

GLOBAL HEALTH GOVERNANCE IN THE WTO: A PRELIMINARY ASSESSMENT OF THE APPELLATE BODY'S INTERPRETATION OF THE SPS AGREEMENT AND THE LEGITIMACY OF SPS MEASURES

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ABSTRACT

Global governance is a contested concept and global health governance no less so (Finkelstein, 1995). Notwithstanding the ambiguity of the concept, there are common features that point to some level of shared understanding of the concept and its referents. Though not exhaustive of the applicable definition of global governance, the term doubtless involves governance of a variety of issue areas, while global health governance may be limited to the issue of health protection. And, while not the only or final word on the concept, regime theory scholars regard global governance as consisting of the establishment and operation of social institutions to resolve collective action problems.(Young 1990). Adopting this conceptual framework situates World Trade Organization (WTO) within the zone of an appropriate site for evaluating the issue of global health governance.

The WTO not only addresses issues of sustainable development that implicate health protection, but also the interpretation of specific agreements that require mediation of competing norms across issue areas that include health protection. The Appellate Body's interpretation of the Agreement on Sanitary and Phyto-sanitary Measures offers but one

example of the WTO's attempt at mediating between competing norms of health protection and trade liberalization. With respect to its interpretation of this agreement, but also of, Article XX (b) of GATT 1994¹, the claim has been made that health protection has assumed the status of an interpretive principle. If the AB's interpretation is to be so characterized, this has implications for the WTO as a site for global health governance if one of the referents of global health governance is taken to be the contracting out of sovereignty by states for resolving collective action problems. This is because health protection as an interpretive principle has the effect of re-transferring or returning the sovereignty originally contracted out by privileging domestic regulatory autonomy in the application of SPS measures.

This paper is an attempt at exploring the issue of the extent to which the WTO may be regarded as a site for global health governance given the claim that health protection is claimed to be an interpretive principle privileging domestic regulatory autonomy, with the implication that health protection is now largely within the domain of states.

I argue that the Appellate Body's interpretation of the Agreement on Sanitary and Phyto-Sanitary Measures (SPSA) and Article XX (b) of GATT 1994 as regards *necessary* sanitary and phyto-sanitary measures provides little support for the position that health protection has assumed the status of an interpretive principle, and the corollary implication of the WTO not being a site for global health governance. This is largely

¹ Article XX(b) of GATT 1994 concerns measures adopted that are necessary to protect human, animal or plant life or health and is addressed in this paper because the SPSA represents an elaboration of the rules for application of measures adopted under Article XX(b) of GATT 1994, in accordance with the preamble of the SPSA.

attributable to the different criteria to be met under the necessity tests under both provisions, and under GATT Article XXIV with respect to free trade agreements demonstrates the challenge that will accompany the design and application of SPS measures to pass muster under GATT and under RTA provisions that must be consistent with GATT.

INTRODUCTION

As the focus of health governance, health protection has loomed large as a value worthy of deference by the WTO that has prompted the claim that it has now assumed the status of an interpretive principle in the interpretation of trade agreements. By this is meant that protection for health as an interpretive principle is given substantial weight to allow WTO Members significant discretion in the application of measures for health governance.

The claim that health protection is an interpretive principle has implications for the WTO as a site of global health governance because it presumes the trumping of global governance by domestic regulatory autonomy. The following paper does not seek to examine this claim with respect to every agreement within the WTO's mandate that may implicate the principle of health protection.

Rather, I argue that the Appellate Body's interpretation of the Agreement on Sanitary and Phyto-Sanitary Measures (SPSA) and Article XX (b) of GATT 1994 as regards *necessary* sanitary and phyto-sanitary measures provides little support for this position, that is,

health protection as an interpretive principle.. The different criteria to be met under the necessity tests under both provisions, and under GATT Article XXIV with respect to free trade agreements demonstrates the challenge that will accompany the design and application of SPS measures to pass muster under GATT and under RTA provisions that must be consistent with GATT, and by extension, the diminution of regulatory autonomy in the design and application of SPS measures. On this view, the WTO may properly be seen as a site for global health governance, especially because in resolving these questions it is mediating between competing norms of health protection and trade liberalization that are global in scope and effect.

Health protection as an interpretive principle: what does or should this mean?

The view has been expressed that health protection is an interpretive principle because of substantial deference given to WTO Member's trade restrictions under GATT Article XX (b), and AB's interpretation of the SPSA. Necessary SPS measures under GATT Article XX (b) must be based on scientific evidence of health risk but this evidence need not based on majority scientific opinion.² This position is seen as one embracing the precautionary principle and tending toward 'less onerous standards of proof and review for trade restraints when health is at stake'.³

² *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 155 (5 April, 2001).

³ M. Gregg Bloche, *WTO Deference to National Health Policy: Toward an Interpretive Principle*, *Journal of International Economic Law* , vol. 2002, 825-845, at p. 833.

One may examine the implications of this position by asking whether the principles of interpretation as set out in the Vienna Convention on the Law of Treaties 1969 (hereafter VCLT) and endorsed by the AB are invoked alongside or in competition with health protection as an interpretive principle in the resolution of trade disputes that implicate measures for health protection. Or the enquiry may be whether other principles of interpretation are subordinated to health protection as an interpretive principle. On the other hand, the concept gains little in our understanding of how trade disputes are resolved where there are health implications if that principle has no overarching importance to resolve disputes relative to other principles.

Additionally, the enquiry may be whether what is regarded as an interpretive principle is in essence the invocation of a substantive rule with one possible implication being that it may not matter much for this characterization of the AB's jurisprudence on the legitimacy of health measures if other substantive rules in the agreements examined take precedence to health protection.

The approach taken throughout this paper is to examine the claim of health protection as an interpretive principle from the perspective of health protection as a substantive rule that competes with substantive rules favouring trade liberalization. Specifically it is argued that the requirement that SPS measures be more trade restrictive than necessary takes precedence to a WTO Member's right to determine its appropriate level of protection and to set SPS measures accordingly. This requirement to meet a necessity test for SPS measures is reflected in the SPSA, and GATT 1994 with respect to Article

XX(b), and also Article XXIV with regard to SPS measures in RTAs. This expansive jurisdiction to determine the legitimacy of SPS measures demonstrates the diminution of regulatory autonomy consistent with the WTO's characterization as an institution of global health governance.

As shown above, the view of health protection as an interpretive principle rests on two primary claims (1) that it shows the WTO's adoption of the precautionary principle in interpreting trade agreements involving WTO Members' rights to apply SPS measures, and (2) that there is a high degree of deference to WTO Members because of a less onerous standard of review in determining the legality of SPS measures. These claims are however questionable in light of the Appellate Body's jurisprudence, suggesting instead that health protection, though a substantive right to be respected, does not automatically take precedence to other substantive rights that generally fall under the rubric of trade liberalization.

With respect to the precautionary principle, the AB has adopted a nuanced approach, treating it as not a part of customary international law, though recognizing that it is given expression in the SPSA. Thus in *EC-Hormones*⁴, the AB stated that:

'The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having been crystallized into a general principle of customary international environmental law. Whether it has been accepted by Members as

⁴ European Communities-Measures Affecting Meat and Meat Products (Hormones), WT/DS26//AB/R.

a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important but abstract question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation'.⁵

And, with regard to the relationship between the precautionary principle and the SPSA, the Appellate Body noted that the principle is reflected in the preamble of the SPSA, Article 5.7, Article 3.3, in terms of recognizing a WTO Member's right to set their own appropriate level of sanitary protection, but that precautionary principle:

' does not by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement'.⁶

Given that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) reflect customary international law regarding principles of interpretation, it is significant that the Appellate Body has observed that the precautionary principle is not yet recognized either as a principle of customary international law or is not a principle that forecloses or takes precedence to the application of the principles of customary

⁵ Appellate Body Report, para. 123.

⁶ Appellate Body Report, para. 124.

international law with respect to treaty interpretation. The implication here therefore is that health protection as an interpretive principle, to the extent that that claim is premised on the acceptance of the precautionary principle, is not legitimized by the AB as an interpretive principle of itself.

That the AB's view on the standard of review for SPS measures is expressed to be no different than what exists of reviewing other domestic measures is also significant as a premised claim on the view that health protection is an interpretive principle. For SPS measures the AB has stated, for example, that the standard of review is neither *de novo* nor total deference.⁷ The total deference standard seeks to determine if a domestic measure was arrived at consistent with the requisite procedural fairness while *de novo* suggests a total review of the facts on which the measure was based (Becroft, 2006). For SPS measures the slant of the AB seems to be more in favour of a *de facto de novo* review, despite its position that WTO Members can set their own appropriate level of protection. Thus, setting the appropriate level of protection as one consistent with a zero risk policy does not absolve a panel of its responsibility from making an objective assessment of the facts to justify a zero risk policy. Here, a panel's enquiry would not be to substitute its own judgment for that of the domestic authority in the sense of determining whether the evidence supporting the SPS measure is such as would permit it to arrive at the same conclusion as that of the domestic authority. Rather, the enquiry, whose effect may be same as a *de jure de novo* review, is whether the evidence is enough for the domestic authority to arrive at its conclusion.

⁷ Appellate Body Report, para 110-119.

Exploring health governance

Discussions of global health governance have generally centred on institutions typically associated with health issues or on actors and non-state actors that contribute to agenda setting, norm-formation and enforcement.

Although few may regard any one transnational institution as embodying the constitutive elements of global governance in a particular issue arena, some attempt has been made to locate global governance within an institutional setting as is done by regime theory. This approach commends itself, despite its arguably narrow focus, to the extent that the institution commands global reach in its impact on states and a wide ranging issue coverage involving a complex interplay of norms that do not necessarily privilege one set over another.

I argue that the World Trade Organization is one such institution notwithstanding its characterization by many scholars as a trade institution or one devoted to free trade primarily. The WTO may also be characterized as a development institution not only if we regard its neo-liberal principles as not an end in itself, but also if there is an examination of the complex interplay of the several principles that permeate the text of the various agreements. Here, development is taken to embrace a multi-faceted understanding that includes sustainable development and health protection.

Below I examine the Appellate Body's interpretation of the SPS Agreement as an instance of global health governance. I argue that the interpretation of the SPS Agreement represents an attempt to demarcate the boundaries of domestic governance and global governance of health issues, but that the AB's interpretation of the SPS Agreement does not indicate any easily applicable consistent principle on which to separate the appropriate zone of domestic policy formulation and regulation and global governance of health issues, using the WTO as a site for global governance of such issues.

Why treat the WTO as a site for global governance of health issues?

The concept of global governance may be taken to refer to those rules, and behavioural norms that govern conduct in particular issue areas beyond the geographic domain of states. The rules and norms may emanate from states though often following a process of active contestation by domestic constituents as to which of several contending views should prevail or the extent of the concessions to be made among contending views to govern particular issues. The development and formulation of the rules governing conduct and the resultant behavioural norms are not ends in and of themselves but represent a process for issue-grappling both respect to the conduct required but also of the appropriate institutional setting for determining if and when conduct is in accordance with the agreed upon rules.

The institutional setting may be formal (as in the instance of formal adjudicatory bodies) or informal (as in the instance of non-state actors) and the rules may be binding or non-binding. The distinction between the formal and informal is however admittedly arbitrary since agenda setting, norm creation, and enforcement involves a complex interplay of several actors that some scholars have labeled as multi-nodes of governance (Rosenau, 1995). On this view, multi-nodes of governance is inclusive of governance in a formal institutional setting since the rules enforced therein are not derivative of any single actor.

Implicit in this understanding of global governance is that the role of non-state actors in agenda setting, norm creation and enforcement is not mutually exclusive from the role played by other actors, including the state, in the creation of norms embodied in the formal institutional setting to govern particular issue areas. Global health governance therefore may be taken to refer to rules and behavioural norms that govern various aspects of health protection and includes the roles played by both state and non-state actors in the formulation and enforcement of those rules.

The WTO's role as a global governance institution includes the fact that it mediates between competing norms of trade liberalization and other norms reflecting a value for domestic regulatory autonomy. This mediation function may be said to represent a contracting out of sovereignty to address collective action challenges that are beyond the capacity of any one state.

By contrast, the view that the WTO's interpretation of trade agreements demonstrates that health protection is an interpretive principle suggests that domestic regulatory autonomy has been returned to states to resolve hitherto conceived collective action challenges. In what follows below I argue that that the WTO's interpretation of the SPSA and GATT Article XX(b), that is also related to SPS measures, privileges other substantive rules over and above health protection as an interpretive principle or substantive rule, thereby retaining jurisdiction in the design and application of SPS measures that results in a diminution of regulatory autonomy over these matters. This is particularly the case regarding the necessity test that must be met for justification of SPS measures under Article XX(b) of GATT 1994 and the SPSA.

The requirement for meeting the necessity test can be exemplified by exploring the relationship between the SPSA and Article XX of GATT 1994, the object of the measure in terms of meeting the desired appropriate level of protection, and SPS measures under the SPSA and regional trade agreements, which are addressed below.

Relationship between the SPS Agreement and Article XX of GATT 1994

Under Article XX a scientific justification for the measure should be demonstrated. This is taken to mean that there must be sufficient evidence that there is a risk to human life or health and that the measures taken are necessary in relation to the objects pursued.

The SPSA also requires a scientific justification of the measure. Article 2.2 of the SPSA states that there should be sufficient scientific evidence of the risk to be addressed.⁸ This requirement is satisfied if there is a ‘rational or objective’ relationship between the SPS measure and the scientific evidence, and the rational or objective relationship requirement is met depending on the characteristics of the measure at issue and the quality and quantity of the scientific evidence.⁹

The quality of the scientific evidence relates not only to the nature of the evidence provided, but also to who has provided that evidence. Quality therefore would include questions such as whether the methodology employed for the conclusions arrived at is acceptable within the scientific community, but also the credentials of those preparing the scientific report that provides the evidence of risk.

Regarding the quantity of the evidence of risk there is no minimum threshold established by the AB, provided that the evidence is from a ‘qualified and respected’ source. The AB has stated in *EC-Asbestos*¹⁰ that with respect to the evidence to be provided there need not be any quantification of the risk. The risk may be evaluated in quantitative or qualitative terms, and the justification of the measure, at least under Article XX (b) of GATT 1994, may be achieved when the WTO Member relies:

⁸ Article 2.2 of the SPSA states that: *Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.*

⁹ Appellate Body Report, *Japan-Agricultural Products II*, para. 84

¹⁰ *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R.

*in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX (b) of the GATT 1994 on the basis of the preponderant weight of the evidence.*¹¹

Thus a distinction is made between sufficient evidence of risk and the quantification of the risk. Previous statements by the AB, however, indicate that this distinction is not altogether tenable. In *EC-Hormones* the AB in interpreting the requirements of Article 5.1 of SPSA held that a risk assessment needs no minimum quantitative threshold or level of risk provided it goes beyond establishing a theoretical uncertainty and entails an actual empirical enquiry into the existence of risk. How this empirical enquiry can be conducted without some quantification of the risk is not explained. Moreover, if in examining the quality of the evidence about claims of the probability of risk it is found that the methodology grounding those claims is faulty, it seems unlikely that the AB would disregard that aspect of the scientific report on which the measure is based on the basis that it can disregard evidence of quantification.

On this view, therefore, the quality of the report, if based on evidence of quantification of the risk, would be affected by the use of an erroneous methodology for quantification. In some instances therefore quantification of the risk and the quality of the evidence of risk are intertwined.

¹¹ Ibid, at para. 178.

Nonetheless the AB has also maintained, apparently consistent with the view that quantification of the risk is unnecessary, that a WTO Member may set the appropriate level of risk to be regulated as zero risk. But a measure based on a zero risk policy must be justified on the basis of what risk would ensue without the measure put in place to address that risk, and to that extent would seem to involve some quantification of the risk.

It is useful to compare the AB's interpretation of other agreements to indicate the difficulty of applying this distinction between quantitative and qualitative regarding the evidence of risk required to justify an SPS measure.

In its interpretation of the General Agreement on Trade in Services (GATS) the AB has held zero as connoting quantification and denoting a numerical value. In *US-Measures Affecting the Cross-Border Supply of Gambling and Betting*, the AB in interpreting Article XVI of GATS on whether the prohibition on the means of delivery of a service amounts to a limitation on the number of service suppliers in the form of numerical quotas(i.e. whether the banning of cross-border supply of gambling services is a numerical quota on the supply of that service) held that 'limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI: 2(a)'.¹²

MEASURES TO BE NECESSARY IN RELATION TO THE OBJECTS PURSUED

¹² Appellate Body Report, para. 238.

The significance of the necessity test for SPS measures may also be examined by a comparison of Articles 5.6 and Article XX of GATT 1994. Both Article 5.6 of the SPSA and Article XX of GATT 1994 bear a close relationship in terms of the requirement of a balancing between the health measure and its likely effect on trade. Second, both provisions stipulate similar conditions for the balancing of the competing norms of health governance and trade liberalization implicated, although Article XX's interpretation by the AB (in particular Article XX(b)) provides a more nuanced approach to the balancing of these competing norms.

Article 5.6 of the SPSA requires that a Member's SPS measure be no more trade restrictive than necessary in order to achieve its appropriate level of protection. In *Australia-Salmon*,¹³ the AB set out three conditions to be met for there to be a breach of this provision. These are (1) there is an SPS measure that is reasonably available taking into account technical and economic feasibility (2) achieves the Member's appropriate level of sanitary or phytosanitary protection and (3) is significantly less restrictive to trade than the SPS measure contested. The AB indicated that these conditions are cumulative so that if any one of these conditions is not met, the measure in dispute would not be in breach of Article 5.6.¹⁴

Article XX of GATT 1994 provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

¹³ *Australia-Measures Affecting the Importation of Salmon*, WT/DS18/AB/R.

¹⁴ *Ibid.*, para. 194.

between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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

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

A comparison of both provisions requires the meeting of a necessity test for the health measure implemented. Article 5.6 requires that there is no alternative measure in place that is significantly less trade restrictive than the contested measure, and Article XX of GATT requires that the measure be necessary in the sense that there is no less trade restrictive measure in place.

The AB's interpretation of Article XX (b) has benefited from some measure of refinement that has not been extended to its interpretation of Article 5.6 of the SPSA. It has held in *Korea – Beef*¹⁵ that necessary does not necessarily mean indispensable, thereby allowing for a measure that is not the *only* measure that could have addressed the risk posed. Where the measure is not indispensable the AB balances a number of factors to achieve the appropriate balance between the competing norms of health governance and trade liberalization. These are (1) the contribution made by the compliance measure to the enforcement of the law or regulation at issue (2) the importance of the common

¹⁵ *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R.

interests or values protected by that law or regulation, and (3) the accompanying impact of the law or regulation on imports or exports.¹⁶

But the AB has also gone farther in holding that even where the measure is claimed to be indispensable some balancing of factors may be required in the analysis to determine if the measure is indispensable. Thus, it has held that the importance of the values and interests at stake is to be used to determine if a measure is indispensable to address the health risk posed.¹⁷ This holding may, in some instances, be at variance with that stating that a Member may determine what level of risk it wishes to regulate and to ensure that the measure chosen to regulate that risk is such as to eliminate the risk, if, for example, a zero risk is the level of protection chosen.

The importance of the value may be assessed in relation to competing values or to competing notions of health protection within the generally accepted importance given to values relating to promotion of health. How the AB is to be the arbiter of either of these notions for the weighing of the values at stake is questionable, and what evidence it must rely on for that purpose beyond the assertion of the Member imposing the measure is less certain.

That a Member may choose to eliminate a risk does not mean that the values or interests justifying the measure trump other values in the hierarchy of importance of competing values and interests if the importance of the values at stake is to be weighed by this standard. Applying this standard may therefore mean that the banning of imports of a product posing health risks may not be justified on the basis that the values pursued are

¹⁶ Ibid. ;para. 164.

¹⁷ Appellate Body Report, *EC-Asbestos*.

not sufficiently important notwithstanding that a Member is free to choose its appropriate level of protection.

Despite the similar requirement for necessity under Article 5.6 of SPSA and Article XX(b) of GATT 1994, there is some notable difference in the application of the standard under both agreements. Conceivably, Article 5.6 includes measures that are not indispensable by virtue of the fact that a measure may be justified if it is not significantly more trade restrictive than a reasonably available alternative. Consequently, if the alternative measure is merely less trade restrictive the challenged measure may still meet the requirements of Article 5.6, but without the balancing requirement for the necessity standard under Article XX(b) of GATT 1994.

The disconnect in the jurisprudence on the necessity standard under both agreements may be justified on the basis that the SPSA is a more specific agreement to address measures to protect health and that the SPSA is designed to provide a less onerous route for the justification of health measures in the form of an SPS measure. The difference in the requirements for justification of measures under Article XX (b) and Article 5.6 of the SPSA seems to support this argument. The Chapeau to Article XX of GATT 1994 requires, as the AB clarified in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*,¹⁸ that a Member imposing a measure pursuant to Article XX discharges its duty to negotiate a bilateral or multilateral outcome to resolve the dispute prior to an embargo against another Member's exports. Although the decision relates to the interpretation of Article XX (g) and not Article XX(b) of GATT 1994, it has general application for the interpretation of other Article XX exceptions to GATT for as the AB

¹⁸ *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

further clarified ‘ any appraisal of justifiable or unjustifiable discrimination’ requires an examination of whether the Member imposing the measure in the form of an embargo has engaged Members who may be affected in concluding a bilateral or multilateral solution.

The ‘justifiable or unjustifiable discrimination’ standard is contained in the *Chapeau* that the AB has clarified to require interpretation for GATT consistency of any exception measure taken under Article XX even if they initially meet the necessity or other test under that provision.¹⁹

This duty is a duty to negotiate and not necessarily to conclude a bilateral or multilateral agreement. Further, this duty arises in the context of discrimination in the design or application of the measure between countries where the same conditions prevail. In this respect, there is some level of difference between the requirements of the necessity test under Article 5.6 of the SPSA and Article XX, (i.e. the duty to negotiate being contingent on the discriminatory aspects of a measure) although an SPS measure designed to achieve a zero risk in the banning of imports may be applied discriminatorily under the SPSA, but without the duty of the Member imposing the measure to negotiate a treaty solution. Separating the requirements of the Chapeau from the necessity test under Article XX confirms the additional requirements for an SPS measure applied under that exception.

It is interesting to note, however, that an SPS measure may pass muster under the necessity test of the SPSA and fail that test under Article XX of GATT 1994. That is, in the one case there is no balancing of factors for the measure to be justified if it is not

¹⁹ Ibid, para. 147.

indispensable while in the other a balancing is required for the justification of the measure as necessary where the measure is not indispensable.

There is no apparent justification in principle for the difference in the AB's approach on the necessity standard under both provisions. It may be argued that there is no need to harmonize the jurisprudence on both provisions (with respect to the necessity standard) because both provisions focus on different issues, one (Article XX of GATT 1994) addressing general exceptions under GATT and the other (Article 5.6n of SPSA) addressing specific measures under a specific agreement.

This position is less than convincing because the AB has opined that the WTO Agreement must be read and interpreted as a whole. Indeed, claimants often plead a breach of several agreements in a dispute. It would not be unusual therefore for a Member to claim that an SPS measure is in breach of the SPSA and of another provision of GATT 1994 that would require the respondent Member to plead Article XX(b) as a defence. In this regard, the AB has stated that no one agreement takes precedence over the other. This means that where Article XX is claimed as a defence to an SPS measure the SPS measure would ultimately have to be justified under the more stringent of the two separate criteria for justification of such measures.

Relationship between the SPS Agreement and SPS measures undertaken under RTAs

Article XXIV of GATT 1994 governs the formation of RTAs. SPS measures are usually an important component of the rules within an RTA, but their inclusion present several

interpretive issues. An SPS measure implemented within an RTA may be the result of a mutual recognition agreement as between the members of the RTA, or there could also be mutual recognition agreements between the RTA members collectively and some countries outside of the RTA. GATT inconsistent SPS measures have to meet a necessity test under Article XXIV to be justified. This requires that the measure be put in place on the formation of the customs union (CU) or free trade area (FTA) and the measure is necessary for the formation of the CU or FTA, that is the CU or FTA could not have been formed but for the SPS measure. It is unclear whether the SPS provision in an RTA if stated to require consistency with GATT obligations would therefore mean that the FTA never intended a GATT inconsistent SPS measure to be a necessary condition for the formation of the CU or FTA. That means that the discriminatory application of An SPS measure, whether *de facto* or *de jure*, would not meet the necessity test under Article XXIV of GATT 1994.

The necessity test under Article XXIV, like that under Article XX (b) of GATT 1994 and Article 2.2 and 5.6 of the SPSA are designed to balance trade liberalization against legitimate domestic regulatory policy goals of health protection. However, the criteria to be met for each when compared to the other are substantially different thereby resulting in uncertainty in the appropriate design of domestic policy instruments to demarcate the margin of appreciation for domestic regulatory autonomy.

Under Article XXIV, the balancing between the two objectives of liberalization and health protection requires that the SPS measure, if regarded as ‘other regulations of

commerce' pursuant to Article XXIV: 5, be no not higher or more restrictive 'than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area...'²⁰ Internal MRAs that, on the whole, raise the level of, or require more stringent criteria than, what existed before the formation of the RTA may conflict with this requirement. By contrast, MRAs, that on the whole provide qualitatively lower SPS measures to accommodate integration efforts within the RTA, meet the requirements of Article XXIV:5, but possibly run afoul of the MFN requirement under Article XXIV:5 with respect to MRAs between the RTA and Members external to the RTA, if there is no consistency in the qualitative level of the SPS measure extended to Members external to the RTA. In other words, qualitatively lower SPS measures would also have to be extended to non-RTA Members, even though the RTA Members may be handicapped in terms of their entry into markets with higher SPS standards.

Negotiation of MRAs with provisions requiring qualitatively higher SPS measures than exists within the RTA, to ensure that the RTA Members are not any more disadvantaged in market access to non-RTA Member markets than those non-RTA Members would be with respect to the market of the RTA, would also run counter to the national treatment obligation in Article XXIV:5. It could then be argued that the application of a qualitatively higher SPS measure for imports into the RTA than for intra-RTA trade is not necessary under Article 2.2 of the SPSA because of the existence of a less trade restrictive alternative. Here, a violation of the national treatment obligation under Article

²⁰ Article XXIV: 5 of GATT 1994.

XXIV:5's necessity test merges with the necessity requirement under Article 2.2 of the SPSA.

Similarly, concluding MRAs with Members external to the RTA that provide for qualitatively different levels of SPS measures among these Members would also be potentially inconsistent with the MFN requirement and would pose a challenge to meeting the necessity test under Article XXIV:5 (because the RTA does not require these to be in existence), and possibly that under Article 2.2 and 5.6 of the SPSA (because of the availability of a less trade restrictive alternative).

Relationship between Article XX(b), Article XXIV and the SPSA

Article 4 of the SPSA provides for MRAs to be concluded even if the SPS measure of the importing and exporting Member is different, provided that the exporting Members SPS measure satisfies the importing Members SPS protection. It is useful to state the Article 4 provision, which is as follows:

4.1 Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

4.2 Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Article 4.1 apparently mandates that there be an agreement while Article 4.2 is confined to a best efforts approach to an agreement, although it appears from the words ‘with the aim of’ that negotiations are to be conducted in good faith. Alternatively, Article 4.1 may be interpreted as not requiring an agreement, but establishing a legal obligation for mutual recognition of SPS measures that achieves an importing Member’s appropriate SPS level. If the latter approach is adopted, this obligation to accept different SPS measures seems to run against the less obligatory ‘best efforts’ approach under Article 4.2. This is so because an agreement that may, *but not must*, possibly result from consultations mandated under Article 4.1 would presumably arise if the exporting Member’s SPS measure achieves the importing Member’s appropriate SPS level of protection. There may, of course, be other scenarios but it is difficult to envisage an agreement that permits imports from a Member with different SPS measure unless the importing Member’s SPS level is satisfied.

The relationship between these two provisions has not yet been articulated by the WTO jurisprudence but Article 4.1 is consistent with the requirements of the necessity test under Article XX(b) of GATT 1994. That is, there is no obligation to conclude an

agreement that could have resulted in a less trade restrictive alternative to the SPS measure adopted as necessary.

There is however at least one respect in which the requirements under Article XX(b)'s necessity test may be different from Article 4.1 of the SPSA. While Article 4.2 requires that negotiations be conducted if a request made, there is some uncertainty as to whether this must be done under Article XX(b). In the *Shrimp* case the AB seemed to have required that a Member justifying its measure as necessary under Article XX, in circumstances where its measure would amount to the banning of imports, must seek to negotiate in good faith bilateral or multilateral agreements to provide a less trade restrictive alternative. On the other hand, in *US-Gambling*, the AB seems not to have endorsed this interpretive approach. Antigua argued, and the panel accepted, that in 'rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative'.²¹ The AB however rejected this position and held that a Member imposing a measure is not required to demonstrate that there are no reasonably available alternatives nor is it required to explore and exhaust alternative measures. Demonstration of a reasonably available WTO-consistent alternative is only required if the complaining Member raises an alternative.

This difference of approach, if further extended to necessary SPS measures under Article XX of GATT 1994, may suggest that WTO Members have significant leeway in the

²¹ *US-Gambling*, Panel Report, para. 6.531.

application of SPS measures consistent with the view that health protection is given a high premium as to constitute an interpretive principle. However, that the AB would most likely retain control over when and under what circumstances a reasonably alternative may be said to exist suggests that domestic regulatory autonomy is not enlarged.

Concluding remarks

Health governance is of central concern in the interplay between trade liberalization and appropriate standards for trade in goods. The SPSA is designed to play an important role in achieving a balance between these competing norms. However, the AB's interpretation of this agreement raises unresolved questions about when and under what circumstances liberalization will trump health standards. SPS measures must be necessary under SPSA, GATT Article XX (b), and Article XXIV with respect to RTAs where the SPS measure is inconsistent with GATT. That the necessity test under these provisions is not identical has implications not only for the appropriate design of domestic policy instruments to demarcate the margin of appreciation for domestic regulatory autonomy, but for SPS measures under RTAs.

The requirement for meeting the necessity test within the multilateral and regional framework for SPS measures indicates that far from health protection being an

interpretive principle as to override other substantive provisions within the SPSA thereby ensuring a greater degree of domestic regulatory autonomy, the necessity test is itself testimony to the importance of the WTO as an institution of global health governance to the extent that it mediates between competing norms of health protection and trade liberalization. This it does without any sufficiently clear guideline to demarcate the boundary between domestic regulatory autonomy and governance of these collective challenge issues at the global level.

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