular measures (such as ones relating to carbon footprint) are permissible.

Hierarchy clauses

FTAs should clarify that, in the event of a conflict between the provisions, parties’ environmental obligations will prevail over those of the FTA. This should clarify that the terms of the FTA will not preclude a party from taking a measure in order to comply with obligations under MEAs and / or domestic environmental commitments. The type of clause is found in various FTAs, including the United States-Mexico-Canada Agreement (USMCA).⁵² The USMCA parties are entitled to adopt PPM-based measures to comply with obligations under the listed MEAs, provided that the primary purpose of the measure is not to impose a disguised restriction on trade. Further, USMCA clarifies that a party is not precluded from adopting or maintaining measures deemed necessary for it to fulfil *its* legal obligations to indigenous people.⁵³ For the purposes of this provision, it is not necessary that the legal obligations be common to all USMCA parties; it is sufficient that they are obligations for one party alone. Moreover, the obligations may be domestic as well as international. Although in USMCA this clause is limited to obligations owed to indigenous people, this approach could be extended to incorporate (domestic) environmental obligations too.

Recognition of domestic discretion

Sovereign nations have the right to make laws and introduce regulations. In agreeing FTAs, states should affirm and not unduly restrict this right. States should ensure that they are afforded sufficient discretion to determine what measures are necessary to meet their environmental objectives and ambitions. This “leeway should go beyond merely stating that parties can determine their own levels of protection and should aim to ensure a deferential stance by panels when scrutinizing regulation of parties under the agreement”.⁵⁴

In addition and more specifically, states ought to endeavour to increase the scope of their discretion by seeking to advance the exceptions-related provisions in FTAs. While WTO rules do allow for exceptions, reliance on these exceptions is not unconditional. In order to fall within an exception, a measure must be ‘necessary’, the ‘least trade restrictive means’, it must avoid ‘arbitrary and unjustifiable discrimination’ and cannot be a ‘disguised restriction on international trade’. The requirements to be no more trade-restrictive and no more discriminatory than necessary may in particular hamper or dissuade action to protect the environment by failing to provide states with a wide enough ‘margin of appreciation’ to introduce the public policy measures they consider necessary or important.⁵⁵ In their negotiations, states

⁴⁹ *US – Shrimp* (n 31) [133].

⁵⁰ *US – Shrimp* (n 31) [144].

⁵¹ Robert Howse ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’ (2002) 27 *Colum. J. Envtl. L.* 491.

⁵² Article 1.3 (Relation to Environmental and Conservation Agreements).

⁵³ Article 32.5 (Indigenous Peoples Rights).

⁵⁴ Dr Jessica C. Lawrence and Dr Laurens Ankersmit (n 34) p14.

⁵⁵ Dr Jessica C. Lawrence and Dr Laurens Ankersmit (n 34).

should prioritise protecting their domestic regulatory sovereignty to ensure they are able to take the actions needed in response to the climate and ecological crises.

Interpretive context

FTAs provide an opportunity for parties to set out and protect their values and priorities, and parties should take steps to ensure that the terms of their trading relationships are interpreted in a way consistent with those values. For instance, FTAs usually contain obligations based on WTO rules – such as the prohibition of discriminatory treatment of imports. Importantly, the other terms in the FTA can provide helpful interpretive context. For instance, a provision that recognises the importance of trade and investment in furthering environmental objectives could be valuable in laying the foundation for more sustainable trade. This must be supported by meaningful and enforceable provisions like a requirement for the elimination or reduction of tariffs and other barriers to products manufactured through sustainable natural resource use.⁵⁶ These sorts of provisions can be helpful in and of themselves, but also in indicating that the parties agree that sustainably obtained products are not ‘like’ unsustainably obtained products. This is useful colour that can in turn be applied to the interpretation of the other obligations of the FTA.

It should be noted that the existence of a generous exception or term in an FTA is not a panacea. It may prove possible to challenge measures that are consistent with more generous FTA terms but inconsistent with WTO rules through the WTO. But the existence of the FTA provision is still valuable in affirming and developing a better approach to trade, improving transparency regarding environmental priorities and encouraging and facilitating delivery of increased environmental ambition.

Conclusion

International trade rules do not prevent countries from introducing regulations designed to protect the environment, including properly designed measures that restrict imports based on PPMs. There is value in recognising that there are multiple approaches policymakers can take in order to ensure that measures are legitimate in the context of international trade rules.⁵⁷

First, domestic regulations and taxes must be non-discriminatory – they must not treat imported products any less favourably than ‘like’ domestic products. The concept of ‘likeness’ is important and can be tricky to elucidate precisely. But there is some flexibility in the concept, which has proved responsive to shifting contexts and emerging, scientifically-evidenced threats. As such, it may be possible to demonstrate that two products are not ‘like’ based on environmental PPMs.

Next, if an environmental protection regulation *is* considered to be discriminatory – in that it distinguishes between like products and treats the imported product less favourably – and/or falls foul of MFN requirements – then it will be necessary to justify this treatment on the basis of an exception to the usual rules. Whilst there are hurdles to clear in order to benefit from a general exception, they are in no sense insurmountable.

Finally, states should recognise and realise the potential to make advances through the FTAs they negotiate. These important agreements can and should be used to reinforce countries’ environmental

⁵⁶ See, for instance, Article 16.6 (Biological diversity), EU-Japan FTA.

⁵⁷ This paper has focussed on the requirements of the GATT regime, and further consideration is needed to understand application to the SPS and TBT regimes.

commitments, and to better protect the discretion that states inherently enjoy to introduce ambitious environmental protections. In using FTAs to clarify their environmental priorities, states have the opportunity to push the boundaries and improve the interpretation and application of international trade law more generally.

Whilst there is arguably a need for modernisation of the existing WTO framework, action can still be taken today to improve how trade rules interact with environmental protection measures. Countries should use their existing power and influence to prioritise progressive environmental protection across their political and legislative agendas. They should recognise the changing contextual nature and potential for progress within existing rules. States must be careful not to interpret international trading relationships and the rules and agreements that govern them as obstacles to achieving and delivering necessary environmental ambition.

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