Process and Production Methods: Implementation and Monitoring

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Abstract

With environmental problems moving to the centre of attention in politics in the early 1990s, the distinction between trade measures aiming at products and those aiming at production processes faced increasing criticism. Underlying the debate is the presumption that trade measures can be subdivided into measures that are linked to products themselves and measures that are linked to processes of production, and that both groups of measures have a different legal status under the GATT. Since the distinction between products and production has considerable logical appeal, it is often overlooked that the legal content of the concept is vague. Another important issue is how WTO Members can track methods of production on products produced outside their territory, particularly if the carbon values are not detectable in the final commercial product. This underlying question is perhaps the most important legal issue as the vast majority of carbon emissions related to a product are associated with its production and transportation to the point of sale. This paper turns to the issue as to how trade measures based on production methods can and should be implemented. First, it discusses the process and production methods as criteria of likeness. Then it examines the possibility to rely upon voluntary declarations of product characteristics and labelling. In the conclusion, the paper will sketch out a legal framework addressing the management of production methods administration and monitoring in international law.
Implementation and Monitoring of Process and Production Methods

With environmental problems moving to the centre of attention in politics in the early 1990s, the distinction between trade measures aiming at products and those aiming at production processes faced increasing criticism. The GATT and a few years later the WTO were often accused of preventing national policies preserving the environment or other public goods with high standards, and the illegality of production-based trade measures were one important aspect of the alleged shortcomings. The general idea and reasoning behind this criticism was increasingly met with approval, without however leading to the multilateral solution that some had hoped for.

Underlying the debate is the presumption that trade measures can be subdivided into measures that are linked to products themselves and measures that are linked to processes of production, and that both groups of measures have a different legal status under the GATT. Since the distinction between products and production has considerable logical appeal, it is often overlooked that the legal content of the concept is vague. In view of the development of efficient tools to fight climate change the governments feel the need to protect domestic industry from competition in countries not applying the same environmental standards, in particular with respect to CO2 emissions.

Another important issue is how WTO Members can track methods of production on products produced outside their territory, particularly if the carbon values are not detectable in the final commercial product. In this context, how can a country contest harmful emissions produced during the product’s manufacture in another country? This underlying question is perhaps the most important legal issue as the vast majority of carbon emissions related to a product are associated with its production and transportation to the point of sale.

This paper turns to the issue as to how trade measures based on production methods can and should be implemented. First, it discusses the process and production methods as criteria of likeness. Then project engages in comparative studies on implementation of PPM-based trade measures, it examines the possibility to rely upon voluntary declarations of product characteristics and labelling. In the conclusion, the paper will sketch out a legal framework addressing the management of production methods administration and monitoring in international law.
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I. The principles of non-discrimination and process and production methods (PPMs) as criteria of “likeness”

The World Trade Organization (WTO) law has two principles of non-discrimination: the most-favoured-nation (MFN) treatment obligation and the national treatment obligation. The former imposes that a WTO Member, given that it grants favourable treatment to another nation, must also grant similar favourable treatment to other WTO Members. The latter obliges a WTO Member to have foreign products, services and service suppliers treated not less favourably than “like” domestic products, services and service suppliers.

In the legislation, however, the concept of “likeness” is not clearly defined. In a more particular sense, there are products which can be considered alike in terms of how they look and in terms of their functions and properties; however, these products may differ in terms of the methods used for production. Is a cup manufactured by “green” technologies similar to the cup made by conventional technologies? Is cement produced through renewable energy use similar to the cement produced through coal energy? And, in terms of the production methods used, is the regulation imposed towards imported foreign products similar to “like” domestic products?

As far as policy is concerned, the two principles of non-discrimination are applicable to all WTO members. The most-favoured-nation (MFN) treatment obligation attempts to promote equal treatment among members in terms of products and services produced. The national treatment obligation is applicable to foreign products; that is, upon crossing and entering the domestic market, these products must not be treated less favourably in terms of taxation or regulation relative to “like” domestic products. In other words, all the trade measures imposed in support of an environmental policy for instance, depend on “likeness” of domestic products to that of foreign products. In the first place, the question is: are members of the WTO allowed to differentiate between products produced by different methods in order to pursue their environmental policies? This chapter shall look into whether products can be considered alike despite the difference in the methods of their production.

A. WTO Law on “Unfair” Trade and Environmental Protection

Today, the WTO law contains highly complex rules which treat more particular forms of “unfair” trade. It implies that although the WTO law justifies “specific” violations in relation to trade, it does not contain “higher” or universal moral principles which are common to all countries and recognized by all members of the organization. Setting aside the basic rules and principles, the WTO law addresses disputes in relation to trade liberalization including economic and non-economic societal values and interests which come in conflict with free trade. More in particular, non-economic values and interests cover the environment and its protection, public health, national treasures and security. Such rules can be found mainly under Articles XX and XXI of the General Agreement on Tariffs and Trade (GATT) 1994 and Articles XIV and XIV bis.

2 Wolf, M.; “What the world needs from the multilateral trading system”; Cited in The Role of the World Trade Organization in Global Governance by G. Sampson; United Nations University Press; 2001
3 Potts, Jason; “The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy” ; International Institute for Sustainable Development; Winnipeg, Manitoba Canada; 2008
The GATT system is the most important rule system for international trade. It is made up of more or less 200 ancillary treaties including several related arrangements. The system covers specific rules on unfair trade practices and one of its core principles on trade liberalization is stated in Article III known as national treatment.

In its broadest and fundamental sense, Article III was developed to ensure that internal measures shall “not be applied” to imported and domestic products; that is, to avoid protectionism with respect to the application of internal charges and regulatory measures. It should be noted, however, that Article III is only applicable in view of internal and not of border measures – indicated under GATT provisions Article II (tariff concessions) and Article XI (quantitative restrictions).

When applied to imported products, the difference between internal measure and border measure is relatively difficult to define. For instance, barring the import of a product at a border due to failure to meet consumer or public health safety requirements applicable to “like” domestic products, should be considered under the language of Article III and not Article XI (general elimination of quantitative restrictions). Outright trade quotas and trade bans are the instruments primarily targeted by Article XI.

B. Environmental Criticisms Against the WTO and Its Treatment of “PPMs”

In many cases, the WTO is criticized for “disallowing” processes and restrictions of production and process methods (PPMs) which affect trade. Environmentalists are convinced that the trading system imposed by the organization hinders ecological protection. Environmental protection has become more significant for the sake of future generations. In the protection of the environment, rules of sanction, international cooperation and trade-restricting measures are involved so as to avoid undermining of government actions by other governments. The dilemma occurs because trade liberalization is also needed for the welfare of the economy and for the many individuals seeking for greater opportunity. These two opposing policy objectives and the conflicts which emanate from their proponents are acquired from “difference in cultures”; that is, from different perceptions and attitudes which further create misunderstandings. In order for the two parties to reconcile, PPMs and their legal status must be recognized in “rightful” terms.

Eventually, issues of interpretation emerged in several “environmental” cases in terms of how products are produced. For instance, an Ontario regulation, designed to promote environmental consciousness, imposed higher tax on the sale of beverages in aluminum containers. It was found out, however, that the number of beverages sold in such containers were relatively higher in imports coming from the United States than those produced domestically. Thus, the regulation appears to be discriminatory by nature.

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4 Potts, Jason; “The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy”; International Institute for Sustainable Development; Winnipeg, Manitoba Canada; 2008
5 Ibid (11-14)
C. Trade-Related PPM Measures: A Two-Sided Argument

Generally, there are three major arguments which point the inappropriateness of trade-related PPM measures as policy instruments.\(^8\) One, the implementation of such measures may be used to promote protectionist interests. Two, the “exportation” of priorities with respect to national policy through PPM-based regulations could go against other states and their sovereign rights including their respective policy priorities. Lastly, the geographic and temporal distance between the enforcing state and the actual application of PPMs could make enforcement unfeasible and arbitrary.

At the back of these arguments, PPM measures in a more conservative sense, may also be considered as “signposts” prior the creation of “sustainable” PPM policy, environmental policy being one. For one thing, the ability of trade-related PPM measures to promote protectionist interests is common to all trade-related measures and thus, should not be based whether the measure specifies PPMs or not but in terms of its accessibility to all origins.\(^9\) Second, the opposition against the use of PPMs in view of other states and their sovereign rights provides no basis for neglecting such measures. In their pursuit of policy objectives, foreign states could benefit from PPM and non-PPM-based policy measures unless foreign jurisdictions and their ability to “select” their respective policy objectives is hindered by such measures (e.g. restriction of access to market, etc.); even so, policies which hinder market access are considered instruments of the international law the fact that national sovereignty is not infringed upon.\(^10\) In response to the third argument, non-product related PPMs also triggered special challenges to the private sector which initiated the development of alternatives to “physical” verification requirements through the application of new information technologies in customs practice.

D. Various Issues on Non-Product Related PPMs in Relation to the Environment and Its Protection

1. Extraterritoriality

In view of Article III (national treatment obligation), Article XI (limitation of import prohibition) and Article XX (exceptions of imposing measures can be allowed), can one country dictate another country what environmental regulations should be imposed and regardless of the quality of goods produced, do trade rules allow measure to be applied against the methods used in the production of goods? The issue is further elaborated in the following related cases. The decision of the panel is also discussed with respect to every case.

i. Case Title: United States – Restrictions on Imports of Tuna/“Tuna-Dolphin I” Not Adopted/ Circulated 3 September 1991

Mexico and others filed a case against the United States under GATT. “The U.S. and Mexico settled out of court”\(^11\). The case and its various implications for environmental disputes gained wide interest among environmental-legal practitioners and became a good working ground for succeeding related cases.

In eastern tropical areas of the Pacific Ocean, tuna is harvested using purse seine nets. In most cases, schools of yellowfin tuna swim beneath schools of

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8 Ibid (4-6)
9 Potts, Jason; “The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy” ; International Institute for Sustainable Development; Winnipeg, Manitoba Canada; 2008
10 Ibid (6)
11 United States – Restriction on Imports of Tuna/Tuna-Dolphin I; www.wto.org
dolphins. As tuna is harvested, dolphins are also trapped in the nets and worse, they often die unless released. The U.S. Marine Mammal Protection Act imposes dolphin protection standards and such includes countries fishing for yellowfin tuna within that particular area. If a country (exporting tuna to the United States) failed to meet U.S. standards for the protection of dolphins (as set in U.S. law), the U.S. government has the right to embargo all fish imports coming from that country. In 1991, Mexico, the exporting country, complained against the United States for banning the former's exports.

The United States could not embargo tuna imports from Mexico because Mexican regulations on “how tuna was produced” is not compatible with U.S. regulations (product versus process). Furthermore, GATT rules do not allow one country to impose its domestic laws to another country regardless if that measure was for the protection of the environment. Environmentalists criticized the panel's ruling on the issue. Meanwhile, Mexico decided to pursue the case and consensus of rejecting the panel report was not obtained; thus, the report was never adopted. Both countries held their bilateral consultations outside GATT aiming to reach an agreement.

According to Section 101 (a)(2) of the U.S. Marine Mammal Protection Act (MMPA) of 1972, the importation of commercial fish or fish products obtained using commercial fishing technology shall be banned by the secretary of state in an attempt to stop incidental killings or serious injury of ocean mammals. The PPM measure adopted for this case had no effect on the products physically. Such, however, was linked to an aspect of production.

Under the GATT, such production methods have been allowed and Mexico claimed that these measures were not PPMs for the reason that rather than primarily focusing on tuna production, they also considered the welfare of the dolphins. According to the panel report, Article III was not applicable to the import prohibition since it only dealt with measures applicable to the product “as such”; that is, only regulated the sale of tuna which had no effect on tuna as a product. Furthermore, the measure did not violate Article III:4 because it only covered and compared products' treatment and did not affect tuna as a product. Thus, the emphasis was placed under Article XX and on the aspect of extraterritoriality.

Furthermore, the GATT Panel addressed trade measures and its “lawfulness” with emphasis on extraterritoriality. The case demanded other states to prove that their environmental regulatory systems are relatively similar or “comparable” to that of the United States before any of them could access the U.S. market. Eventually, it was found out that the import prohibitions appeared in contrary to GATT Article XI and so the case was pointed under Article XX(b) or (g). In application to the case,
Article XX was subsequently rejected by the panel in fear that contracting parties or other states apply their national standards and non-compliance may trigger unilateral trade restrictions; that is, other states have to choose whether to adopt similar standards imposed by the importing state, the United States, or accept trade measures for non-compliance.

**ii. United States – Restrictions on Imports of Tuna/“Tuna – Dolphin II” Not Adopted/ Circulated 16 June 1994**

The EU brought a case against the United States under GATT following the Tuna – Dolphin I. The EC and the Netherlands complained that the nation embargoes (primary and intermediary) which enforced pursuant to the Marine Mammal Protection Act was not covered by Article III and was inconsistent with Article XI:1 and Article XX.

The United States argued that the intermediary nation embargo was GATT-consistent the fact that it was covered by Article XX (paragraphs g,b&d).\(^{18}\) Furthermore, the nation argued that the primary nation embargo did not impair benefits of the EC and the Netherlands since it was not applicable to these countries.

Both the primary and intermediary nation embargoes were not covered by Article III, in contrary to Article XI:1 and cannot be covered by the exceptions in Article XX (b,g&d) of the GATT either.

The decision of the panel was aligned to that of the decision in 1991 and pointed out the inapplicability of Article III to the case. Although the Tuna Dolphin I panel focused on the extraterritoriality effects with respect to the measure, the panel of the Tuna Dolphin II has decided to reject the measures as it undermined the multilateral trading system and in a sense, unjustifiable.

Extensively in the U.S. Tuna Dolphin II case, the GATT Panel claimed that the measures forcing other states to have their policies changed were not mainly directed towards the conservation of natural resources.\(^{19}\) Similarly, the U.S. failed GATTArticle XX(g) justification. The only difference was that in the second case, the panel did not disregard the possibility of adopting measures on the promotion of non-economic goals under the jurisdiction of other states. Nevertheless, there was no further development with respect to Article XX(g) and its interpretation. The Tuna cases have been excluded under Article III since the measure applied had no relation to the product.\(^{20}\) The cases, however, were found in violation of Article XI since any regulation (e.g. tariff, tax, etc.) which results to blocking of trade due to non-compliance is potentially considered as a quantitative restriction on trade.


Countries India, Malaysia, Thailand and Pakistan raised a joint complaint against a ban imposed by the United States on the importation of certain shrimp and shrimp products. The latter argued for the protection of sea turtles affected in the course of shrimping. The U.S. lost the case due to discrimination against other WTO members and not because it sought for the protection of the environment.

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18 United States – Restriction on Imports of Tuna/Tuna-Dolphin II; www.wto.org  
19 Ibid (310-313)  
20 Zleptnig, Stefan; “Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements”; Martinus Nijhoff Publishers; Leiden, Boston; 2010
Under the rules of the WTO, countries have the right to adopt trade action to protect the environment; that is, to protect the lives of and health of humans, animals, and plants. “The WTO does not have to allow them this right”. The measures to protect sea turtles is legitimate under GATT Article XX which states exceptions to WTO trade rules for as long as non-discrimination occurs.

The ban imposed by the United States was inconsistent with GATT Article XI, a provision which limits the use of prohibitions or restrictions on imports. The ban was not justifiable under GATT Article XX. Although the measure did qualify for provisional justification under Article XX (as what the Appellate Body has argued), the measure failed to comply the requirements of Article XX's introductory paragraph which defines the conditions as to when exceptions are allowed to be cited.

Going back to 1982, the World Charter for Nature (approved by the United Nations General Assembly) sought the cooperation of governments to create standards for products and manufacturing processes which have negative effects on nature. In this case, an explicit endorsement of a PPM which affected trade was not provided by the Agreement on Agriculture and the World Charter for Nature. The result was the emergence of trade conflicts among foreign service suppliers and regulation of imported products.

The Appellate Body rejected the approach of the panel and claimed that the measures were justifiable by Article XX; that is, the fact that the sea turtles affected all occurred in waters under the jurisdiction of the United States. The panel found out that the measure constituted unjustifiable and arbitrary discrimination between nations: one WTO member required other members to have a similar comprehensive regulatory program adopted prior to creating a certain policy aim without having to consider other members’ various territorial conditions. Thus, the jurisdiction was not under the rule of Article XX due to the fact that it unjustifiably and arbitrarily discriminated other nations under similar conditions.

The U.S. Shrimp-Turtle case revealed a significant development as it emphasized and applied to trade measures on the basis of extraterritoriality. It should be noted that the U.S. measure on the protection of endangered sea turtles had been extended outside its jurisdiction – a step which initially moved the panel to reject the measure as “unlawful” under GATT Article XX. Such approach by the panel was triggered and “overturned” as several parties argued on the inapplicability of Article XX towards justifying a measure (on the protection of natural resources) “outside” the jurisdiction of the imposing WTO Member. In other words, why would a measure be imposed outside the territory of the imposing member?

Nevertheless, such has led to the conclusion that in spite the United States' determination to protect the turtles and environmental aim, the panel viewed the measure and its adoption as a serious threat to the entire multilateral trading system. In short, such cases, including the Tuna Dolphin II case (from which the reasoning of the Shrimp-Turtle case was based), were considered unjustifiable under GATT Article XX.

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21 United States – Import Prohibition of Certain Shrimp and Shrimp Products/Shrimp-Turtle; www.wto.org
23 Ibid (314-317)
2. Climate Change Mitigation: The Carbon Leakage Case

The second issue deals with the inadequacy of WTO regulations to cover and justify measures on climate change mitigation. One country may be in “good” faith as to reducing carbon emission; however, the application of such measure can become an issue relative to other countries and their current regulations on production methods. The following case provides a further discussion on the issue.

The mitigation of climate change raised many competitive issues with respect to the appropriateness of non-product-related PPM measures and its application as policies in the national and international levels. In the journal “The interface between the trade and climate change”, Low, Marceau and Reinaud stated that “the cost implications of carbon constraining policies may provoke trade frictions that translate into deliberative and legal issues for the WTO”. WTO provisions tend to focus on physical products; on the other hand, climate change policies are concerned with the production methods and processes on the reduction of GHG emission.

One significant challenge faced by nations is how national approaches can be unified to mitigate climate change through the adoption of policies which are compatible with WTO regulations; that is, how would countries develop mitigation efforts which are comparable to an internationally-acclaimed policy approach without having to develop related risks (e.g. protectionist interests, unmanageable climate change etc.)? Policies developed in address to climate change involve price and non-price interventions (e.g. GHG permits, taxes, economic incentives, emission sources such as processes and usage of equipment) and WTO rules are just not enough and developed to cover such types of policies.

In the case of the GHGs emission and climate mitigation, the production process simply had no effect on the determination of “likeness” wherein a competition exists in the market between an imported and domestic product. With respect to Article III, products are considered “like” whether they are produced in the same manner or not. Therefore, an application of measure to an imported product in such case (with the application of non-product related PPM measure), is considered “differential” treatment of that imported product relative to domestic “like” products; that is, Article III and its non-discrimination requirement is deemed applicable.

E. The debate on likeness

In view of Article III (national treatment obligation), is it lawful for one country to impose higher tax for “imported” products with prices higher than its domestic “like” products in an attempt to protect domestic products? The WTO law does not have a general rule as to how “likeness” should be determined in order for the dispute to be consistent with Article III. In reference to the issue, the following cases shall further describe the decisions adopted by the panel.

1. Case studies

i. United States – Taxes on Automobiles Not Adopted/Circulated 11 October 1994

In the U.S.-Taxes on Automobiles case, moreover, the same approach was elaborated by the panel with respect to the determination of “likeness”. A retail excise
tax on cars priced over U.S.$ 30000 was imposed by the United States.\textsuperscript{26} The EU filed a case against the United States.

The panel was obliged to determine if the products priced above and below U.S.$ 30000 were “like” products. The European communities complained and argued that “likeness” must be determined with respect to the products' end use, tariff classification and physical characteristics.

The United States argued that “likeness” should be determined on the basis of whether the measure was applied to provide protection to the domestic industry. The panel asserted the need to examine the tax measure's aims and effects and claimed that “likeness” must be viewed in terms of whether the less favourable treatment was due to regulatory distinction in an attempt to give protection to domestic products.\textsuperscript{27}

The panel found that both the luxury tax and the gas guzzler tax (applies to automobiles attaining less than 22.5 miles gallon (mpg)) were inconsistent under Article III:2 of GATT.\textsuperscript{28}

\textit{ii. Case Title: United States: Malt Beverages, Adopted: 19 June 1992}

Other related materials and cases are further elaborated in Peter Van den Bossche's “The Law and Policy of the WTO”. The U.S.-Malt Beverages case presents a different approach adopted by the panel in view of special tax exemptions provided to both domestic and foreign products produced from small firms - an issue which the panel considered “discriminatory” relative to imports from larger foreign firms and a violation of Article III.\textsuperscript{29}

Furthermore, regardless if the products were produced from small or large firms, the issue would still be irrelevant in the determination of “likeness”. With respect to Article III, the panel claimed that the purpose for differentiating wines was to protect local production of wine and the U.S. had failed to adopt an alternative policy for differentiation.\textsuperscript{30} The differentiation of the product was relevant and must be taken into consideration in view of the “likeness” of products.

\textbf{2. The Determinants of “Likeness” and Non-Product Related PPMs}

By definition, PPMs refer to “any activity undertaken in the process of bringing a good to market”.\textsuperscript{31} There are two types of PPMs: (1) product-related and (2) non-product related – both PPMs are utilized in the manufacture of goods. The latter, by contrast, does not describe or affect the product's physical characteristics.

Given such perspective on non-product-related PPMs, it is “physically impossible” to figure out the types of PPMs utilized based on the analysis of the product's physical characteristics.

\textsuperscript{27} Bossche, Peter Van den; “The law and policy of the World Trade Organization: text, cases and materials”; Cambridge University Press, The Edinburgh Building, Cambridge, UK; 2005
\textsuperscript{31} Potts, Jason; “The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy”; International Institute for Sustainable Development; Winnipeg, Manitoba Canada; 2008
It was already mentioned that under Article III, a non-discrimination requirement is applicable to products with respect to taxes and charges. For as long as it does not trigger less favourable treatment of “like” products, however, the GATT rules allow different treatment for foreign products. The main criteria utilized with respect to the determination of the “likeness” of two products are as follows: (1) the products and their physical characteristics (2) end use (3) preferences of consumers and (4) tariff classification of every product. What is absent is whether it is allowable to differentiate products with respect to the methods used in their production.\(^\text{32}\) This is not under the jurisprudence of the national treatment obligation “unless” one member decides to apply measure in criticism to the respective regulations imposed in other members.

In view of Article XI (quantitative restrictions), however, this “likeness” of two products is challenged by the fact that members do not seem to have a unified international treatment with respect to non-product related PPMs. Thus, a member may simply ban the import of certain products coming from other members due to non-compliance of non-product related PPMs (imposed by the former) of the other members. In other words, “likeness” is not clearly recognized in view of non-product related PPMs and that whichever member wishes to impose measures due to difference in production methods used relative to other members, could simply do so. Although blocking of trade due to non-compliance is considered a violation of Article XI, it does not clearly address the issue on “likeness” of the products and the methods used for production between members.\(^\text{33}\)

This is the reason why environmental advocates continue to question WTO rules with regards to climate change mitigation efforts as inappropriate. What remains is the clause that regardless of the difference of the methods used for production, both imported and “like” domestic products are still considered alike as viewed by the WTO law.

It is obvious how governments and their pursuit of establishing provisions such as environmental policies are also hindered given the instability and inconsistency of the rules and regulations under the WTO law in view of non-product related production and process methods. It is a fact that governments may be allowed to differentiate products and the methods used for production; that is, for as long as “they do not give less favourable treatment to imported relative to domestic products”; however, more related issues are bound to arise as various non-product related measures may be continuously imposed due to incompatibility of regulations with respect to production.

The absence of a unified international treatment on non-product related PPMs in the determination of “likeness” among products continue to promote uncertainties as methods of production are regarded inseparable to the products’ physical aspects. The cases presented above are only some of the many scenarios where in products, despite the differences in the manner they were produced and despite the risks (e.g. environmental etc.) involved, are considered alike and are continuously tolerated for the sake of trade.

\(^{32}\) Wolf, M.; “What the world needs from the multilateral trading system”; Cited in The Role of the World Trade Organization in Global Governance by G. Sampson; United Nations University Press; 2001

\(^{33}\) Potts, Jason; “The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy”; International Institute for Sustainable Development; Winnipeg, Manitoba Canada; 2008
While the issue of likeness is pending, PPMs can be justified in terms of exceptions. Thus, specific fishing methods supporting conservation may be imposed on the basis of Article XX(g) GATT as a condition of importation of the product itself. PPMs adopted in the context of climate change mitigation are therefore not excluded under GATT even though PPMs cannot serve as a foundation for discriminatory treatment under Article III of the GATT. 34

II. Verification of environment-friendly production methods

Assuming that the country will be able to justify its PPM-based trade measures, another issue arises with regard to monitoring or utilized PPMs and implementing PPM-based policies. PPMs in effect result in the extraterritorial reach of domestic production standards, as foreign producers are required to comply in order to obtain import clearances for their products. 35

Environmental labelling is increasingly used as an instrument of climate protection. 36 However both mandatory and voluntary labelling schemes risk contravening WTO law, especially if they are based on non-product related PPMs. 37 Alternative to labelling is tailoring of existing quality assurance methods and the experience of international standards, such as ISO.

ISO technical committee ISO/TC 207, Environmental management, is responsible for developing and maintaining the ISO 14000 family of standards. The committee’s current portfolio consists of 21 published International Standards and other types of normative document, with another nine new or revised documents in preparation.

ISO/TC 207 was established in 1993, as a result of ISO’s commitment to respond to the complex challenge of “sustainable development” articulated at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.

Published documents and ongoing work of ISO/TC 207 address the following areas: Environmental management systems, Environmental auditing and related environmental investigations, Environmental performance evaluation, Environmental labelling, Life cycle assessment, Environmental communication, Environmental aspects of product design and development, Environmental aspects in product standards, Terms and definitions, Greenhouse gas management and related activities, Measuring the carbon footprint of products.

Environmental audits are important tools for assessing whether an environmental management system is properly implemented and maintained. The auditing standard, ISO 19011, is equally useful for EMS and quality management system audits. It provides guidance on principles of auditing, managing audit programmes, the conduct of audits and on the competence of auditors. Such an audit can be implemented to verify climate-friendly production methods.

The ISO 14020 series of standards addresses a range of different approaches to environmental labels and declarations, including eco-labels (seals of approval), self-

34 Thomas Cottier and Matthias Oesch, Direct and Indirect Discrimination in WTO Law and EU Law, NCCR Working Paper No 2011/16, April 2011
35 Ibid.
36 For a list of countries and measures see the database of the International Energy Agency (http://iea.org/textbase/pm/grindex.aspx)
declared environmental claims, and quantified environmental information about products and services.

ISO 14001 addresses not only the environmental aspects of an organization’s processes, but also those of its products and services. Therefore ISO/TC 207 has developed additional tools to assist in addressing such aspects. Life-cycle assessment (LCA) is a tool for identifying and evaluating the environmental aspects of products and services from the “cradle to the grave”: from the extraction of resource inputs to the eventual disposal of the product or its waste.

ISO 14045 will provide principles and requirements for eco-efficiency assessment. Eco-efficiency relates environmental performance to value created. The standard will establish an internationally standardized methodological framework for eco-efficiency assessment, thus supporting a comprehensive, understandable and transparent presentation of eco-efficiency measures.

ISO 14051 will provide guidelines for general principles and framework of material flow cost accounting (MFCA). MFCA is a management tool to promote effective resource utilization, mainly in manufacturing and distribution processes, in order to reduce the relative consumption of resources and material costs.

MFCA measures the flow and stock of materials and energy within an organization based on physical unit (weight, capacity, volume and so on) and evaluates them according to manufacturing costs, a factor which is generally overlooked by conventional cost accounting. MFCA is one of the major tools of environmental management accounting (EMA) and is oriented to internal use within an organization.

ISO 14064 parts 1, 2 and 3 are international greenhouse gas (GHG) accounting and verification standards which provide a set of clear and verifiable requirements to support organizations and proponents of GHG emission reduction projects.

ISO 14067 on the carbon footprint of products will provide requirements for the quantification and communication of greenhouse gases (GHGs) associated with products. The purpose of each part will be to: quantify the carbon footprint (Part 1); and harmonize methodologies for communicating the carbon footprint information and also provide guidance for this communication (Part 2).

ISO 14069 will provide guidance for organizations to calculate the carbon footprint of their products, services and supply chain.
Bibliography


Charnovitz, Steve; “The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality”; Yale Journal of International Law; 2002

Conrad, Christiane R.; “The status of measures linked to non-physical aspects and processes and production methods (PPMs) in WTO law: A contribution to the debate on the impact of WTO law on national regulation pursuing social goals”: Dissertation; 2008

Cossy, Mireille; “Determining likeness under the GATS: Squaring the circle?”; World Trade Organization, Economic Research and Statistics Division: Manuscript; 2006


Low, Patrick, Marceau, Gabrielle & Reinaud, Julia; “The interface between the trade and climate change regimes: Scoping the issue”; The Graduate Institute, Center for Trade and Economic Integration, Geneva; 2010

Pauwelyn, Joost; “U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law”; Nicholas Institute for Environmental Policy Solutions; Duke University; 2007

Potts, Jason; “The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy” ; International Institute for Sustainable Development; Winnipeg, Manitoba Canada; 2008

Sutherland, P., Sewell, J. & Weiner, D.; “Challenges facing the WTO and policies to
address global governance”; Cited in The Role of the World Trade Organization in Global Governance by G. Sampson; United Nations University Press; 2001

Wolf, M.; “What the world needs from the multilateral trading system”; Cited in The Role of the World Trade Organization in Global Governance by G. Sampson; United Nations University Press; 2001

Zleptnig, Stefan; “Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements”; Martinus Nijhoff Publishers; Leiden, Boston; 2010


“United States – Import Prohibition of Certain Shrimp and Shrimp Products”: GATT Dispute (www.wto.org)