Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement

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Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement

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Introduction

Many environmentalists argue that the GATT must be “greened.” They believe GATT rules are insensitive to environmental goals. Because GATT policy favors free trade and environmental policy calls for measures that
may restrain imports, the two perspectives sometimes clash. This article discusses the trade-environment conflict concerning product standards that protect an importing country’s own environment.

Import restrictions for environmental purposes fall into two categories. First, countries use restrictions to counter environmental degradation occurring beyond their own borders. These are often called process-motivated restrictions because it is the production process—and not the product itself—that degrades the environment. For example, a country might want to block or penalize imports of computer chips made through a process that releases ozone-depleting chlorofluorocarbons (CFCs) into the atmosphere. Alternatively, a country might want to prohibit imports of tuna caught with nets that kill too many dolphins or animal furs from endangered species. Proposals to levy countervailing duties against imports allegedly “subsidized” through lax environmental standards in the origin country provide another example. The central problem in these cases is extraterritoriality: the importing country tries to impose an environmental standard on processes that occur in a foreign country, or at least outside the importing country’s jurisdiction.

Second, countries use product-motivated restrictions to prevent the product itself from degrading the environment within the importing country. These might be better understood as restrictions on product-caused pollution. Examples include setting exhaust emission standards for automobiles and placing restrictions on preservatives used in foodstuffs. This article addresses only this second category of restrictions—standards for product-caused pollution. The term “pollution” in this context is defined broadly to include harm to human, animal, or plant life, as well as harm to the environment.

The dominant problem within this second category is “de facto” discrimination against imports. If a country wants to protect its internal environment from product-caused pollution—contaminated food, unhealthful additives, emission-prone automobiles, non-recyclable beverage containers, and the like—it will generally impose the same product standards on both domestic and imported goods. Thus, the regulation at issue will be facially nondiscriminatory.

Nevertheless, in practice such regulations can burden imports more than domestic output. For instance, a country could base its automobile emission standards on the average emission level for all cars sold—an approach that would disadvantage foreign importers selling only large, relatively fuel-inefficient luxury cars. A country could even adopt a particular standard deliberately to burden imports, a practice generally called “disguised protectionism.” For example, the allowance level for a particular food additive not used by local producers but common in a foreign

1. For an argument opposing this use of countervailing duties, see John J. Barceló III, Countervailing Against Environmental Subsidies, 23 CAN. BUS. L.J. 3 (1994).
Environmentalists have argued that GATT rules concerning product-caused pollution threaten an importing country's freedom to regulate its own environment. They foresee GATT rules interfering with a country’s attempt to block or restrict imports that do not meet the importing country’s internal environmental standards. The GATT Secretariat, on the other hand, claims that countries have virtually unfettered freedom to control their own environment and to demand that imports meet their own environmental standards. This statement, which seems perhaps overly optimistic even under the original GATT, would have to be qualified after the Uruguay Round agreements on product standards take effect.

This article evaluates the extent to which the GATT rules and procedures do in fact restrict an importing country's freedom to enforce its own environmental standards and examines whether the existing restrictions are reasonable. Should the GATT rules and procedures in this area be changed? If so, how? In particular, do the new Uruguay Round agreements on product standards neglect the environment, or do they reasonably accommodate potentially conflicting free trade and environmental goals? The challenge is to develop a regime that allows member countries maximum freedom to set their own internal environmental standards within a framework that also protects against “disguised protectionism” and excessive “de facto” discrimination against imports. This article explores how well the original GATT and the newly completed Uruguay Round agreements meet that challenge.

Part II will describe the current GATT rules concerning import restrictions aimed at preventing product-caused pollution in the importing country. Part III will turn to the two new Uruguay Round agreements on product standards: the Agreement on Sanitary and Phytosanitary Measures, dealing with food and beverage standards, and the Agreement on Technical Barriers to Trade, covering all technical product standards other than food and beverage standards. This part will analyze the effect

3. Another example of disguised protectionism may be the dispute between Canada and the United States involving a special tax levied by Ontario Province on aluminum beer cans. Although the tax did not involve a product standard, the United States accused Canada of disguised protectionism. Canada claimed that the tax was for environmental purposes. It was crucial to the U.S. argument that the tax primarily affected U.S. beer producers—most Canadian beer is sold in bottles, whereas most U.S. beer is sold in aluminum cans, and soft drink aluminum cans were not taxed. See Keith Bradsher, Canada Beer Dispute Flares on Eve of Trade Talks, N.Y. Times, July 25, 1992, §1, at 35.


6. Agreement on Technical Barriers to Trade, GATT Doc. MTN/FA II-A1A-6 (Dec. 15, 1993) [hereinafter TBT Agreement], in Uruguay Round, supra note 5.
of these new agreements on an importing country's freedom to enforce its environmental protection laws. The article discusses in detail only the S&P Agreement, however, because it is the more restrictive of the two.

The article concludes that the Uruguay Round agreements impose reasonable restrictions and do not seriously threaten environmental standards in importing countries. The most significant issue is whether one should read into the S&P Agreement a cost-benefit balancing test under which a GATT panel could strike down a product standard because the panel concludes that the increased benefit to the environment is not worth the increased damage to trade. This paper argues that GATT panels should not so construe the agreement.

I. The Original GATT (1947)

The original provisions of the General Agreement on Tariffs and Trade (GATT or 1947 GATT) as adopted in 1947 impose very few restrictions on a member's freedom to set product standards for domestic environmental protection. Because article III's nondiscrimination requirement and the prohibition on quantitative restrictions contained in article XI are mutually exclusive, the basic obligation is simply one of nondiscrimination against imports. Had these articles imposed additive obligations as contained in the parallel provisions of the European Union treaty, the GATT would have restricted the regulatory freedom of its members much more. This point is perhaps best understood by looking at the European Union approach.

A. The Additive Nondiscrimination and Quantitative Restriction Obligations Under European Union Law

European Union (EU) law also contains both provisions with which we are concerned: a general nondiscrimination obligation, found in article 6 of the EU treaty, and a prohibition on all quantitative restrictions and "measures with equivalent effect" in article 30. Because EU case law defines a "measure with equivalent effect" very broadly, virtually any internal regulatory measure falls within the article 30 prohibition. The famous

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8. Id. art. III. This article requires that imported products be subject to internal taxes and charges only to the same extent and amount as like domestic products. See infra notes 19-20 and accompanying text.
9. Id. art. XI. Article XI forbids quantitative restrictions on the importation of goods. See infra notes 21-25 and accompanying text.
10. By "mutually exclusive" I mean that as long as a product requirement or restriction passes muster under either one of these two provisions, then it will be upheld. See infra notes 23-24 and accompanying text.
11. See infra notes 12-18 and accompanying text.
12. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, as amended by Treaty of European Union (the Maastricht Treaty), art. 6, 1992 O.J. (C224) 1 [hereinafter EU Treaty].
13. Id. art. 30.
Dassonville case, for example, defines a “measure with equivalent effect” as follows: “All trading rules enacted by member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”

This test would include virtually any product standard as a “measure with equivalent effect.” A product standard must be applied nondiscriminatorily pursuant to article 6, but even then it still runs afoul of article 30. The tests are additive. Article 36 lists various public policy exceptions which a member-state may claim for measures that would otherwise be struck down under article 30. Through its interpretive powers the European Court of Justice (ECJ) has also added other public policy justifications that apply under article 30 itself. The ECJ subjects these article 36 and article 30 justifications to scrutiny under a “rule of reason” or “proportionality” principle that gives the Court considerable power to strike down regulatory regimes it finds unnecessarily or excessively restrictive of trade between member-states. The important point is that under EU law, virtually every internal regulatory standard for products must be nondiscriminatory and must also be justified under a balancing test.

B. The Mutually Exclusive Non-Discrimination (Article III) and Quantitative Restriction (Article XI) Obligations Under the GATT

The central GATT obligation for product standards—found in article III—is that a member must apply the same standard to domestic and imported products alike, without discrimination. Article III(4) requires national treatment for imports under all internal regulation, which is of course an obligation not to discriminate against imports. Thus, most genuine environmental legislation will easily pass muster under article III. If an apple must not carry the residue of a dangerous pesticide, it must not do so whether it is home-grown or imported. If beverage containers must be recycled, they must be recycled whether filled locally or filled abroad and imported.

In addition, GATT article XI prohibits quantitative restrictions against

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15. Id. at 453-54.
16. The grounds listed in article 36 are: “public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.” EU Treaty, supra note 12, art. 36.
19. GATT, supra note 7, art. III.
20. Id. § 4.
imports. An outright quota on imported apples would obviously violate article XI. But the GATT defines quantitative restrictions much more narrowly than does EU law. GATT ad article III explains that any law or regulation that applies to both an imported product and a like domestic product and is enforced in the case of an imported product at the point of importation "is nevertheless to be regarded as an internal . . . regulation . . . and is accordingly subject to the provisions of article III." The clear implication is that such a measure is not considered a quantitative restriction to be governed by article XI.

Several GATT panel decisions support this interpretation. To the best of this author's knowledge, no decision that treats a measure as an internal regulation subject to article III also subjects the measure to analysis under article XI. GATT panels tend to categorize a measure initially as subject either to article III or article XI, but not to both. One panel, for example, distinguished between measures intended to apply to "imported products"—in which case it would fall under article III—and those intended to apply to "importation"—in which case it would be governed by article XI. In the famous Tuna-Dolphin decision, the panel first concluded that the U.S. measure banning importation of Mexican tuna caught by a dolphin-destructive method was not a regulation of a product qua product—and hence was not an internal regulation under article III. The U.S. measure therefore fell under article XI as a quantitative restriction.

The significance of mutual exclusivity, then, is that most internal environmental standards for products would easily pass muster under the 1947 GATT. Such standards would almost always apply nondiscriminarily to imported and domestic products alike, and would therefore satisfy the national treatment requirement of article III. As such, they would not be subject to further scrutiny under article XI.

Some analyses of internal product standards devote considerable attention to the general exceptions provisions of GATT article XX. That article permits measures, for example, "necessary to protect human, animal or plant life or health" and measures "relating to the conservation of exhaustible natural resources." Some commentators have criticized the GATT because article XX does not include "environmental

21. Id. art. XI.
22. Id. ad art. III.
23. See, e.g., Canada—Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, GATT Doc. L/6304 (Mar. 22, 1988), B.I.S.D., supra note 7, 35th Supp., para. 4.24 (referring to "the distinction normally made . . . between restrictions affecting the importation of products and restrictions affecting imported products").
26. GATT, supra note 7, art. XX(b).
27. Id. art. XX(g).
protection” as one of the goals justifying a general exception from GATT obligations.28 It should be remembered, however, that as long as product standards are applied nondiscriminatorily, there is no violation of GATT rules to begin with, and hence no need to find an exception under article XX. Under EU law, by contrast, virtually all internal product standards must be justified under the exceptions in articles 36 and 30 of the EU treaty, the EU equivalent of GATT article XX.29 But because the internal regulation (article III) and quantitative restriction (article XI) obligations under the GATT are mutually exclusive, this pattern does not arise under GATT law.

In some instances, product standards may be applied more harshly (hence discriminatorily) against imported products for environmental purposes. For example, if a form of animal disease breaks out in country X, an importing country might subject the derivative animal products coming from X to extra testing and heightened scrutiny. In this case the importing country could rely on the exceptions contained in article XX to justify its discriminatory treatment of X products.30 But in the normal product standard case, the rules would be applied without discrimination to domestic and imported products alike.

C. De Facto and Disguised Discrimination

GATT article III contains language that could be read as prohibiting various forms of “de facto” or “disguised discrimination.”31 As mentioned earlier, regulations that are facially nondiscriminatory can nevertheless impose serious de facto burdens on imports and can actually be designed with the intent of hindering imports.32 There are no real standards in the 1947 GATT for dealing with these problems, and it seems that no GATT panel has ever relied upon the notion of “disguised discrimination” to rule against a member-state regulatory regime.33 Furthermore, nothing in the 1947 GATT deals with the proliferation of national product standards. Proliferation alone operates as a “de facto” barrier to trade by eliminating the efficiencies of large scale production.

In part to deal with the proliferation of standards and also to introduce rules and principles that can reduce the occasions of “de facto” or

28. See, e.g., Esty, supra note 2, at 221-222. Article 36 of the European Union treaty also does not mention the environment, but the European Court of Justice has interpreted article 30 to include “environmental protection” as one of the legitimate ends of member-state product regulation. See, e.g., Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607, 1 C.M.L.R. 619 (1989).
29. See supra notes 16-18 and accompanying text.
31. See GATT, supra note 7, art. III, para. 1 ("[I]nternal... regulations... should not be applied to imported or domestic products so as to afford protection to domestic production."). See also, John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict? 49 Wash. & Lee L. Rev. 1227, 1236-39 (1992).
32. See supra notes 2-3 and accompanying text.
"disguised discrimination" in national regulations, the Final Act of the GATT Uruguay Round includes two important product standards agreements—the Agreement on the Application of Sanitary and Phytosanitary Measures (S&P Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement). These agreements will impose important new disciplines that go beyond the basic national treatment obligation of the 1947 GATT. Thus, once the S&P and TBT agreements become operative, a member-state product standard must not discriminate against imports, and must comply with all S&P or TBT requirements.

II. The Uruguay Round Sanitary and Phytosanitary Agreement

The Uruguay Round S&P Agreement applies to product standards used to protect human, animal, or plant life from "additives, contaminants, toxins or disease-carrying organisms in foods, beverages or feedstuffs." The Uruguay Round TBT Agreement applies to all other technical product standards (mandatory and voluntary) not included in the S&P Agreement. Thus the TBT Agreement is the more general of the two. The S&P Agreement contains stricter provisions, more constraining of member-state freedom to impose product standards. The following discussion is therefore confined to the S&P Agreement and focuses on whether its provisions seriously interfere with a member's freedom to regulate its own internal environment. If one finds the S&P Agreement to be reasonable and not environmentally unfriendly—as this article maintains—one can more or less conclude that the same is true for the TBT Agreement.

34. See supra notes 9-10. To be more precise, the 1979 Tokyo Round Code on Technical Barriers to Trade was the first GATT attempt to deal with the non-tariff-barrier aspect of product standards. Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, 1186 U.N.T.S. 276, reprinted in GATT, B.L.S.D., supra note 7, 26th Supp. 8 (1980). See also Ivan Bernier, Product Standards and Non-Tariff Obstacles: The GATT Code on Technical Barriers to Trade in Non-Tariff Barriers After the Tokyo Round 195 (John Quinn & Philip Slayton eds., 1982). The S&P and TBT Agreements can be described more precisely as elaborations on the provisions of the 1979 Code.

35. S&P Agreement, supra note 5, annex A, art. 1 (emphasis added).

36. TBT Agreement, supra note 6, art. 1.

37. The discussion that follows in the text lists five disciplines contained in the S&P Agreement. The first ("Not More Trade Restrictive Than Required") and fifth ("Based on International Standards") have counterparts in the TBT Agreement. See id. arts. 2.2, 2.4. The second ("Based on Scientific Principles and Evidence"), third ("Based on a Risk Assessment"), and fourth ("Arbitrary or Unjustifiable Distinctions Prohibited") disciplines have no precise counterparts in the TBT Agreement. The language in paragraph 7 of the S&P Agreement prohibiting arbitrary or unjustifiable discrimination and disguised restrictions on trade—which may constitute a sixth discipline—is found explicitly only in the preamble to the TBT Agreement. Id. pmbl.

The one discipline in the TBT Agreement that has no strict counterpart in the S&P Agreement seems mostly precatory. TBT Agreement article 6.1 states: "Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own . . . ." Id. art. 6.1. But this provision is qualified as follows: "provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures." Id.
A. The S&P Agreement Disciplines

The S&P Agreement contains several procedural obligations that are not likely to affect a member’s freedom to adopt S&P standards. These obligations achieve more transparency in a member’s process for adopting standards. A member must give advance notice and an opportunity for comment before adopting a standard and must establish national “enquiry points” through which other members may obtain relevant information about its S&P standards and regulatory processes.38 The agreement also provides for reasonable procedures for inspection and approval of imported products.39

The S&P Agreement imposes five distinct substantive obligations that to some extent will restrict a member’s freedom to employ a product standard, four of which can be seen as an elaboration upon the requirement that a measure not involve disguised protection or excessive de facto discrimination. The fifth involves harmonization. This article argues that these five disciplines are reasonable and are not a serious intrusion upon a member’s freedom to regulate its own internal environment. The agreement might be construed to include a sixth discipline, however, under which a measure must satisfy an incremental cost-benefit balancing test.40 The article argues against construing the agreement to include this balancing test discipline.

1. Not More Trade Restrictive Than Required

A member must insure that its S&P measures “are not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility.”41 Note that this “least-trade-restrictive” requirement does not constrain the level of protection of human, animal, or plant life a member can set as its objective. The agreement is explicit in saying in the definition section that the term “appropriate level of sanitary and phytosanitary protection” is the level deemed appropriate by the member.42

Thus, it would seem that if the United States were to set a policy of zero risk from pesticide Z on apples, it would be entitled to ban the import of apples containing only trace residues of pesticide Z. It is difficult to conceive of a less-restrictive alternative measure that could fully and precisely achieve that objective.

If the U.S. purpose were to eliminate risk from pesticide Z only, a crude ban on all pesticide residues of any kind on apples would seem inconsistent with the least trade-restrictive requirement. For example, if there were a technically feasible, fully reliable, and inexpensive test to detect only pesticide Z residue on apples, the United States would presumably have to use that test instead of banning all apples with any pesticide residue.

38. S&P Agreement, supra note 5, annex B, art. 2.
39. Id. annex C, art. 1.
40. See infra part II.A.6.
41. S&P Agreement, supra note 5, para. 21.
42. Id. annex A, para. 5.
residue. Such an outcome, however, would not compromise the environmental protection goal in any way.

The agreement is also careful to protect a member from being whip-sawed by various proposed alternative measures that may involve only marginally less trade restriction. An explanatory footnote states that the alternative measure must be used only if it "achieves the appropriate level of protection and is significantly less restrictive to trade."43

2. Based on Scientific Principles and Evidence

An S&P measure must also be "based on scientific principles" and must not be maintained "without sufficient scientific evidence."44 There is an important qualification to the second proviso. If "relevant scientific evidence is insufficient," a party may still apply the S&P measure "provisionally" on the basis of "available pertinent information," but the party must seek additional information for an "objective assessment of risk" and review the measure "within a reasonable period of time."45 Presumably this means that if after some reasonable period of time no scientific evidence of a risk to animal or plant life or health can be found, then the measure cannot be maintained. But in such a case, one could hardly understand how the measure could be a genuine health or environmental measure in the first place. Of course, there may be disputes over whether there is pertinent scientific evidence, whether the evidence is sufficient, and what is a reasonable period of time.

We should keep in mind, however, that the appropriate level of S&P protection is the "level of protection deemed appropriate by the Member establishing the [S&P measure]."46 Thus, if there were scientific evidence, for example, that pesticide Z was dangerous to rats and scientific principles suggested even a small related risk to humans, presumably a party wanting no risk whatsoever to humans could ban apples containing trace amounts of pesticide Z. The sufficiency of evidence rule, therefore, takes on much less force in the face of a rule giving the member imposing the measure complete control over the level of protection sought.

One would also assume that the burden of proof in a case like this would be on the exporting country challenging an S&P measure. In most procedural systems, the challenging party bears the burden of proof. In fact, GATT panels and GATT procedures have been less than precise on these burden-of-proof points, and the S&P Agreement is no exception. The burden-of-proof problem will be discussed more generally below,47 but it would seem appropriate to note here that the burden of proof in a case like this should rest with the country challenging another member's S&P standard.

43. Id. para. 21 n.3 (emphasis added).
44. Id. para. 6.
45. Id. para. 22.
46. Id. annex A, para. 5.
47. See infra part II.B.
3. Based on Risk Assessment

An S&P measure can only be adopted on the basis of a "risk assessment" process. Thus, there must be some scientific evidence of a risk to animal, plant, or human life or health that the S&P measure is logically designed to protect against. It is difficult to see how any good faith S&P measure could fail to meet this test.

One difficult issue, however, is certain to arise. Under specific U.S. legislation, referred to as the Delaney Clause, no substance can be added to foods if the substance causes cancer in humans or in animals. In Public Citizen v. Young the Court of Appeals for the D.C. Circuit held that this statutory provision was intended to be strictly applied, even when the substance, though shown to be carcinogenic to animals, was considered by the Food and Drug Administration (FDA) on the basis of a "quantitative risk assessment" to be of extremely low risk to humans. An FDA decision allowing use of the substance on the ground that the risk to humans was "de minimis" was overturned by the court.

Does this mean that the Delaney Clause will clash with the risk assessment obligation under the S&P Agreement? I believe the answer should be no. The S&P Agreement does not require any particular kind of risk assessment; in particular, it does not require a "quantitative risk assessment." The Delaney Clause is still based on a risk assessment because a substance is banned only if it causes cancer in animals and, at the same time, involves at least some risk of cancer in humans, even if the risk is very small or "de minimis." Congress through the Delaney Clause legislation has in effect chosen a "zero" risk level of protection against carcinogenic agents in food. The S&P Agreement is clear that each member-state is entitled to choose its own appropriate level of protection against S&P risks.

4. Arbitrary or Unjustifiable Distinctions Prohibited

A party must "avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions

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48. S&P Agreement, supra note 5, paras. 16-23.
50. 831 F.2d 1108 (D.C. Cir. 1987).
51. Id. at 1123.
52. This statement assumes that in all Delaney Clause cases there will be a respectable scientific opinion that the agent found carcinogenic to laboratory animals also poses some level of carcinogenic risk to humans.
result in discrimination or a disguised restriction on international trade.\textsuperscript{54} The meaning of this language is not immediately apparent, but on its face it could provide a ground for a more searching scrutiny of a party's S&P provisions than any of the other three requirements thus far discussed. We should note, however, that the "arbitrary distinctions" language is tied to the proviso "if such distinctions result in discrimination or a disguised restriction on international trade."\textsuperscript{55} That proviso helps to clarify the kind of case envisioned. A good example is the well known German Beer case in EU law decided by the European Court of Justice in 1987.\textsuperscript{56}

In the German Beer case, Germany allowed beer to be sold in Germany and labeled "bier" only if it was made from malted barley, hops, yeast, and water. No additives at all were allowed. Most German beer has been made in this manner since the sixteenth century. Beer in other EU countries, however, is frequently made from rice and other cereals. In the case of these beers, additives are needed for technical reasons to produce the beer. The German rule therefore prevented much of the beer made in other EU countries from being imported and sold in Germany as "bier." Germany tried to justify the rule in part on the ground that Germans consume large quantities of beer and that the additives in general would pose a human health risk. The European Court of Justice rejected this argument, however, for one very striking reason: \textit{for all beverages, other than beer, German law specifically allowed some of the very additives that were banned completely in beer.} Thus, the arbitrariness of these distinctions appeared to convince the ECJ that the German regulation was essentially a form of disguised protectionism designed to protect German beer producers from non-German competitors.

Suppose, for example, that the toxicity of pesticides Y and Z are indistinguishable. Suppose further that the United States adopts a rule calling for zero pesticide Z residue on apples. The U.S. provision might run into trouble if, for example, pesticide Z were traditionally used in Canada, pesticide Y in the United States, and the zero pesticide residue rule applied only to pesticide Z.

Admittedly, judgments could differ about the application of this "arbitrary distinctions" standard. But in its defense, how else could one deal with a situation such as that presented by the German Beer case, apparently a case of disguised protectionism? There is a risk of an inappropriate panel decision under the standard. Without it, however, there would be a loophole through which very large amounts of disguised protection could be driven.

5. Based on International Standards (Harmonization)

Members must "base their sanitary or phytosanitary measures on interna-

\textsuperscript{54} S&P Agreement, supra note 5, para. 20.
\textsuperscript{55} Id.
tional standards, guidelines or recommendations, where they exist . . . .”57 There is, however, an express exception to this rule. A member is free to set unilaterally a high level of risk protection, and it may depart from an international standard if necessary to achieve its desired protection level.58

The agreement thus contains only a weak effort to harmonize S&P standards. Harmonization of standards of course can improve consumer welfare significantly by removing the trade-clogging effects of a plethora of inconsistent world-wide standards. Yet at the same time, harmonization may have a tendency toward installing the least common denominator of protection. The agreement therefore privileges the party seeking higher health protection, so long as the higher level is a genuine S&P measure and is not disguised protection of producers. Drawing the line between a genuine S&P measure and disguised protection is left to the other disciplines of the agreement—essentially the four requirements discussed above.59

Paragraph 10 of the agreement nudges the parties in the direction of using international standards by providing that any S&P measure based on an international standard is “deemed to be necessary . . . and presumed to be consistent with the relevant provisions of [the S&P Agreement].”60 But the exact significance of this “deeming” and “presuming” is not clear. “Deeming” a certain fact presumably establishes it irrebuttably. Thus, giving the word “necessary” its natural meaning (that there is no other less restrictive means to the same end), the “deemed necessary” language of paragraph 10 seems to mean that the measure will be found irrebuttably to meet the requirement in paragraph 21 that “measures are not more trade restrictive than required to achieve their appropriate level of protection . . . .”61 If a member uses an international standard, no one can claim that the measure is more trade restrictive than necessary or “required” to achieve the “appropriate level of protection.”

The presumption that a measure which conforms to an international standard meets all other requirements of the S&P Agreement is curious. The burden of proof issue is discussed more thoroughly below,62 but, as noted earlier, the burden of proof is normally borne by the complaining member-state. Hence, one would have thought that a respondent state always starts with a presumption that its measure is in compliance with all requirements. If this analysis is correct, the agreement gives only a slight nudge, or incentive, to members to use international standards—the “deemed necessary” provision. The major thrust of the harmonization obligation is thus hortatory.

So, coming back to our basic hypothetical, even if the international standard called for allowing some pesticide Z residues on apples, the

57. S&P Agreement, supra note 5, para. 9.
58. Id. para. 11.
59. See supra notes 41-57 and accompanying text.
60. S&P Agreement, supra note 5, para. 10.
61. Id. para. 21.
62. See infra part II.B.
United States would still be free to insist on a higher level of health protection—namely zero risk and zero residue. In such a case the United States would merely lose the "deeming" function of paragraph 10. It could therefore be forced to respond to a claim that the measure in question was more trade restrictive than necessary or required.

6. An Incremental Cost-Benefit Balancing Test

A sixth discipline—an incremental cost-benefit balancing test—could conceivably be found in the S&P Agreement. Nothing in the agreement explicitly imposes such a discipline. Nevertheless, parts of the agreement are open to such a construction. This is perhaps the aspect of the S&P Agreement that most threatens a member's freedom to pursue its own level of environmental protection. A cost-benefit balancing test could possibly be inferred from the provisions of paragraphs 6 and 7 of the S&P Agreement.


Paragraph 6 of the S&P agreement states that "[m]embers shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health . . . ." 63 This language could be given at least three different readings. First, one could emphasize the word "applied" and reason that the provision says nothing about the substantive level or trade restrictiveness of S&P measures but merely addresses the manner in which an existing measure is applied. Thus, to use an example put forward by the U.S. Trade Representative's Office, the provision would prevent a country from imposing a two-year quarantine of imported cattle when a two-week period would suffice. 64 The Trade Representative's Office used this example to stress that NAFTA language identical to that in paragraph 6 was intended to discipline how a measure is applied rather than its substantive content. 65

Of course, emphasizing the word "applied" may be more question begging than helpful. All standards must be applied, and if an unreasonable discipline attaches to the "application" rather than to the "creation" stage of a standard, the result is still unreasonable interference with a member's freedom to control its environment. But if the emphasis on "applied" is combined with a second possible reading of the paragraph 6 language, the result should be noncontroversial.

The second reading of paragraph 6 would give the word "necessary" its most ordinary or literal meaning: that an S&P measure should not cause more trade restriction than necessary to achieve the desired level of protection of human, animal, or plant life. In other words, if a member's

63. S&P Agreement, supra note 5, para. 6.
64. Letter from Michael Kantor to Waxman, supra note 53.
appropriate level of protection could be achieved by two measures—A, which would restrict trade by ten percent, and B, which would restrict trade by fifty percent—only the less restrictive measure A would be permitted. At least one previous GATT panel decision has in fact construed the term “necessary” in GATT article XX to mean the “not-more-trade-restrictive-than-required” standard.\cite{66}

There are two possible objections to this second reading of paragraph 6. First, it could be argued that this interpretation renders superfluous the paragraph 21 requirement that “[S&P measures] are not more trade restrictive than required to achieve [a member’s appropriate level of protection].”\cite{67} Second, in interpreting NAFTA article 712(5), a provision virtually identical to paragraph 6, the U.S. Trade Representative expressly claimed that the article does not impose a “least-trade-restrictive” requirement.\cite{68}

Both of these objections can be overcome, however, by combining the first and second constructions, thereby interpreting paragraph 6 to require that a member not apply a measure so as to cause more trade restriction than necessary for the appropriate level of protection desired. This reading, of course, exactly tracks the U.S. Trade Representative’s hypothetical quarantine case.\cite{69} A measure aimed at protecting domestic cattle from disease should not be used to quarantine imported cattle for two years when several days would suffice. This approach has considerable appeal—it gives meaning to the word “applied,” gives a natural reading to the word “necessary,” and does not overlap with paragraph 21.\cite{70}

Paragraph 6 also lends itself to a third construction. The language “only to the extent necessary to protect human, animal or plant life or health” could be interpreted to imply a means-ends balancing test in which a measure’s contribution to protecting human, animal, or plant life would be weighed against its cost in decreased trade. Even if the balance were set very much in favor of any improvement in S&P protection, however slight, presumably there would be some level of trade loss that would

\footnote{66. The panel construed the word “necessary” with reference to GATT article XX(d) concerning a measure “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . .” See United States Measures Affecting Alcoholic and Malt Beverages, GATT Doc. DS23/R, para. 5.52 (Feb. 2, 1992), reprinted in 4 WORLD TRADE MATERIALS 25, 113 (1992).}

\footnote{67. S&P Agreement, supra note 5, para. 21.}

\footnote{68. Article 712(5) of NAFTA provides: “Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection . . . .” NAFTA, supra note 65, art. 712(5).}

\footnote{69. See supra notes 63-65 and accompanying text.}

\footnote{70. Note that paragraph 5 of the S&P Agreement provides: “Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health . . . .” S&P Agreement, supra note 5, para. 5 (emphasis added). This provision does not contain the word “applied.” But it is phrased as a right, not an obligation, and thus does not seem to impose any new obligations or “disciplines.” In any event, the “necessary” concept in paragraph 5 also seems best interpreted to mean “least-trade-restrictive.”}
outweigh the environmental benefits and defeat the measure. This can be called the incremental cost-benefit balancing test version of paragraph 6.

Richard Stewart claims that language in the draft version of the Uruguay Round agreement very similar to the paragraph 6 "necessary" provision "invites" this third reading.\footnote{71} Ford Runge, in discussing the "necessary" language in GATT article XX(b), language similar to that in paragraph 6, quotes Robert Hudec as arguing that the concept of "necessary" implies an incremental cost-benefit balancing test: "[W]hether a burdensome regulation is 'necessary' to achieve a domestic environmental or health and safety objective 'is really an interlocking decision about whether, as compared with the next least restrictive alternative, the extra burden is worth the extra gain.'"\footnote{72}

Daniel Esty, also discussing the "necessary" concept in GATT article XX, argues for a more moderate cost-benefit test but still accepts a balancing test as inherent in the "necessary" concept: "Thus the pivotal word 'necessary' should be reinterpreted to mean 'not clearly disproportionate in relation to the putative environmental benefits and in light of equally effective policy alternatives that are reasonably available.'"\footnote{73}

While these arguments are certainly worthy of consideration, I remain convinced that a construction combining the first and second readings is preferable for the reasons discussed above. That approach is also supported in part by the Office of the U.S. Trade Representative, the government agency that negotiated the S&P Agreement for the United States.\footnote{74}

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\footnote{71. See Richard Stewart, The NAFTA: Trade, Competition, Environmental Protection, 27 \textit{Int'l L.} 751, 760 n.29 (1993). The language that Stewart quotes is as follows: "[The standards] shall not be more restrictive than necessary to fulfill a legitimate objective." \textit{Id.} (quoting GATT, Draft Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, GATT Doc. MTN/TNC/W/FA Dec. 20, 1991, § 6, Standards Code, art. 2.2). Perhaps it is significant that this language does not contain the word "applied" and actually seems to track most closely the "least-trade-restrictive" provision of paragraph 21.}

\footnote{72. C. Ford Runge, Freer Trade, Protected Environment 18 n.12 (1994) (citing a personal communication from Robert Hudec discussing GATT article XX). GATT article XX(b) provides a general exception to GATT obligations using language very close to that of paragraph 6 of the S&P Agreement: "[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health. . . ." GATT, \textit{supra} note 7, art. XX.}

\footnote{73. Esty, \textit{supra} note 2, at 222.}

\footnote{74. The support from the U.S. Trade Representative's office is only partial because the letter from Kantor to Adams, \textit{supra} note 65, denies that the paragraph 6 language—at least as used in NAFTA—imposes a "least-trade-restrictive" requirement. Note, however, that the quarantine example used by Kantor in his letter to Waxman, \textit{supra} note 53 and text accompanying note 64, seems to contradict Kantor's position in his letter to Adams. The quarantine example in the Waxman letter made the point that cattle should not be quarantined for two years when a quarantine of several days would be just as effective. Thus, the example seems to follow a least-trade-restrictive rationale—albeit in the context of "applying" a measure.}
b. Paragraph 7: The "Arbitrary-Discrimination-Or-Disguised-Restriction" Standard

Even if the "necessary" language of paragraph 6 were not read to introduce a cost-benefit balancing test, the provision in paragraph 7 might yield that result. Paragraph 7 states:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrariy or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.  

This language comes directly from the "head" or "chapeau" provision in GATT article XX, the general exceptions article: "[Measures authorized by the article shall not be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . . ."  

Paragraph 7's link to an incremental cost-benefit test is indirect, but it is not trivial. The article XX language just quoted was the model for both paragraph 7 and for the last sentence of article 36 of the EU treaty. EU article 36 excludes certain measures from the EU article 30 ban on any measure equivalent to a quantitative restriction. Member-state product standards are considered quantitative restrictions and fall within the EU article 30 prohibition. EU article 36 excludes from the ban, however, those product standards based on various public purposes, including "the protection of health and life of humans, animals or plants . . . ." The last sentence of EU article 36 then adds that "such prohibitions or restrictions [inherent in product standards] shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."  

It is precisely this language, the last sentence of article 36, that the ECJ has relied upon in finding a cost-benefit balancing test—called the "principle of proportionality"—in article 36:  

[I]n its [previous] judgments . . . the Court inferred from the principle of proportionality underlying the last sentence of Article 36 of the Treaty that prohibitions on the marketing of products containing additives authorized in the Member State of production but prohibited in the Member State of importation must be restricted to what is actually necessary to secure the protection of public health. 

As part of this proportionality principle, the ECJ includes a "least-trade-
restrictive" test, but it also goes further in some cases to embrace an explicit benefit-cost balancing test.

The well-known Danish Bottles case is one of the clearest examples of cost-benefit balancing in EU proportionality decisions. In Danish Bottles, Denmark required manufacturers to market beer and soft drinks in Denmark only in reusable containers matching one of the thirty specific container types approved by the Danish government. Denmark explained that authorizing more than thirty container types would interfere with the willingness of retailers to cooperate in the deposit and return system because of increased handling costs and the need for more storage space. Danish law granted an exception to this basic regulation and allowed foreign producers to use non-approved containers but limited the exception to market-testing quantities not exceeding 3000 hectoliters per year per producer, provided that a deposit-and-return system were established for the non-approved containers. The ECJ upheld the basic Danish requirement that all beer and soft drink containers be sold in reusable containers subject to a deposit-and-return scheme, even though it acknowledged that the scheme would disadvantage foreign producers disproportionately because they would lose scale advantages in adjusting to the Danish requirements and would face greater compliance costs by virtue of being more distant foreign producers.

At the same time—and this is the most important aspect of the case for our purposes—the ECJ struck down the quantity limitation on the use of unauthorized containers. The Court concluded that the Danish restrictions on unauthorized containers were just too damaging to trade in comparison to the slight improvement in container recycling they would bring:

It is undoubtedly true that the existing system for returning approved containers ensures a maximum rate of re-use and therefore a very considerable degree of protection of the environment since empty containers can be returned to any retailer of beverages. Non-approved containers, on the other hand, can be returned only to the retailer who sold the beverages, since it is impossible to set up such a comprehensive system for those containers as well.

Nevertheless, the system for returning non-approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports. In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued.

83. See, e.g., Case 124/81, Commission v. United Kingdom, 1983 E.C.R. 203, 2 C.M.L.R. 1 (1983) (UK system requiring all UHT milk to be imported into the United Kingdom solely by licensed operators, who in effect were required to repackage the milk in the United Kingdom, was disproportionate because there was a less burdensome means of assuring that the imported milk was safe).


85. Id. at 4632 (emphasis added).
From an American perspective, this rationale is similar to the balancing approach the U.S. Supreme Court has followed in passing on state regulation of interstate commerce.\textsuperscript{86} Thus, one might conclude that a balancing approach is in the end the only truly workable solution to the dilemma of trying to accommodate two conflicting values—the freedom of each state to pursue its own legitimate public purpose regulatory goals and the freedom of commerce to flow unfettered among the member-states. Nevertheless, I do not think GATT panels interpreting the S&P agreement should feel entitled to adopt a similar incremental cost-benefit balancing test in passing judgment on member S&P measures.\textsuperscript{87}

I believe the S&P provisions must be much more explicit about authorizing a balancing test before GATT panels should venture into this kind of decision-making.\textsuperscript{88} GATT panelists are generally government officials expert in trade negotiations—they are not distinguished or revered jurists or judges. Hence GATT panel decisions interpreting the Uruguay Round Agreements will not benefit from the expertise and authority, or receive the deference, that normally accompanies decisions of the ECJ or the U.S. Supreme Court. Aggressive or imaginative adjudicating, at least during the early stages of implementing and interpreting the new Uruguay Round agreements, is likely to cause the GATT panel procedure to lose rather than gain acceptance and prestige.

Of course it is true that the Uruguay Round agreements establish a new World Trade Organization (WTO) with a dispute settlement proce-

\textsuperscript{86} Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), is most often cited as the leading authority for a balancing test in “dormant” commerce clause cases. For a more recent example of this approach, see Northwest Cent. Pipeline Corp. v. State Corp. Comm’n of Kan., 489 U.S. 493 (1989).

\textsuperscript{87} For a similar conclusion in a more general analysis of technical barriers to trade, see Symes, supra note 33, at 17.

\textsuperscript{88} The legislative history of the TBT Agreement offers an example of a provision that clearly would have authorized the incremental cost-benefit balancing test. The 1991 version of the TBT Agreement provided in article 2.2: “[T]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.” TBT Agreement, supra note 6, para. 2.2.

A footnote at the end of this sentence provides: “This provision is intended to ensure proportionality between regulations and the risks non-fulfillment of legitimate objectives would create.” 3 The GATT Uruguay Round: A Negotiating History (1986-1992) 527 (Terence P. Stewart ed., 1993) (emphasis added).

That footnote would surely have introduced incremental cost-benefit balancing into the TBT Agreement. See Ernst-Ulrich Petersmann, International Competition Rules for the GATT-MTO World Trade and Legal System, 27 J. World Trade 35, 45 (1993). The footnote was omitted, however, in the final version of the agreement. TBT Agreement, supra note 6, para. 2.2.

Omission of the footnote appears to mean that the parties did not intend to include an incremental cost-benefit balancing test and hence that the term “necessary” retained in the final version of article 2.2 should not be interpreted as authorizing such a balancing test. These points were confirmed to the author in a phone conversation with a U.S. Trade Representative negotiator. This analysis indirectly supports the argument in the text accompanying notes 65-72 that the “necessary” language in paragraph 6 of the S&P Agreement also should not be interpreted as authorizing a cost-benefit balancing test in the S&P Agreement.
procedure under which panel decisions will be binding, adding stature to the role of the panelists. The procedure will also include appellate review of legal questions by a Standing Appellate Body. Thus, it will be the decisions of the Standing Appellate Body that will be the final word on interpreting the Uruguay Round Agreements. Moreover, members of the Appellate Body will be required to have "demonstrated expertise in law," which is not currently required of panelists. Still, the Appellate Body is not likely to carry the prestige or command the authority of the ECJ or the U.S. Supreme Court at any point in the foreseeable future.

In any event, I believe environmentalists have a solid foundation for opposing any interpretation of the S&P Agreement that authorizes GATT panels to employ an incremental cost-benefit balancing methodology. This represents probably the greatest threat to a member's freedom to pursue its own level of environmental protection. There is considerable evidence in the operative provisions themselves—and in the aspirational provisions of the preamble to the S&P Agreement—that the parties intended such member freedom.

B. Burden of Proof

As stated earlier, the paragraph 10 provision that a measure in conformity with international standards is "presumed to be consistent with the relevant provisions of [the S&P Agreement]" is puzzling. One might infer that without the presumption the burden of proving a measure's conformity with S&P Agreement requirements rests on the member employing the measure. It is unclear, however, from what source such a burden of proof assignment could arise. It is certainly contrary to the normal procedural rule in most legal systems that puts the burden of proof on the challenging party and not on the respondent.

Where a member has been forced to rely on the general exceptions of GATT article XX to justify a trade measure, GATT practice has indeed been to place the burden of justification on the member claiming the benefit of the article XX exception. But as noted at the outset of this paper, as long as a member applies a measure non-discriminatory, it

90. Id. para. 17.3.
91. See id. para. 16.4.
92. See supra notes 60-61 and accompanying text.
93. The preamble, for example, states: "Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, . . . without requiring Members to change their appropriate level of protection of human, animal or plant life or health . . . ." S&P Agreement, supra note 5, pmbl. (emphasis added).
94. See supra notes 60-61 and accompanying text.
96. See supra text accompanying notes 19-25.
acts consistent with GATT and has no need to resort to the general exceptions of article XX. The S&P Agreement imposes additional obligations upon countries that adhere to it, but nothing in the agreement provides that parties as a general matter are burdened with a presumption against compliance. The agreement therefore introduces confusion about which party holds the burden of proof.

In the absence of further clarification, I would assume that the presumption in paragraph 10 was not meant to shift the burden of proof from the respondent (where it never rested in the first place) to the complainant, but rather to require the complainant to meet a higher level of proof than ordinary. Thus, a member would be encouraged to use an international standard, because the “presumption” attaching to such use would impose something like a “clear and convincing evidence” burden on any member complaining against the use of that standard.

C. Dispute Settlement

The new dispute settlement procedure introduced by the Uruguay Round has been described earlier in this article.97 The new binding force of panel decisions will be celebrated by those who want to see the GATT system taken more seriously, but it will likely be a cause of concern for environmentalists worried that GATT rules threaten environmental welfare. Yet, even if this article's conclusions are incorrect and the new Uruguay Round agreements prove to be more intrusive than I have argued they seem to be or should be, there is still an ultimate safeguard for national autonomy.

The binding quality of GATT panel decisions under the Uruguay Round provisions means only that the panel result will establish the meaning of the GATT provisions in dispute. The GATT has no right or power to require a change in a member-state's internal law. Members have not even undertaken a formal obligation to bring their internal law into consistency with GATT panel decisions. A member can in good faith refuse to conform its internal law if it is willing either to compensate the complaining party or parties with other trade concessions or to suffer retaliation against its own exports. Of course, these consequences in a given case could be onerous and will surely exert considerable pressure on a member to amend its national law. It is nevertheless significant that through unilateral decision a member-state may choose to retain any of its environmental standards.

Conclusion

This article has tried to show that the original 1947 GATT was especially benign in its effect on members' freedom to regulate their own environments. The new Uruguay Round S&P and TBT Agreements will usher in important new commitments that go beyond the basic non-discrimination

97. See supra notes 88-91 and accompanying text.
obligation of the original GATT. Nevertheless, this detailed look at the S&PC Agreement supports the conclusion that its disciplines should pose no real threat to genuine environmental standards for product-caused pollution.

While any supranational regime, such as the GATT, constrains to some extent the autonomy of contracting parties in areas regulated by the regime, the disciplines in the S&PC Agreement seem relatively mild and reasonable. That is not to say that there are no areas of the new GATT regime that merit continued scrutiny or that may require adjustments in the future. Experience under the new Uruguay Round regime may well expose areas of weakness that need attention. This article has discussed two such areas: the provisions on burden of proof and, more importantly, the provisions that might induce a future panel to read into the agreement an incremental cost-benefit balancing regime. This paper has argued against such a balancing test—it is not explicitly provided for in the agreement and would give unwarranted discretion to GATT panels. The balancing test aside, the S&PC Agreement appears to be an admirable effort at curtailing de facto and disguised protectionism in product standards while retaining a member’s basic freedom to fix its own level of internal environmental protection.