NEW WTO ADJUDICATION AND ITS IMPLICATIONS FOR THE ENVIRONMENT

By Steve Charnovitz *

On May 20, 1996, the World Trade Organization (WTO) found that a U.S. government regulation on gasoline pollution violates trade rules. This case is significant for three reasons. First, as the initial dispute to come before the WTO and the initial appeal to come before its newly-created Appellate Body, this case shows the workability of the WTO's system of adjudication. Second, it demonstrates that trade rules can interfere with national regulatory policy-making. A more recent WTO decision involving Japanese taxes—discussed later in this commentary—manifests this same potential with respect to national tax policy-making. Third, this episode points to a new willingness by the administration of U.S. President Bill Clinton to yield to international rules.

On June 19, 1996, Charlene Barshefsky, the acting U.S. trade representative (USTR), announced that the U.S. government would meet its obligations regarding the WTO's decision. She characterized the decision as containing "a number of positive messages about WTO rules and protection of the environment."

Background of Dispute

The Clean Air Act Amendments of 1990 (P.L. 101-549 §219) directed the U.S. Environmental Protection Agency (EPA) to reduce harmful emissions from gasoline. In December 1993, EPA finalized new regulations (40 CFR Part 80). For "reformulated" gasoline, refiners, blenders, and importers must reduce emissions from a baseline level. For "conventional" gasoline, baseline level emissions must not be exceeded. Baselines are either "individual" (e.g., for a refinery) or "statutory." The statutory baseline is set by EPA to reflect average gasoline quality in the United States during 1990. Both baselines include multiple parameters.

Any domestic refiner operating for at least six months in 1990 is assigned its own individual baseline. The remaining domestic refiners and all importers are assigned the statutory baseline. Foreign refiners cannot qualify for individual baselines. No entity gets a choice of baselines.

Following complaints by Venezuela and Brazil regarding this regulation, the WTO established an investigatory panel. The panel's report was circulated to all WTO members on January 29, 1996, about nine months after the inquiry was launched. The panel ruled against the United States, finding that a key provision in EPA's gasoline regulation constituted a WTO violation. [1]

On February 21, USTR announced a limited appeal. The next day, the WTO Appellate Body selected three of its members to hear the appeal. They were: Christopher Beeby from New Zealand, Florentino Feliciano from the Philippines, and Mitsuo Matsushita from Japan. Beeby is a recently retired diplomat specializing in international economic affairs. Feliciano serves on the Supreme Court of the Philippines. Before being named to the court, he practiced corporate law. Matsushita is a professor of international economic law at Seikei University and professor emeritus at the University of Tokyo. According to the WTO treaty, Appellate Body members must have expertise in law and international trade. None of the biographies of Appellate Body members note any expertise in environmental law.

On April 22, the Appellate Body finalized its decision. [2] It reversed a key legal conclusion of the first-level panel but found the EPA regulation to be a WTO violation on other grounds. The process took 61 days, effectively meeting the target of 60 days set in the WTO Agreement.

The Appellate Body held two days of hearings closed to the public. The U.S. government as appellant and Venezuela and Brazil, as respondents, made statements and answered questions from Appellate Body members. The Appellate Body's opinion contains findings of fact and interpretations of law. Since no procedure for remand was available, the Appellate Body had to consider factual and legal points not examined by the first-level panel.

Before reaching the heart of the case, the Appellate Body considered a procedural issue. Brazil and Venezuela were arguing that the first-level panel erred in finding that clean air was an "exhaustible natural resource." Because these two countries had not formally lodged an appeal, the Appellate Body skirted this issue by ruling that it was not properly before them.

Panel's Decision

To provide context for understanding the report of the Appellate Body, it will be helpful to review the first-level panel's decision. The panel determined that the EPA regulation violates Article III:4 of the General Agreement on Tariffs and Trade (GATT). This article, known as "national treatment," provides that imports must be treated no less favorably than "like" products of domestic origin. Scrutiny under this article involves two questions: Are the foreign and domestic products at issue "like"? If so, is the foreign product treated less favorably than the domestic product?

The panel began with a determination that chemically identical imported and domestic gasoline were "like" products. Next, the panel held that the EPA regulation treats

[1] For a detailed summary and critique of the panel's report, see Steve Charnovitz, "The WTO Panel Decision on U.S. Clean Air Act Regulations," *International Environment Reporter*, March 6, 1996, p. 191. See also Cynthia M. Maas, "Should the WTO Expand GATT Article XX: An Analysis of United States-Standards for Reformulated and Conventional Gasoline," *Minnesota Jounral of Global Trade*, Summer 1996, p. 415. The panel report is reprinted in 35 *International Legal Materials* 274 (1996).

[2] "United States—Standards for Reformulated and Conventional Gasoline," Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, reprinted in 35 *ILM* 603 (1996).

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foreign gasoline less favorably because it is linked to the "characteristics of the producer and the nature of the data held by it." According to the panel, imports may only be regulated on the "objective basis of their likeness as products."

The panel's decision tightens Article III:4 beyond what GATT-approved panel reports have done. Nevertheless, the Clinton administration did not appeal this holding. Of course, this was not the best case to argue about the meaning of Article III:4 because EPA itself had recognized that its regulation was too fastidious. It was in the process of rewriting it when Congress called a halt in September 1994.

After finding a violation of Article III, the panel considered whether the EPA regulation qualified for any of the General Exceptions in the GATT. Article XX(b) permits measures "necessary" for the protection of human life or health. According to the panel, a measure can qualify as "necessary" only if no alternative exists which is "reasonably available" and "less inconsistent" with the GATT. The panel concluded that such an alternative was available to U.S. regulatory authorities. EPA could have given foreign refiners or importers an opportunity to establish individual baselines. The Clinton administration did not appeal this holding.

The panel also considered USTR's claim that the EPA regulation qualified for the exception in GATT Article XX(g). That exception embraces measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." In 1987, the Canada *Herring and Salmon* panel had held that qualifying measures had to be "primarily aimed at" rendering effective such restrictions. After declaring that clean air is an exhaustible natural resource, the *Gasoline* panel held that the unavailability of individual baselines for foreign refiners was not "primarily aimed at" the conservation of clean air. The panel found no "direct connection" between the less favorable treatment of foreign suppliers and U.S. environmental objectives.

Article XX(g)

The Appellate Body reverses the first-level panel's determination regarding Article XX(g). It agrees with USTR that the baseline methodology in the gasoline regulation is primarily aimed at the conservation of clean air. The Appellate Body also clarifies some interpretative issues regarding Article XX(g).

As critics of its report pointed out, the first-level panel seemed to be creating a new necessity test for Article XX(g) similar to what previous panels had created for Article XX(b). Rather than stating clearly why the EPA baseline methodology was not primarily aimed at cleaner air, the panel focused on the connection between the Article III infringement and U.S. conservation goals. The Appellate Body grasped this error quickly, saying: "In our view, the panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head."

The Appellate Body notes that all parties, including USTR, used a "primarily aimed at" test for Article XX(g), as articulated in previous panel reports. In one of the most interesting passages in their opinion, the Appellate Body points out that the "primarily aimed at" phrase "is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)." This statement may lead to a challenge to the "primarily aimed at" test the next time a conservation law comes under review.

After rejecting the analysis of the first-level panel, the Appellate Body considers whether the baseline methodology is primarily aimed at conservation. The Appellate Body reaches a conclusion by looking at the baseline methodology, not in isolation but in the context of the overall gasoline regulation. Noting that baselines of some kind are needed, the Appellate Body finds that EPA's methodology is more than "incidentally" aimed at conservation. Without describing its weighing technique, the Appellate Body determines that the relationship is sufficient for EPA's methodology to be judged "primarily" aimed at conservation.

The next issue involves the tail-end of Article XX(g). This is the requirement that qualifying measures be "made effective in conjunction with restrictions on domestic production or consumption." The first-level panel had not ruled on this matter.

Brazil and Venezuela argued that EPA's baseline methodology had to facilitate the effectiveness of domestic conservation. Venezuela went further. It argued that USTR must show that the baselines have a "positive conservation effect." Venezuela's argument was buttressed by decisions of three GATT panels that had pointed to ineffectiveness of a U.S. environmental law as a reason for finding Article XX(g) to be inapplicable.[3] None of these decisions were officially adopted by the GATT, however.

Citing a basic rule of treaty interpretation—namely, that words in a treaty are to be given their "ordinary" meaning—the Appellate Body rebuffs these arguments. In its view, Article XX(g) requires only that the baseline rules be promulgated or brought into effect together with domestic restrictions. On top of its syntactic point, the Appellate Body notes other reasons why an "empirical" effects test is inappropriate. One is the difficulty of determining causation. Another is the normal time lag between conservation measures and their intended effect.

Thus, under this new interpretation, Article XX(g) dictates only that regulatory measures be made operational in conjunction with restrictions on domestic production or consumption.[4] The test is whether there is "even-handedness." This rejection of an effectiveness test may be the most important holding of the Appellate Body.

Article XX 'Chapeau'

The exceptions in GATT Article XX are subject to a requirement that qualifying measures must not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or [be] a disguised restriction on international trade." This headnote has received little attention by GATT panels. The first-level panel did not discuss it.

The Appellate Body held that the EPA regulation violates the headnote. Since it calls the headnote a "chapeau," that term will be used in the remainder of this article. The Appellate Body decision marks the first time a trade panel has used the chapeau to rule that a national measure violates GATT rules.

Drawing on the negotiating history from the U.N. Conference on Trade and Employment of 1946–48, the Appellate Body notes that the purpose of the chapeau is to avoid abuse of the exceptions. This is a constructive use of treaty

[3] The three decisions are *Tuna-Dolphin* I §5.31, *Tuna-Dolphin* II §5.27, and *Auto-Taxes* §5.60.

[4] For criticism of this aspect of the Appellate Body's decision, see David Palmeter, "The WTO Appellate Body's First Decision," *Leiden Journal of International Law*, forthcoming November 1996.

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records. It should be noted, however, that some commentators have criticized GATT panels for paying too much attention to such negotiating history.

To avoid abuse, the Appellate Body suggests that measures under Article XX "must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned." It is unclear whether the Appellate Body intends this as a new balancing test for Article XX. It is also unclear what the panel means by the "legal rights" of the other parties concerned. The Appellate Body seems to be saying that the GATT accords substantive rights to exporting countries that stand outside of Article XX. But it is hard to reconcile such a view with the language of the GATT that makes Article XX a "General" Exception.

The Appellate Body assigns the burden of proof for the chapeau to the party invoking the exception. This constitutes a precedent because neither of the two GATT panels that focused on Article XX's chapeau made an explicit assignment of this burden. The Appellate Body did not give any reason for this decision. It is true that several panels have assigned the burden of proof to defending parties under the individual paragraphs of Article XX. But one can distinguish that from the burden of proof for the chapeau.

There has been a dearth of GATT case law interpreting the chapeau. Therefore, the Appellate Body breaks new ground in construing one of the key terms. In the 1982 U.S. *Tuna* case, a GATT panel found that the U.S. import ban was not a "disguised restriction" on international trade because it was "publicly announced" as an import ban. Implicitly criticizing this decision, the Appellate Body states that "concealed or unannounced" restrictions do not exhaust the meaning of this chapeau term. This reinterpretation fortifies the chapeau.

Another issue of interpretation is the meaning of "disguised restriction." The Appellate Body states that a "disguised restriction" on international trade "may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination." In effect, this intermixes key standards in the chapeau. The Appellate Body does not explain why it does this, except to suggest that similar factors could be considered in applying both standards.

Since the chapeau was not decisive in previous GATT adjudications, the Appellate Body had an opportunity to delineate its key terms. The Appellate Body does not seem to appreciate that the "disguised restriction" standard suggests a protectionist intent. By conflating "discrimination" with "disguised restriction," the Appellate Body would encourage the WTO to accuse a government of having an ulterior motive whenever there is a regulation deemed "unjustifiable" or "arbitrary" by a WTO panel.

USTR argued that different treatment for importers was justified by the difficulties of verifying and enforcing individual baselines in foreign countries. USTR also argued that if foreign refiners were permitted to establish individual baselines, they would be able to "game" the system by choosing the dirtier of an individual or statutory baseline. The Appellate Body admits that EPA's concerns "are doubtless real to some degree" but concludes that they do not justify the different treatment being applied. The Appellate Body points to "two omissions" by the United States that make its treatment of Venezuela and Brazil unjustifiable.

First, the Appellate Body states that the record of the case "does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States." The Appellate Body also declares that there is a "strong implication" that EPA has not pursued such cooperative arrangements. This is an odd statement by the Appellate Body since it had the opportunity to conduct a full inquiry during its two-day hearing. Before finding the U.S. government guilty of an omission, the Appellate Body should have accorded more due process to the United States.

It is unclear whether the Appellate Body is saying that governments invoking Article XX(g) have an obligation to pursue negotiations first. The Appellate Body offers no legal rationale for such an obligation. Nor does it discuss the negotiating history of Article XX(g), where a clause relating to international agreements was considered and dropped by the GATT's draftsmen. [5]

Requiring negotiations for utilizing Article XX would weaken all the exceptions within it. For example, the United States might not be able to ban imports of prison-made goods—as provided for in Article XX(e)—unless it negotiated verification procedures with China. The Appellate Body does not explain what happens if the exporting government refuses to negotiate or if negotiations deadlock.

The Appellate Body agreed with the first-level panel that EPA could have applied the same techniques to collect foreign data that are used by the U.S. Department of Commerce in administering anti-dumping laws. Since anti-dumping investigations are often criticized for their arbitrary methodology and protectionist bias, it is unclear why the Appellate Body wants environmental regulators to emulate such practices.

The second omission criticized by the Appellate Body is that EPA failed to "count the costs for foreign refiners that would result from the imposition of statutory baselines." The Appellate Body makes a factual determination that such costs went uncounted, but it is unclear on what evidence that is based. Moreover, the Appellate Body does not explain how regulators should count foreign costs. Does Article XX require that they be weighed equally with domestic costs?

The Appellate Body offers no explanation for why the United States has a legal obligation to take foreign costs into account. Would such an obligation exist if the treatment of foreign and domestic producers was neutral? The notion that the WTO requires governments to weigh the regulatory impact on foreigners is a novel one. It will be interesting to see if future panels require this for other environmental laws, such as a ban on elephant ivory or a pesticide residue restriction.

In view of these two omissions, the Appellate Body concludes that the EPA regulation is both "unjustifiable discrimination" and a "disguised restriction on international trade." The Appellate Body also points out that such discrimination "must have been foreseen, and was not merely inadvertent or unavoidable." It is unclear whether the Appellate Body is suggesting a new "unavoidability" test that would compare the alternatives available to EPA.

The Appellate Body does not appear to have considered whether "the same conditions prevail" between the United States, on the one hand, and Venezuela and Brazil, on the other. This overlooks a contention by USTR that the same conditions do not prevail. In addition, the Appellate Body does not directly address USTR's argument that the preven-

[5] Steve Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX," *Journal of World Trade*, October 1991, p. 45.

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tion of "gaming" qualifies as a justification under the Article XX chapeau.

In summary, this case marks the first use of the Article XX chapeau to rein in environmental measures. On the one hand, it is a positive development. Since the chapeau provides sufficient anti-protectionist discipline, there is no need to constrict Article XX(b) and (g) as previous panels have done. On the other hand, it is a potentially dangerous development. The Appellate Body creates new tests for the chapeau. The Appellate Body also uses the term "disguised restriction" in a loose way that impugns the motives of EPA. This gives credence to accusations that environmental measures are protectionism in disguise.

Other Issues

The Appellate Body follows the approach by recent panels of applying the Article XX chapeau last, after consideration of the specific requirements in paragraphs (b) and (g). There is no jurisprudential reason for this approach. A chapeau, or headnote, could logically be considered first. The initial GATT panels applying Article XX did so. Considering the chapeau first would put the panel's emphasis on whether the measure is arbitrary, unjustified, or disguised, which is where it should be. Evaluating environmental justifications through paragraphs (b) and (g) will always be treacherous ground for a trade panel.

Some commentators have raised the question of how deferential WTO panels should be to factual determinations by national regulatory agencies.[6] Neither the first-level panel nor the Appellate Body seemed to accord much deference to EPA's judgment as to the infeasibility of providing individual baselines to foreign refiners. It is interesting to note that the WTO treaty provides for a degree of deference regarding anti-dumping measures but fails to do so for environmental measures.

Finally, the WTO treaty states that panels may clarify provisions "in accordance with customary rules of interpretation of public international law." The Appellate Body uses the Vienna Convention on the Law of Treaties and cites decisions from the International Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights. Many legal scholars were pleased by these citations and pointed approvingly to the statement by the Appellate Body that the GATT "is not to be read in clinical isolation from public international law."[7] It should be noted, however, that the Appellate Body uses international law only for textual interpretation. It remains to be seen what a WTO panel would do if faced with a conflict between WTO rules and international environmental or human rights law.

Compliance With WTO

At the end of its decision, the Appellate Body recommends that the WTO Dispute Settlement Body (DSB) request the U.S. government to bring the EPA regulation into conformity with GATT obligations. The DSB accepted this recommendation on May 20. In response, EPA on June 20 filed a *Federal Register* notice (61 FR 33703) seeking public comments on how to comply with the WTO's decision.

Although the WTO treaty states that "prompt compliance" with a DSB ruling "is essential," governments may ask for a "reasonable period of time" to do so. The exact period is subject to negotiation and potential arbitration. Since there is no provision in the WTO for retroactive damages, governments have an incentive to delay compliance for as long as possible.

It is too early to tell whether changing the EPA regulation will worsen air quality in the United States. Since imports would probably capture only a small percentage of the U.S. market, the pollution impact is likely to be small. Moreover, the U.S. government always has the option of screening out the dirtiest gasoline and then compensating Venezuela and Brazil for their lost export opportunities.

Environmental Implications

It is not surprising that the first dispute to come before the WTO involves an environmental law. The business community is worried that environmental regulations will interfere with trade. Even voluntary eco-labeling is being criticized as a potential trade barrier.

The Appellate Body states that "WTO members have a large measure of autonomy to determine their own policies on the environment." While that is true, the new decision is important in spelling out the limits of this autonomy. Even before the gasoline dispute, none of the four attempts to justify an environmental measure under Article XX had succeeded. The new tests for the chapeau erect even higher hurdles for environmental policy-makers.

Unlike adjudication within the GATT, which allowed the losing country to block a panel report, decisions in WTO disputes are automatically adopted. This new feature is worrisome to environmentalists because, in recent years, U.S. laws regarding marine mammals and automobile fuel efficiency were judged to be GATT violations. Some politicians are also concerned. In his acceptance speech at the Republican convention, Robert Dole declared that if elected, his administration would "not let our national sovereignty be infringed by the World Trade Organization or any other international body."

In pointing out deficiencies in the Appellate Body's decision, this author is not suggesting that the EPA's gasoline regulation is fair. It exudes unfairness. Very little domestic gasoline qualifies for all the parameters that foreign gasoline has to meet.

Under pressure from USTR and the U.S. Department of State, EPA in 1994 agreed to revise its baseline methodology for imports. But then the Congress intervened and forbade further rule-making. In April 1996, Congress enacted and President Clinton signed a new prohibition (P.L. 104-134, p. 656) on action by EPA to complete the rule-making it began over two years ago.

The fact pattern of this case is suggestive of the kind of dispute that will come to the WTO in the future. In its oral presentation to the Appellate Body, the European Commission warns that environmental measures can get "caught in the crossfire between green lobby groups, the industrial lobby, and the need for budget cuts," resulting in "a compromise which combines environmental objectives with aspects which make such objectives palatable to industry . . ." The Commission gives an accurate portrait of environmental policy-making. But one wonders whether government officials—in Washington, Brussels, or other capitals—are ready for the WTO to enforce political chastity.

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[6] Steven P. Croley and John H. Jackson, "WTO Dispute Procedures, Standards of Review, and Deference to National Governments," *American Journal of International Law*, April 1996, p. 193.

[7] For example, Shinya Murase, "Unilateral Measures and the WTO Dispute Settlement," presentation to the Asia Conference on Trade and the Environment, Singapore, June 28, 1996.

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Japanese Alcohol Case

On July 11, a WTO panel issued its report on a complaint against Japan lodged by the European Union, the United States, and Canada.[8] At issue is whether Japanese excise taxes on vodka, gin, rum, and other hard alcohol violate GATT Article III:2 because such taxes are higher than the taxes levied on Shochu, a beverage produced in Japan. The panel, in a 121-page decision, found that Japan's tax violates Article III:2. Japan appealed on August 8. While the subject matter of this case is not related to the environment, the new legal principles articulated by the panel will apply to environmental taxes.

GATT Article III:2 has two parts. The first sentence states that imported foreign products may not be subject to internal taxes "in excess of those applied ... to like domestic products." The second sentence states that internal taxes may not be applied so as to afford protection to a domestic product that is "directly competitive or substitutable" with a foreign product that is "not similarly taxed."

During the 1990s, two GATT panels interpreted the first sentence of Article III:2 narrowly in order to reduce interference with national tax sovereignty. In the U.S. *Alcoholic Beverages* case of 1992, the panel stated that in determining whether two products are "like," it would be necessary to consider whether the tax distinctions are made to protect domestic production.

This approach was followed two years later by a panel considering the complaint against U.S. environmental and luxury taxes on automobiles. The U.S. *Auto Taxes* panel explained that "Article III could not be interpreted as prohibiting government policy options, based on products, that were not taken so as to afford protection to domestic production."[9] To assist its inquiry, the panel suggested an "aim and effect" test. Applying this test to the "gas guzzler" tax, the panel concluded that the U.S. law did not violate Article III:2. Because of objections by the European Commission, which had instigated the case, the *Auto Taxes* decision was not adopted by the GATT Council.

Although the European Commission and USTR are co-plaintiffs in the dispute with Japan, they differ on why the liquor taxes violate Article III:2. USTR argues that the aim and effect of the tax distinctions are to protect production in Japan. The European Commission argues that whether or not a tax distinction has a protective purpose is "irrelevant" to determining whether the imported and domestic products are "like."

The *Alcohol Taxes* panel sides with the European Commission, noting that the *Auto Taxes* decision was never adopted. Acknowledging a similar holding in the U.S. *Alcoholic Beverages* decision, the panel declares that it does not agree with it. The panel explains that the "aim and effect" approach puts too much burden on the plaintiff.

Turning to the facts of the case, the panel finds that vodka and Shochu are "like" products because they share most physical characteristics and have a common end-use. Japan argued that these two products are filtered differently and have different alcohol contents. Yet the panel does not find these differences sufficient to make the products unlike. Because there is a higher excise tax on vodka than on Shochu, the panel holds this to be a GATT violation.

Regarding the second sentence in GATT Article III:2, the panel uses elasticities of substitution to find that Shochu is "directly competitive" with gin, rum, and certain other hard alcohols. After noting that the tax on Shochu is lower, the panel explores whether there might be some basis on which the products could be viewed as "similarly taxed." The panel considers Japan's contention that the products are taxed on a roughly constant tax/price ratio, but the panel does not find this explanation convincing. Thus, the panel concludes that other excise taxes in dispute violate the second sentence in Article III:2.

More Environmental Implications

The new interpretation of Article III:2 has important implications for the autonomy of national governments. Previous panels had tried to give governments greater leeway to use tax policy for purposes that were not protectionist. That has now been annulled. From now on, environmental taxes will be reviewable by the WTO using a strict "like product" criterion. This could affect taxes related to vehicle emissions, recycled content, and packaging. Tax exemptions for production by indigenous peoples could also be affected.

It should be noted that the Japan *Alcohol Taxes* case differs from the U.S. *Gasoline* case. In *Gasoline*, the panel finds that chemically identical imported and domestic gasoline are "like" products. But in *Alcohol Taxes*, the panel finds that chemically different imported and domestic liquor are "like" products.

In arguing against the "aim and effect" test, the European Commission warns that it "could open the door to claims that the extraterritorial application of environmental regulations concerning non-product-related processes and production methods is not contrary to Article III." With the door to Article III now closed, environmental laws will be reviewed under the restrictive rules in Article XX. Many green taxes might be challenged. For example, the U.S. tax on ozone-depleting chemicals (26 U.S.C. §4681) covers imports. It includes a provision that applies the tax to chemicals used in the manufacturing process and then released into the atmosphere.[10]

The U.S. *Auto Taxes* decision was announced on September 29, 1994, about two months before the U.S. Congress voted on legislation to approve the WTO treaty. Some members of Congress pointed to the U.S. "win" on the gas guzzler tax as evidence that the GATT was becoming more sensitive to the environment. *Auto Taxes* was never adopted, however. If the new interpretation in *Alcohol Taxes* is followed, the U.S. gas guzzler tax could be declared a violation of GATT Article III.

The second sentence in GATT Article III:2 was apparently invoked only once in GATT's history to declare a tax illegal. By focusing new attention on this discipline, *Alcohol Taxes* may engender more challenges of fiscal measures. Green taxes with varying rates will be vulnerable when competitive products are not similarly taxed. For example, taxing bottles differently from cans could provoke a trade dispute.

Most green taxes have a clear rationale for any tax variation. For example, the U.S. government taxes chloro-

[8] "Japan—Taxes on Alcoholic Beverages," WT/DS8-10/R, July 11, 1996. This report remains restricted by the WTO.

[9] For a discussion of this case, see Steve Charnovitz, "The GATT Panel Decision on Automobile Taxes," *International Environment Reporter*, November 2, 1994, p. 921, and James H. Snelson, "Can GATT Article III Recover From Its Head-On Collision with United States-Taxes on Automobiles?" *Minnesota Journal of Global Trade*, Summer 1996, p. 467.

[10] 26 CFR §52.4682-3.

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fluorocarbons and halons differently depending on their ozone-depleting potential. A WTO panel reviewing this type of green tax would probably permit it.

Conclusion

New adjudication in the WTO is toughening GATT disciplines. Article III:4 was tightened by the *Gasoline* panel. Article III:2 was tightened by the *Alcohol Taxes* panel. Article XX's chapeau was tightened by the Appellate Body. The one area where toughening did not occur was Article XX(g). Indeed, the Appellate Body's opinion could be read as a relaxation of the existing discipline.

The WTO's new dispute settlement mechanism is evolving according to plan. There are six other panels under way. While it is too early to judge compliance, the Clinton administration's announcement that it will modify U.S. Clean Air Act regulations is a sign of the growing clout of the multilateral trading system.

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HIGHLIGHTS

A MAASTRICHT TREATY PROTOCOL outlining new, specific environmental taxes is proposed by the Danish government. The proposal will be taken up by the Intergovernmental Conference, which is currently renegotiating the Maastricht Treaty on European Union, in Brussels later in September (p. 803).

ADOPTION OF EU ENVIRONMENT LAWS is a daunting but essential task all Eastern and Central European countries must complete prior to being accepted into the European Union, Commission members say at a meeting with 10 environment ministers from Central and Eastern Europe. The Commission also calls for the prospective members to draw up strategies that include environmental priorities and least-cost solutions (p. 803).

A TRADE AND ENVIRONMENT REPORT by the World Trade Organization's Committee on Trade and Environment is expected to be adopted October 25 so that it can be presented to the WTO ministerial meeting slated for December in Singapore .... Meanwhile, a Canadian-based trade policy think tank accuses the WTO of trying to derail discussions of environmental and development issues, charging that the first 21 months of the WTO have been marked by "a policy of secrecy and key committees bogged down in futility" (p. 806).

THE NEW TROPICAL TIMBER PACT goes into effect January 1, 1997. Producers and consumers of tropical timber sign an accord on the operation date for the new International Tropical Timber Agreement, which has been delayed from going into effect because of the slow pace of ratification (p. 806).

DUMPING IN THE RHINE RIVER is banned under a new international environmental treaty signed by France, Belgium, the Netherlands, Germany, Luxembourg, and Switzerland. The accord is designed to ban dumping of waste from cargo-carrying vessels navigating the waters of the Rhine River basin and to place a tax on fuel to finance waste collection (p. 811).

CONFUSION SURROUNDING ISO 14001, the International Standards Organization's environmental management systems standard, and its possible extension to cover forest products is the topic of a Worldwide Fund for Nature report. The report calls on the ISO to address a range of issues regarding the 14001 standard, including lack of media access to ISO meetings and a general lack of transparency (p. 811) .... In another report on ISO 14001, a draft only, the United Nations Conference on Trade and Development says firms in developing countries are eager to get certified under the standard because they see it as both a way to expand their export markets and as a future condition for doing business globally (p. 812).

EXPORTS OF HAZARDOUS WASTE from plants operating on the U.S.-Mexico border to the United States have been "increasing by a significant percentage" since last year, Mexican Environmental Secretary Julia Carabias says, in large part because of the success of a waste tracking program put into place by the two governments in 1995 (p. 814).

A GREAT LAKES TOXICS STRATEGY marks the first time the United States and Canada formally agree on a list of priority chemicals to control, Elizabeth LaPlante of the U.S. Environmental Protection Agency's Great Lakes National Program Office in Chicago tells BNA. LaPlante says the final U.S.-Canada strategy for controlling persistent toxic pollutants in the Great Lakes is expected to be signed around October (p. 817).

AN ANALYSIS AND PERSPECTIVE by Steve Charnovitz, director of the Global Environment & Trade Study at Yale University, discusses new World Trade Organization adjudication and its implications for the environment (p. 851).

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