The Rise of National Regulatory Autonomy in the GATT/WTO Regime

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ABSTRACT
This article sets forth two arguments. First, to respect a WTO Member’s national regulatory autonomy in the world trading system is essential to ensure the WTO’s long term success in light of the WTO’s institutional constraints, the WTO’s underlying philosophy and the WTO’s nature as an incomplete contract. Second, and contrary to many popular criticisms against the WTO’s allegedly intrusive penetration to national regulatory autonomy, this article argues that these critics have failed to appreciate the recent WTO case law developments. Indeed, the recent WTO case law has shown that the WTO Appellate Body has quietly fine-tuned its previous jurisprudence and as a result, WTO Members enjoy a broader scope of regulatory autonomy than conventionally assumed.

I. INTRODUCTION
International economic law is fraught with big concepts. These concepts shape our understanding of the international legal framework governing economic relations among sovereign states and serve as the foundation of much intellectual discourse in international economic law. However, these concepts are not always clearly explained, largely due to their inherently uncertain and highly contested nature. Indeed, one of the best strands of international economic law scholarship is to delve into these concepts, expose what they really mean and analyze their policy implications. The exemplary work of such scholarship is of course Professor John H. Jackson’s trenchant treatment of sovereignty as allocation of government decision-making power.1 Equally illuminating endeavors include international trade law scholars’ rigorous and

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critical exploration of such concepts as ‘free trade’, ‘fair trade’, and ‘governance’.

This article seeks to follow this well-trodden path of inquiry and revisit the concept of ‘national regulatory autonomy’ in international economic law. The term national regulatory autonomy has been widely used by international economic law scholars. It has also been hailed as one of the cardinal, constitutional principles of the GATT/WTO system. In the GATT/WTO dispute settlement, the panels and the Appellate Body (AB) have repeatedly emphasized that Members enjoy wide discretion in setting national trade policies. However, the WTO Agreements have never used the term national regulatory autonomy, nor did the users of the term define it clearly in their writings. Moreover, the term has been frequently used interchangeably with other similar concepts such as ‘sovereignty’, ‘policy space’, or ‘margin of appreciation’. As a result, the meaning of national regulatory autonomy is ambiguous and used differently by different people in different contexts, often in pursuit of conflicting objectives. Then, what exactly does it mean to say


that a WTO Member enjoys a certain extent of national regulatory autonomy in the GATT/WTO regime? Why should WTO tribunals respect a Member's national regulatory autonomy? Have WTO tribunals excessively impinged upon the national regulatory autonomy of WTO Members, as many WTO critics argued? These questions cut to the core of international economic law and at stake are the very parameters of state self-determination to pursue its regulatory objectives, as well as the very legitimacy of the GATT/WTO system itself.

This article sets forth two arguments. First, to respect a WTO Member's national regulatory autonomy in the world trading system is essential to ensure WTO's long term success in light of the WTO's institutional constraints, the WTO's underlying philosophy and the WTO's nature as an incomplete contract. Second, and contrary to many popular criticisms against the WTO's allegedly intrusive penetration to national regulatory autonomy, I argue that these critics have failed to appreciate the recent WTO case law developments. Indeed, the recent WTO case law has shown that the AB has fine-tuned its previous jurisprudence and as a result, WTO Members enjoy a broader scope of national regulatory autonomy than conventionally assumed. The last part concludes.

II. THE CONCEPT OF NATIONAL REGULATORY AUTONOMY IN THE GATT/WTO REGIME

A. National regulatory autonomy and sovereignty

National regulatory autonomy is part and parcel of the concept of sovereignty, a multifaceted concept that can be analyzed from different angles. In the middle of and ever since the establishment of the WTO in 1995, there have been genuine concerns that the WTO, especially its powerful judicial body, will disrupt excessively the well-established domestic regulatory order through an assault on national sovereignty. The so-called 'Great Sovereignty Debate' in the US before it acceded to the WTO in 1994 testified to widespread misgivings among legislators, policy makers as well as NGOs about

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the new global trade institution. The ensuing acceptance and implementation of the Uruguay Round Results in the US have not appeased the critics of the WTO. For example, Senator Max Baucus from Montana openly stated that WTO panels are making up rules that the US never negotiated, that the Congress never approved, and that the Congress would never approve. In response to a string of losses before the WTO Dispute Settlement Body (DSB) and growing concerns over WTO tribunals’ interpretation of the WTO Agreements, the US Congress requested the Commerce Department to submit a report addressing whether the DSB has diminished the rights of the United States in the WTO. The report concludes, *inter alia*:

The United States does not agree with the approach that the WTO panels and the Appellate Body have sometimes taken in disputes, and is concerned about the potential systemic implications. . . . When the agreements were signed, Members struck a very careful balance of commitments that provided them with certain benefits and costs. . . . If the perception develops that the WTO panels and the Appellate Body are substituting their own policy judgments for a negotiated balance of rights and obligations, then it will be difficult to maintain the support and confidence of Members and the public in the value of future negotiation.

Sovereignty is a contested concept and the concept itself causes much obfuscation in practice. Indeed, the very existence of the concept generates arguments as to its core criteria. One argument holds that concerns over national sovereignty constitutes by themselves a legally relevant consideration for preserving national regulatory autonomy and can thus be invoked irrespective of the circumstances of a case. However, to argue that the ultimate decision-making power should remain in the hands of individual states simply because any other rule would undermine their sovereignty proves untenable. The WTO Agreements, after all, represent a large-scale,

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14 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body, Report to Congress Transmitted by the Secretary of Commerce (30 December 2002), at 7.
16 Matthias Oesch, *Standards of Review in WTO Dispute Settlement Resolution* (Oxford: Oxford University Press, 2003), at 29 (Oesch himself does not share this view).
multilateral compromise of sovereignty and they impose binding international obligations on WTO Members. The AB in *Japan – Alcoholic Beverages II* has made this point clear:

The WTO Agreement is a treaty—the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.  

However, this does not mean that sovereignty as a concept is purely descriptive and lacks a normative element. As Besson observes:

As a normative concept, the concept of sovereignty expresses and incorporates one or many values that it seeks to implement in practice and according to which political situations should be evaluated. These values are diverse and include, among others, democracy, human rights, equality and self-determination. Concept determination amounts therefore to more than a mere description of the concept’s core application criteria; it implies an evaluation of a state of affairs on the basis of sovereignty’s incorporated values.

An early starting point for the concept of sovereignty focused only on paradigms involving the formation and application of such values as exclusive control by a state of its territory and non-intervention in the internal affairs of other states. Today, however, through a process of contestation, the concept has arguably been broadened to include other actors and also to contain values such as legitimacy, democracy, autonomy, freedom, accountability, security, and equality that are core to a modern conception of sovereignty.

In his work, Professor Dan Sarooshi has pointed out that one important value of sovereignty, at least in the view of the US, is economic autonomy, i.e. the capacity of the US to make independent decisions about its own economic future. This value of economic autonomy arguably has two aspects that influence the US governmental action in relation to the international trading system: corporate economic autonomy and nation-state economic

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autonomy. The two aspects are inextricably linked. Corporate economic autonomy refers to the US position that firms in the market should make independent business decisions about their economic future and government intervention in productive operations should be a very rare exception rather than the rule. To ensure that it can project internationally its value of corporate economic autonomy, the US strives to maintain a considerable degree of nation-state autonomy in making decisions on trade both in terms of its international trading position but especially in relation to its own domestic trade law and practice. The formerly notorious and powerful section 301 of the Trade Act of 1974 and the prominent place that it took in debates in US Congress on acceptance and implementation of the results of the Uruguay Round testified to the great importance the US Congress attached to nation-state autonomy.22

Professor Sarooshi's perspective on sovereignty prompts a similar conceptual question: what exactly does national regulatory autonomy mean when the critics of the WTO argue that the WTO has inappropriately intruded into its Members' regulatory autonomy? I submit that, on most occasions, when WTO critics argue for national regulatory autonomy in the WTO law, they actually mean two intertwined positions. First, domestic regulations should reflect domestic social preferences and respond to domestic needs, even if these preferences and needs differ from other Members or international standards. Second, the fulfillment of domestic regulatory purposes reflected in domestic regulations should be honored despite their adverse trade effects, as long as these regulations reflect genuine preferences and priorities of citizens of the nation state rather than trade protectionism. In other words, a WTO Member should be entitled to national regulatory autonomy as regards the policy objectives it chooses to pursue as well as the means by which it chooses to pursue such policy objectives, so long as they do not constitute protectionism, overt or covert.

These positions have powerful normative rationales. To begin with, different culture and experience of citizens in different societies will naturally lead them to different perception and tendency to particular types of regulation. National institutions, which are more familiar and accountable to the average

22 Ibid, at 91–5. As John H. Jackson recounts: 'The U.S. Congress made it very clear... that it would not tolerate changes in Section 301... This statutory provision was perhaps the most important political bellwether of the sovereignty considerations in the Congress during the 1994 debate.' See John H. Jackson, above n 12, at 183–84. After the US-Sections 301-310 of the Trade Act of 1974 case (WT/DS152/R, 22 December 1999), though Section 301 remains public and available on the books and a number of investigations have been launched under the provision, no sanctions have been applied as a result of Section 301 investigations. See USTR, United States Launches Section 301 Investigations into China's Policies Affecting Trade and Investment in Green Technologies (9 September 2010), http://www.ustr.gov/node/6227 (visited 22 August 2011).
citizen than international organizations, are more likely than the latter to reflect the tastes, traditions, and economic realities of the people whom the regulations may affect. For the same reason, regulations are also likely to be more efficient when they derive from national, as opposed to international institutions. Even if these regulations differ from the general conception of what the best regulations should be or that they affect trade adversely in one way or another, there is no reason to force a WTO Member to change its peculiar preference. Second, national regulatory autonomy should be respected because the disputed measure may be the outcome of democratic processes at the national level. Democracy confers legitimacy on a system of governance. In recent times, democracy has come to be seen as an important element of legitimate sovereignty. Modern democracy has developed within the nation state and because of the weakness of international institutions, it still relies primarily on the state for its protection. It thus seems quite legitimate that a democratic domestic government should be responsible for the welfare of its citizens, as opposed to international organizations. A new level of normative activity superimposed on national democratic systems makes citizen participation more remote, and parliamentary control over the executive becomes even less effective. This problem becomes even more palpable when international organizations operate with little transparency or public and parliamentary scrutiny.

One criticism of my arguments above might be that since states have voluntarily agreed to be bound by the WTO rules through proper domestic political processes, they should comply with the rules and unfavorable judicial outcomes, in good times and bad. At any rate, they can simply exit the WTO at any time if they wish to. This argument has oversimplified the complexity of the issues involved here. To begin with, as Professor Howse argued, when focusing attention on the actual political processes by which WTO rules have been debated and accepted at the level of domestic political institutions, the gap between formal and actual consent is highlighted.

24 Ibid, at 529.
28 Ibid, at 490.
In international treaty negotiations, there are significant agency problems in the use of representative institutions to determine the consent of the principals, the people, to bargains negotiated by their agents (diplomats, expert negotiators, etc.) with agents of other peoples. These agency problems have put into question whether the apparent consent truly reflects the will of the peoples. Furthermore, as will be elaborated below, many WTO rules are written in very general terms, to the extent that some commentators have characterized them as ‘standards’ rather than ‘rules’. There is no guarantee that the interpretation endorsed by WTO tribunals reflects expectations in democratic deliberation ex ante at the national level. At the same time, too many surprises for WTO Members in the interpretation of WTO rules ex post will undermine the legitimacy of the WTO. The problem is further aggravated by the current institutional arrangements of the WTO, which make it practically impossible for a WTO Member to be excused from or modify a WTO rule that the people of a particular polity may no longer view as legitimate. Finally, even if some commentators seek to diminish the legal effects of the WTO dispute settlement reports by suggesting that WTO obligations may be sidestepped by the losing party accepting trade retaliation or offering compensation, the mainstream opinion holds that the adoption of the WTO AB reports imposes on the losing party an international legal obligation to comply with the AB’s ruling, i.e. to modify or withdraw the illegal measures in question.

To highlight the importance of national regulatory autonomy is of course not to deny the ‘capture’ theory advanced by public choice theorists. It is entirely possible that concentrated pressure groups may turn a regulation to their private advantage at the expense of the public interest and in turn, pose serious obstacles for democracy at home. If the WTO could successfully

31 Ibid, at 106.
34 See the Section II.B below.
restrain the influence of protectionist interest groups, then it actually re-
inforces, rather than weaken democracy, an important element of sover-
eyignty.38 Looked at from this perspective, the conventional wisdom that
the WTO inevitably poses a threat to the regulatory autonomy of WTO
Member States must be dispelled. It is only when the WTO oversteps
its mandate or undertakes an overly intrusive review of a domestic regu-
lation that the national regulatory autonomy is under threat. In essence,
the concept of national regulatory autonomy asks how much freedom
WTO Members enjoy in crafting their regulations while at the same
time fulfilling their obligations under the WTO Agreements. There is no a
priori answer to this question and it must be analyzed on a case-by-case
basis.

B. National regulatory autonomy and WTO institutional constraints
The value of national regulatory autonomy is more conspicuous in the WTO
context in view of its institutional constraints. The evolution of GATT/WTO
system in the past twenty years has been characterized as a process of ‘le-
galization’.39 Much has been written about the increased legalization of the
WTO dispute settlement system, a shift described as one from an ‘ethos of
diplomats’ to the ‘rule of lawyers’.40 Under the GATT 1947, the dispute
settlement mechanism had a strong conciliatory and diplomatic underpin-
ing. If a state allegedly violated the terms of the agreement, the injured
party could protest and request a panel. However, because the GATT 1947
worked on a consensus-vote approach, a single state, including the accused
party, could block the creation of a panel. Moreover, even if the accused
state initially acquiesced to the panel creation, it could block adoption of its
report if it did not agree with the outcome. Under the WTO, in contrast, any
state can call for the establishment of a panel and the adoption of the AB’s
ruling can be blocked only if there is a consensus of WTO Members, includ-
ing the winner of the case, to overturn the ruling. This is essentially the
opposite of what existed under GATT 1947 and is generally known as the
‘negative consensus’.41 The revamped dispute settlement system is one of
the most efficient mechanisms of inter-state dispute settlement that exists
today and has been referred to as the ‘jewel in the crown’ of the WTO

38 Robert O. Keohane et al., ‘Democracy- Enhancing Multilateralism’, 63 International
39 Judith Goldstein et al., ‘Introduction: Legalization and International Politics’, 54(3)
Internal and External Legitimacy of WTO Dispute Settlement’, 35(2) Journal of World
41 Rachel Brewster, ‘Rule-Based Dispute Resolution in International Trade Law’, 92 Virginia
regime, drawing plaudits from WTO Members and interested parties.\textsuperscript{42} A reflection of the huge success of the WTO dispute settlement system has been its frequent use by WTO Members to solve successfully a large number of trade disputes.\textsuperscript{43} This is also one of the main reasons why so many trade-linkage issues are brought into the ambit of WTO by various interest groups.\textsuperscript{44}

This highly efficient dispute settlement mechanism is in sharp contrast to the inefficient political or ‘legislative’ branch of the WTO.\textsuperscript{45} In theory, the Ministerial Conference and the General Council are the masters of the WTO Agreements. In reality, however, their powers are very much reduced by the fact that, according to the settled practice, they decide by consensus on every issue.\textsuperscript{46} Bartfield considers two consensus requirements, the consensus required to block an AB report and the consensus required to legislate, to be ‘constitutional flaws’ of the WTO regime.\textsuperscript{47} For example, as a practical matter, it is impossible for the WTO institutions to give interpretations of the WTO rules. To begin with, only the Ministerial Conference and the General Council, in which all WTO Members are represented, can adopt interpretations. Such interpretations can only be adopted by a vote carrying three-quarters majority of the WTO Members. Furthermore, the WTO Agreement expressly stipulates that this procedure may only result in clarifying interpretations, and that such interpretations may not amount to an amendment of the WTO Agreement.\textsuperscript{48} In reality, not only have WTO Members been reluctant to create clarifying powers for the WTO, the WTO has not exercised these powers. To date, this mechanism for the adoption of clarifying interpretations has remained a dead letter.\textsuperscript{49} Similarly, it has proven to be very cumbersome for WTO Members to review existing


\textsuperscript{43} As of 2 November 2009, 400 disputes have been brought to the WTO, See WTO, WTO Disputes Reach 400 Mark, http://www.wto.org/english/news_e/pr09_e/pr578_e.htm (visited 15 May 2011).

\textsuperscript{44} John H. Jackson, Sovereignty, the WTO and Changing Fundamentals of International Law (Cambridge: Cambridge University Press, 2006), at 144.


\textsuperscript{47} See Bartfield, above n 9, at 3.

\textsuperscript{48} Art. IX:2, Agreement Establishing the World Trade Organization.

rules, or to impose deadlines for the adoption of new rules.\(^{50}\) In general, experienced observers feel that the emphasis on consensus decision making in the WTO can sometimes lead to paralysis, and can be blamed for the perceived inability of the organization to make difficult but necessary decisions.\(^ {51}\)

The imbalance between the legislative and judicial branches of the WTO creates serious systemic problems for the GATT/WTO regime. It is well known that the WTO Agreements are characterized by gaps, overlaps and conflicts.\(^ {52}\) Since the WTO dispute settlement system is so efficient and compelling, there is a natural tendency for all the stakeholders in a dispute to litigate differences of opinion about vague statements and unclear rules in WTO Agreements. Where the texts are ambiguous, it is up to the WTO tribunal to find an answer.\(^ {53}\) These circumstances have pushed the WTO dispute settlement process from a purely bilateral and reciprocal system of episodic dispute settlement towards a multilateral system with a regulatory character.\(^ {54}\) This is worrying because, with judges and lawyers filling gaps left (sometimes intentionally) by negotiators, it undermines democratic control over international cooperation and rule-making, and it prevents a more broad-based participation of all stakeholders in the formulation of international rules. The WTO panels and the AB are not elected and cannot be removed by elected officials. Indeed, they cannot be removed at all except in exceptional circumstances. Moreover, there are practically no checks on AB decisions. There is neither higher authority to review its decisions, and there is essentially no legislative check. This stands in contrast to domestic government, where legislators must answer to the electorate and can overrule court decisions through legislative action. With neither sufficient accountability nor checks on the AB decisions, the WTO is perceived to lack legitimacy to craft effective, policy-driven solutions.\(^ {55}\)

In this regard, it should also be noted that the WTO panels and the AB should be subject to much greater institutional constraints than those that apply at the national, or even transnational level such as the European Court

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\(^{50}\) See Bronckers, above n 33, 552–53. As an example, as of 22 August 2011, no provisions of the WTO Agreements had been amended. See WTO Analytical Index, ibid, paras 168–77.


of Justice (ECJ). Unlike EU law which has created a regional constitutional order integrating societies with more or less homogenous cultural values, the WTO is based on cooperation among a large and heterogeneous group of sovereign states with no common history or common cultural values upon which it could build a community, nor is this its goal.\textsuperscript{56} The ultimate vision of a unified community and single market has essentially provided the ECJ with the clear constitutional prerogative to curtail state sovereignty in favor of free trade and thus the greater economic welfare of all nations within the community. In contrast, nothing in the text of the WTO Agreements indicates that national sovereignty should be given lesser weight than the other values such as free trade. The WTO institutional constraints thus make the respect of national regulatory autonomy a more salient issue compared to the EU.

C. National regulatory autonomy and embedded liberalism

The importance of national regulatory autonomy in the GATT/WTO regime is also related to the very structure of the world trading system. Contrary to the assumptions of many trade lawyers, the GATT regime established at Bretton Woods after the World War II was not \textit{laissez-faire} liberalism or unrestricted freedom in international trade. Instead, it was characterized by, in John Ruggie’s words, ‘embedded liberalism’, in the sense that the GATT regime was predicated on a shared sense of the necessity, and legitimacy, of governmental intervention into the market for the purposes of securing stability.\textsuperscript{57} Trade liberalization was embedded within a political commitment to the progressive, interventionist welfare state. A state should be able to protect domestic social and political stability, using means that avoid exporting domestic social and economic difficulties and threatening global stability. It is this complex vision, founded in new understandings about the social purposes for which power may be legitimately exercised, that Ruggie called ‘embedded liberalism’.\textsuperscript{58} In other words, the founding fathers of the GATT/WTO regime recognized from the very beginning an essential role of sufficient national policy space, where a Member can exercise national regulatory autonomy, to deviate from the trade liberalization obligations. This is necessary to maintain the domestic political stability and to ensure the viability and sustainable development of the world trading system.


Whether the idea of embedded liberalism still accurately reflects the current nature and character of the WTO regime is subject to debate. \(^5^9\) Dunoff argues that changes in the global economy as well as changes in the trade regime itself fundamentally call into question the ongoing relevance of the embedded liberalism model. \(^6^0\) Howse argues that it was not until the 1970s that the embedded liberalism bargain came under sustained stress. On the one hand, the normative basis for interventionist adjustment policies was put in question by the *)laissez-faire* outlook of the ascendant economic neo-liberalism, aided by public choice accounts of interventionism as providing rents to concentrated, entrenched constituencies. On the other hand, there were concerns that the ongoing evolution of the trading system threatened the forms of social protection to which states had traditionally attached importance. These dual stresses, in addition to the WTO ‘insiders’ increasingly technocratic ethos, led to the disintegration of the embedded liberalism model established after the Second World War. \(^6^1\)

It may be exactly because the idea of embedded liberalism has been under stress or marginalized in the GATT/WTO regime, following the dominance of neo-liberalism manifested by the Washington Consensus, that the WTO has been accused of being a straightjacket on national regulatory autonomy. \(^6^2\) Much of the original flexibility built into the GATT/WTO system has been gradually lost through WTO panels’ stringent interpretations of GATT/WTO texts in favor of freer trade. \(^6^3\) One example is the GATT/WTO panels’ interpretation of Article XX of the GATT 1994. Article XX provides exceptions for policies that may even entail elements of discrimination, provided that they are justified in terms of certain non-protectionist goals and that their application does not entail unjustified or arbitrary discrimination. However, the AB has imposed extraordinary preconditions on Member governments, an approach that results in a very limited role for Article XX. \(^6^4\) Another example is the WTO panels’ interpretation of


\(^{6^0}\) Jeffery Dunoff, ‘The Death of the Trade Regime’, 10(4) European Journal of International Law 733 (1999), at 738.

\(^{6^1}\) See Howse, above n 30, at 101.


\(^{6^3}\) Yuka Fukunaga, ‘Global Economic Institutions and the Autonomy of Development Policy: A Pluralist Approach’, in Meredith Kolsky Lewis and Susy Frankel (eds), above n 5, at 23.

scientific evidence requirement in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The standard of review adopted by the panels in scrutinizing the scientific basis of the disputed SPS measures was so stringent that it became practically impossible for a WTO Member to defend its measures successfully in certain circumstances.\(^\text{65}\)

Despite the ongoing debate on the relevance of embedded liberalism to the world trading system, it remains widely accepted that, first, the WTO Agreements are not purely liberal trade agreements. Rather, they carefully balance Members’ commitment to free trade with their other non-trade interests, such as the need to protect the environment and even temporary protection of the domestic industry. Accordingly, the interpretation of WTO Agreements should stay true to this balanced political vision.\(^\text{66}\) Second, national policy autonomy, as a constituent element of embedded liberalism, has been eroded in the WTO regime.\(^\text{67}\) Therefore, the debate on whether the WTO Agreements have excessively intruded into the national regulatory order is also a debate over whether the WTO dispute settlement processes have disrupted a delicate political balance enshrined in the very structure of GATT/WTO regime itself.

D. National regulatory autonomy and the GATT/WTO as an incomplete contract

WTO texts are inherently indeterminate and vague, for two basic reasons. First, as Posner explains, there is tension between on the one hand, the willingness of legislators to draft laws using all encompassing language in order to subsume the maximum number of transactions, and, on the other hand, the limits inherent in our human nature to predict future events on which we have, at the stage of drafting, imperfect information.\(^\text{68}\) This tension is particularly present in a contract such as the WTO, which is not meant to be transaction-specific, but as a global meta-regulation, i.e. rules governing how states should regulate.\(^\text{69}\) As a result, negotiators will naturally privilege generic expressions, rather than precise definitions.\(^\text{70}\) Second, multilateral

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\(^{\text{65}}\) See Sykes, above n 9, at 261.


\(^{\text{67}}\) See Dunoff, above n 60, at 750.


treaties always have ambiguities and gaps. The gaps are necessary in order to get the consent required to come to resolution. Many times the diplomats gloss over real differences with language that both sides can interpret the way they want to in order to reach a meeting of the minds as to language.71

The WTO Agreements are no exception to the rule. It is well known that WTO agreements retain many ambiguities expressing compromises adopted to paper over policy disagreements between the negotiators that remain to be resolved.72 A number of reasons account for this state of affairs. To begin with, although the WTO Agreements are today a single treaty, its provisions were originally negotiated in parallel through 15 different working groups. The original intention was that they would operate as autonomous agreements. It was only towards the end of the negotiation that the creation of a single undertaking was agreed on and governments decided to annex the resulting text from each working group to the Marrakesh Agreement Establishing the WTO.73 In addition, the Uruguay Round negotiators, often not lawyers themselves, worked without sufficient legal vetting of the results. Although some efforts of legal co-ordination must have been made, the late involvement of the legal drafting group, combined with the resistance by the United States to the creation of a formal international organization, must have limited the ability to make changes to the texts already drafted in the working groups.74 Furthermore, in grouping under the framework agreement various negotiated texts, without any extensive discussion of the internal organization and hierarchy of WTO norms, negotiators may have hoped that the flexibility inherent in some of the WTO treaty provisions would suffice to reconcile all tensions among its various provisions. The wording of some WTO provisions, however, does not always support such hope.75 Indeed, both the general structure and many of the specific provisions of the WTO Agreements raise issues of interpretation that were known to be highly contestable, and were being contested, at the time when the texts were negotiated and agreed. They have been described as ‘trip-wire texts’ that reflect diplomatic fudges by negotiators, so that cases referred for adjudication under them are likely to be politically charged.76 It becomes very

71 See Jackson, above n 44, at 148.
75 See Bronckers, above n 33, at 551.
76 Karen J. Alter, ‘Resolving or Exacerbating Disputes? The WTO’s New Dispute Settlement Resolution System’, 79 International Affairs 783 (2003), at 793.
difficult to define clearly and precisely the legal parameters of the relationships among the provisions of different WTO Agreements.\textsuperscript{77}

Although virtually any internal policy can have an impact on trade, attempting to regulate all such policies directly through trading rules is a daunting task. Doing so would bring the trading rules into tension with domestic policy goals and require a much higher level of intrusion into domestic sovereignty than was acceptable to GATT negotiators. Rather than attempting to develop carefully tailored rules for internal conduct, GATT/WTO founding fathers opted for an incomplete contract, in the sense that the WTO permits Members to implement regulatory and legislative acts freely to promote whatever public policy they deem appropriate for their national interests, as long as these measures do not discriminate between imported and domestically produced goods of the same kind, or between trading partners.\textsuperscript{78} Moreover, in most jurisdictions, WTO law does not have direct effect in a Member’s domestic legal order.\textsuperscript{79} A large amount of discretion is left to a Member to decide on how WTO substantive rules should be implemented domestically. Usually WTO Members have more than one way to ensure compliance with its trade obligations.\textsuperscript{80} For these reasons, the scope of regulatory autonomy left for Members is always contestable under the WTO Agreements.

Of course, to highlight national regulatory autonomy as an important value of the GATT/WTO system is not to say that it has the effect of overriding a specific rule contained in the WTO Agreements. After all, when the WTO Agreements were signed, Members struck a very careful balance of commitments that provided them with certain benefits and costs as reflected in the specific rules. The idea of \textit{lex specialis} leads to the assumption that specific rules generally take precedence over principles. As the AB stressed in \textit{EC – Hormones}, a principle ‘does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal principles of treaty interpretation in reading the provisions of the agreements’.\textsuperscript{81}


\textsuperscript{80} Appellate Body Report, \textit{US – Gasoline}, above n 7, at 25.

Admittedly, there is no consensus on where to draw the line between global governance and national regulatory autonomy, nor how much interference into the national regulatory autonomy from the WTO tribunal is appropriate. In the GATT/WTO history, not only has the line been repeatedly drawn, shifted, and erased in academic discourse, the jurisprudence also has echoed this uncertainty by evolving, reaffirming the link between the horizontal trade/non-trade debate and the vertical institutional struggle between Members and the WTO adjudicative bodies. For the long term benefit of the world trading system, it is submitted that the current \textit{ad hoc} approach should be replaced by a more consistent methodology, so as to enhance the predictability of both private market actors and the regulating government.

Despite much uncertainty demonstrated in the GATT/WTO jurisprudence, a strong argument can be made that the recent WTO case law has shown much institutional sensitivity and is increasingly more deferential to WTO Members’ national regulatory autonomy. Compared with the earlier jurisprudence, the pendulum has been swinging back to allow more national regulatory space for WTO Members in the GATT/WTO regime. This new trend has so far not fully appreciated by many WTO commentators. Various myths and not well-founded accusations against the WTO still pervade the WTO literature. This part will outline three recent jurisprudential developments under the GATT 1994 and the SPS Agreement, respectively, and argue that they represent the beginning of a fine-tuned new body of jurisprudence in demarcating the boundary of national regulatory autonomy in the GATT/WTO regime.

A. The resurrection of the ‘aims and effects’ test

Ever since the establishment of the WTO in 1995, the AB has repeatedly confirmed that in interpreting ‘like products’ and ‘no less favorable treatment’ in Article III:4 of the GATT 1994, the regulatory purpose should not be separately considered as Article III:4 does not explicitly refer to Article III:1. In practice, the regulatory purpose of a disputed measure in question was given short shrift when assessing the legality of the measure under the national treatment (NT) principle. In GATT case law, however, there was an alternative approach to the NT principle, known as the ‘aims and effects’...
test. This test highlights the importance of the Article III:1 in determining whether two pairs of products are ‘like products’. The aims and effects test originated in *US – Malt Beverages* case partly in response to public outcry against the *US – Tuna* case in the early 1990s. The AB in *Japan – Alcoholic Beverages II* categorically rejected the test in 1996. In recent years, arguably there has been a revival of the aims and effects test in a series of WTO cases, although in a different fashion compared to the GATT case law in 1990s. The first part of the section traces the rise and fall of the aim and effects test. The second part outlines its recent revival in the WTO case law.

1. The rise and requiem of aims and effects test

Traditionally, the determination of ‘like products’ under Article III NT clause is fundamentally a determination of the nature and extent of a competitive relationship between and among products. In assessing this competitive relationship, the AB usually examines, *inter alia*, (i) the properties, nature and quality of products; (ii) the extent to which products are capable of serving the same or similar uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

This traditional market-based ‘like products’ test has been heavily criticized for technical, structural, and normative reasons over the years. In *EC – Asbestos*, the AB pondered the technical interpretative difficulties involved in ‘like products’ under Article III:4. Specifically, the AB highlighted three difficulties:

First, ‘like products’ does not indicate *which characteristics or qualities* are important in assessing the ‘likeness’ of products under Article III:4, since most products will have many qualities and characteristics… Second, it provides no guidance in determining *the degree or extent* to which products must share quality or characteristics…, as products may share only a few characteristics or qualities, or they may share many… Third, it does not indicate *from whose perspective* ‘likeness’ should be judged. Ultimate consumers may have a view about likeness of two products that is very different from that of producers of those products (emphasis added).

It is thus no surprise that the AB repeatedly reminds us that panels can only apply their best judgment in determining whether two products are

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85 Ibid, para 101.
‘like’. This will always involve an unavoidable element of individual, discretionary judgment.87

Structurally, if a domestic regulatory measure is found to discriminate against imports in violation of Article III, the regulating government can seek to justify that discrimination by proving that it is ‘necessary’ or ‘related to’ the achievement of some legitimate regulatory purposes enshrined in Article XX. However, this is not a desirable route to protect national regulatory autonomy as Article XX was traditionally interpreted stringently.88 In addition, Article XX provides a closed list of legitimate objectives for government intervention. This is in sharp contrast to the rise of the regulatory state.89 Most importantly, the traditional objective ‘like products’ test raises a deeper and troubling issue of the very symbolism of political identity. It is a question of constitutional identity, the way a society wants to understand its internal hierarchy of values. In this regard, the objective test establishes a normative hierarchy, whereby the default norm is liberalized trade, and for competing values, such as human health and safety and protection of the environment, to prevail, they have to be justified.90

The aims and effects test can be viewed as an effort to relax the stark dichotomy of Article III and Article XX, especially with regard to origin-neutral regulatory measures. According to this test, ‘like products’ will not be defined by reference to prevailing perceptions about the pair of products in the market place, but by reference to the regulatory aim pursued by the intervening government. The GATT panel report of US – Malt Beverages laid down the groundwork for the test and the GATT panel report of US – Taxes on Automobiles elaborated more fully the correct way to interpret ‘like products’ under the test.91

First, the panel explained how likeness should be appreciated under Article III: ‘the practical interpretative issue was: which differences between products may form the basis of regulatory distinctions by governments that accord less favorable treatment to imported products?’92 Second, the panel made it clear that both Article III:2 and III:4 should not be understood outside the context of Article III as a whole, especially in the light of

87 Appellate Body Report, Japan – Alcoholic Beverages II, above n 18, at 20–21.
88 See McRae, above n 64, at 226.
Article III:1. The panel went on to infer from the text of Article III:1 that the purpose of Article III is not to prevent contracting parties from using their fiscal and regulatory powers by differentiating between different product categories for policy purposes unrelated to the protection of domestic protection. The panel considered that this limited purpose of Article III had to be taken into account in interpreting the term ‘like products’ in this provision. Finally, the panel explained how ‘like products’ should be determined in light of the regulatory purpose of a Member. In the panel’s view, the determination of the relevant features common to the domestic and imported products had to include an examination of the aims and effects of the particular measure:

A measure could be said to have the aim of affording protection if an analysis of the circumstances demonstrated that a change in competitive opportunities in favor of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal. A measure could be said to have the effect of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products.

To be sure, compared with the traditional test of ‘like products’, the aims and effects test tends to provide Members with more regulatory autonomy under Article III. The traditional objective test focuses entirely on the effects of the regulation on competition. A Member seeking to justify a measure that was found in violation of Article III would be remitted to Article XX. In contrast, the panel emphasized the need to accommodate the regulatory purpose of GATT Contracting Parties in the aims and effects test, so that the ‘like products’ determination in the context of Article III would not unnecessarily infringe upon the regulatory authority and domestic policy options of GATT Contracting Parties. Once a domestic product is determined to be ‘unlike’ an imported product on account of the non-protectionist intention of the measure at issue, such a measure will be deemed as consistent with Article III. The ‘no less favorable treatment’ requirement was marginalized in the aims and effects test because any negative trade effects tend to be regarded as incidental and fortuitous, as long as the measure in question carried no protectionist intentions.

Although the aims and effects test has much to be commended, certain problems mitigated against its application. The panel report of Japan – Alcoholic Beverages II explained these problems in the context of Article

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93 Ibid, para 5.7.
94 Ibid, para 5.10.
III:2 and the same reasons also apply to Article III:4. To begin with, similar to Article III:2 the first sentence, Article III:4 contains no textual reference to Article III:1. Second, the adoption of the aims and effects approach has important repercussions for the burden of proof imposed on the complainant in the dispute settlement processes. Under such an approach, the complainant would bear the burden of showing not only discriminatory effects, but also that the aim of the measure is to afford protection to domestic production. However, the aim of a measure may be sometimes indiscernible. In the case of a multiplicity of aims, it would be a difficult exercise to determine which aim or aims should be determinative for applying the test. Finally, the aims and effects test may render Article XX virtually redundant. If panels were required to consider the regulatory purpose of a measure when deciding violation under Article III, all regulatory justifications provided in Article XX would have already been considered in the first stage determination of violation, leaving no reason to conduct the same inquiry again under Article XX. In contrast, the traditional objective ‘like products’ test does not involve any subjective value judgments. Arguably, this protects the panel and the AB and may increase the perception of legitimacy of the AB rulings. Due to these defects and legitimacy concerns, the AB rejected the aims and effects test in Japan – Alcoholic Beverages II shortly after the establishment of the WTO in 1995.

2. The resurrection of the ‘aims and effects’ test

Although the AB in Japan – Alcoholic Beverages II explicitly rejected the aims and effects test in evaluating ‘like products’, the problems afflicting a purely objective methodology remained. Recent WTO cases have retreated from the categorical rejection of the aims and effects test and revived the possibility of evaluating the policy basis of a measure within the very parameters of Article III itself. In Chile – Alcoholic Beverages, after the AB confirmed that (i) all types of spirits are ‘directly competitive or substitutable products’ and found (ii) dissimilar taxation between the average treatment of imported spirits and the average tax rate on domestic spirits, the AB proceeded to evaluate whether the measure was applied ‘so as to afford protection’ to domestic production. The AB stressed that this analysis was completely separate and additional to a finding of dissimilar taxation. In this evaluation, the AB

98 Ibid, para 6.16–6.18.
99 See Horn and Weiler, above n 90, at 30–1.
100 WTO Appellate Body Report, Chile – Taxes on Alcoholic Beverages (Chile – Alcoholic Beverages), WT/DS87/AB/R, adopted 12 January 2000, para 55.
referred to the *Japan – Alcoholic Beverages II* decision to the effect that the evaluation must consider objectively the structure of the national measure in question. However, the AB also observed that the stated objectives by the government may be relevant in evaluating the design of a measure. In the AB’s words:

> [T]he subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry...It does not follow, however, that the statutory purpose or objectives...to the extent that they are given objective expression in the statute itself, are not pertinent.\(^\text{101}\)

The AB also endorsed the panel’s finding that the structure of the Chilean tax did not relate to the purposes stated by Chile, and concluded that this lack of correlation confirmed its finding that the Chilean measure was applied ‘so as to afford protection’. In this connection, the AB rejected Chile’s argument that the panel was wrong to inquire the purposes of the regulation. Instead, the AB approved the inquiry, stating that a measure’s purposes are ‘intensely pertinent’. This is because a plausible purpose might have helped to explain a tax structure that otherwise appears to be applied so as to afford protection.\(^\text{102}\)

Moreover, in the course of agreeing with Chile that its measures need not be shown to be *necessary* to Chile’s asserted purposes, the AB says:

> [I]t appears to us that the panel did no more than try to relate to the observable structural features of the measure with its declared purposes, a task that is *unavoidable* in appraising the application of the measure as protective or not of domestic production.\(^\text{103}\)

Here the AB seems to say that the inquiry is undertaken precisely to identify the measure’s objective or purpose.\(^\text{104}\) As Regan argued, if the ‘aim’ part of the aims and effects test is not understood as a ‘mens rea’ test on the part of the regulators, but in a soft way, it could be argued that the AB has not entirely dismissed the aims and effects approach.\(^\text{105}\)

The soft version, as the US proposed in its submission in *Japan – Alcoholic Beverages II*, holds that the failure of the importing country to provide at the adjudicatory stage a plausible explanation to the measure producing the disparate impact, would create a presumption of improper

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\(^\text{101}\) Ibid, para 62.

\(^\text{102}\) Ibid, para 71.

\(^\text{103}\) Ibid, para 72.

\(^\text{104}\) Donald Regan, ‘Further Thoughts on the Role of Regulatory Purpose under Article III of the GATT’, 37(4) Journal of World Trade 737 (2003), at 740.

\(^\text{105}\) Donald Regan, ‘Regulatory Purpose and “Like Products” in Article III:4 of the GATT’, in Bermann and Mavroidis (eds), above n 9, at 218.
purpose. This is exactly what happened in Chile – Alcoholic Beverages. Chile was held to be in violation of Article III only after the AB concluded that the mere statement of the four objectives pursued by Chile did not constitute an effective rebuttal of such presumption of bad purpose. Thus, while aims and effects were not pertinent to the question of whether these products were substitutable or directly competitive in Chile – Alcoholic Beverages, they were relevant to the issue of whether the measure was applied ‘so as to afford protection’. As some commentators argued, it indicates a resurrection of aims and effects test.

The aims and effects test also reappeared in cases under Article III:4. In EC – Bananas III, the AB concluded that, as there is no specific reference to Article III:1 in Article III:4, there is no requirement to determine separately whether a measure is applied ‘so as to afford protection to domestic production’ when applying Article III:4. In other words, a determination that the imported and domestic products in question are ‘like products’ and that the regulatory measure in dispute provides less favorable treatment to imported products than that accorded to like domestic products, is sufficient to establish a violation of Article III of the GATT 1994. In EC – Asbestos, however, the AB implicitly retreated from its position in EC – Bananas III and stated that Article III:1 ‘informs’ Article III:4 and should act as a guide to understanding and interpreting the specific obligations contained in Article III:4. Despite its nominal reference to Article III:1, the AB in EC – Asbestos appears to show that a thorough examination of the competitive relationship between the two products, by way of the traditional four-factor analysis, is both necessary and sufficient to decide whether they are ‘like products’. The regulatory purpose enshrined in Article III:1 was not mentioned at all in the AB’s analysis of ‘like products’. After EC – Asbestos, it seems settled that even if regulatory purpose in Article III:1 needs to be considered under Article III:4, it should not be considered, at least not explicitly, as part of the ‘like products’ inquiry. The ‘like products’ inquiry should focus only on the competitive relationship in the market place between and among products.

On the other hand, the AB seemed to indicate that regulatory purpose might be considered in connection with a different aspect of Article III:4, i.e.

106 Submission of the United States dated 23 August 1996.
110 Appellate Body Report, EC- Asbestos, above n 84, para 93.
whether foreign goods are accorded ‘less favorable treatment’ than domestic goods. One paragraph in the AB report of EC – Asbestos reads:

The term ‘less favorable treatment’ expresses the general principle, in Article III:1. if there is ‘less favorable treatment’ of the group of like imported products, there is, conversely, protection of the group of like domestic products. However, A Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of like imported products less favorable treatment than that accorded to the group of like domestic products\(^\text{111}\) (emphasis added).

It is unclear, from this passage, how the regulatory purpose might inform ‘less favorable treatment’\(^\text{112}\). Does it mean that a finding of less favorable treatment will automatically lead to a violation of Article III:4, or the consideration of regulatory purpose should be \textit{part of} the ‘less favorable treatment’ analysis? What could the AB possibly have in mind when they employ the tantalizing phrase whereby ‘a Member may draw distinctions between products which have been found to be like’ without that resulting in less favorable treatment and hence in violation of Article III? Is it because the purpose of the distinction is not protectionism? The AB failed to elaborate this critical point. As many prominent WTO commentators have argued, this statement could certainly be a platform from which to embrace an intent test, reviving to some extent the aims and effects test\(^\text{113}\).

In Dominican Republic – Cigarettes, the disputed measure was claimed to have a disparate impact on the class of imported cigarettes compared with the class of domestic cigarettes. In the view of the AB, this disparate effect on imports was not enough to find a violation of national treatment:

\[ \text{T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product…} ^{114} \] (emphasis added).

More recently, the implied requirement of something more than differential treatment between like products, and even something more than a disparate impact on imported products in establishing ‘less favorable treatment’ was reiterated in EC – Biotech Products. In that case, Argentina, USA, and

\(^{111}\) Ibid, para 100.

\(^{112}\) See Regan, above n 105, at 214.

\(^{113}\) See Horn and Weiler, above n 90, at 35.

Canada complained that the EC had accorded less favorable treatment to biotech products than to non-biotech products, despite the fact that they are ‘like products’. The Panel stated:

Argentina is not alleging that the treatment of products has differed depending on their origin. In these circumstances, it is not self-evident that the alleged less favorable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety, etc. In our view, Argentina has not adduced argument and evidence sufficient to raise a presumption that the alleged less favorable treatment is explained by the foreign origin of the relevant biotech products\(^\text{115}\) (emphasis added).

In other words, even if a regulation has a more detrimental effect on imported products compared to domestic ‘like products’, the effect alone is not sufficient to conclude that the regulation provides ‘less favorable treatment’ to imports. A non-protectionist explanation may demonstrate that the regulation does not accord less favorable treatment to imports.\(^\text{116}\)

If the non-protectionist purposes are considered relevant in finding ‘less favorable treatment’ to imported products, two questions need to be answered. First, how close should the relationship be between the disputed measure and its purported non-protective purpose? Second, when considering the purpose of the measure in question, is the panel conducting a \textit{de facto} Article XX exception evaluation under Article III? For the first nexus question, the AB has made it clear that it is not a ‘necessity’ test. The AB found in \textit{Chile – Alcoholic Beverages}:

\begin{quote}
We agree with Chile that it would be inappropriate, under Article III:2, second sentence of the GATT 1994, to examine whether the tax measure is \textit{necessary} for achieving its stated objective or purposes… it appears to us that the panel did no more than try to relate the observable structural features of the measure with its declared purposes, a task that is unavoidable in appraising the application of the measure as protective or not of domestic production.\(^\text{117}\)
\end{quote}

From the statement, it seems that the AB has in mind a kind of ‘related to’ or rational relationship between the measure and the objective allegedly pursued.


\(^{117}\) Appellate Body Report, \textit{Chile – Alcoholic Beverages}, above n 100, para 72.
As to the second question, the AB in EC – Asbestos dispelled the concern that considering evidence relating to the health risks under Article III:4 renders Article XX redundant. In AB’s words:

The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that interpretation of Article III:4 implies a less frequent recourse to Article XX (b) does not deprive the exception in Article XX (b) of effet utile.118 (emphasis added).

Thus, even if the panel considers the regulatory purpose under Article III, Article XX would retain its place in relation to other Articles of the GATT such as Article I, II, and XI. It does not deprive Article XX of its entire usefulness in the GATT.

The non-protectionist purpose is not likely to be the sole factor in determining the legality of a disputed measure. As Pauwelyn argued, increasingly, it seems that proof of violation of Article III, especially de facto discrimination will be decided on a case-by-case basis, looking at a number of elements: the structure, design, and architecture of the regulation; the way the regulation is applied; the effect of the regulation on the group of imports as opposed to the group of like domestic products etc. In most cases, the presence of a non-protectionist purpose, or the absence of a discriminatory effect, will be advanced as evidence by the defendant so as to rebut the complainant’s claim of protectionism. It will be for the adjudicator to weigh everything together and to decide whether the complainant has met its burden of proving that the regulation treats imports less favorably than domestic production.119

B. The changing jurisprudence under Article XX of the GATT 1994
Traditionally, Article XX and its early GATT/WTO jurisprudence were frequently charged with a strong ‘pro-trade’ bias at the expense of legitimate national regulatory autonomy. As a result, while the GATT 1994 does not expressly embrace a laissez-faire philosophy, the evisceration of Article XX defenses made it quite difficult to identify meaningful limits to a WTO panel’s ability to pursue a broad laissez-faire agenda indirectly.120 To begin with, Article XX is structured as ‘general exceptions’. It comes into play only after violations of trade-related obligations are found. This dichotomy between trade-related obligations and regulation-related exceptions, which in

118 Appellate Body Report, EC – Asbestos, above n 84, para 115.
120 See Driesen, above n 2, at 295.
itself implies a pro-trade bias, reflects fundamental characteristics of the GATT. Second, because Article XX is categorized as ‘exceptions’, several GATT panels held that it should be interpreted narrowly as a general principle of law. This again indicates a ranking of interests in favor of trade liberalization at the expense of a Member’s right to protect non-trade interests. Indeed, throughout the GATT 1947 history, not a single Article XX justification ever succeeded. Finally, the list of general exceptions in Article XX is both exhaustive and obsolete. Drafted more than half a century ago, many of these exceptions reflect the regulatory sensitivities of the 1940s. It is difficult to imagine that contemporary social concerns could be fully addressed in a mere 10 exceptions.

More recently, the AB has adopted a more balanced and deferential approach to national regulatory autonomy under Article XX. Due to the space constraints, I will focus on the AB’s interpretation of ‘necessary’ in Article XX (b) as an example. Traditionally, to evaluate whether the measure in question was ‘necessary’ was to determine whether it was the ‘least trade restrictive’ (LTR) means. When applying the LTR test, WTO panels were criticized for neglecting the regulatory prerogatives of the defending WTO Member and arbitrarily proposing hypothetically available alternative measure with less adverse trade effects. Moreover, the panels were blasted for being insensitive to the practical regulatory experiences of national governments and no consideration was given to whether alternatives were feasible in light of a Member’s particular social, political, and economic conditions.

Recent articles analyzing the ‘necessary’ test under Article XX reiterated these criticisms. These criticisms do not hold up well to scrutiny in light of the recent WTO case law under Article XX. To begin with, when interpreting ‘necessary’, the AB no longer searches for an alternative with little regard to the Member’s appropriate level of protection or whether the alternative is truly feasible in view of the Member’s particular political, cultural, and economic conditions.

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121 See Cho, above n 96, at 34.
123 See Hilf, above n 6, at 128.
125 GATT Panel Report, Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand- Cigarettes), 37th Supp GATT BISD 200, 223, para 74.
127 See Kapterian, above n 64, at 103.
situations. Starting from Korea – Beef, and continuously being refined through EC – Asbestos, Dominican Republic – Cigarettes, US – Gambling and the most recent Brazil – Retreaded Tyres, the AB has incrementally established a sophisticated weighing and balancing test, bringing all relevant variables to the table and arguably has struck a much better balance between trade liberalization and national regulatory autonomy than it previously did. The AB’s ruling in Brazil – Retreaded Tyres is a case in point. After recognizing that the interpretation of the term ‘necessary’ illustrates the tensions that may exist between international trade and public health and environmental concerns, the AB stated:

In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis is the contribution it brings to the achievement of its objective…a measure does not have to be indispensable, however, its contribution…must be material…\(^{128}\) (emphasis added).

To recall, in Korea – Beef, the AB held that the measure must be ‘closer to the pole of indispensable than merely making a contribution to the policy goal’.\(^{129}\) Material contribution requirement can be said to demand a less close relationship between the measure at issue and the regulatory objective. Moreover, the AB held that the measure may still stand if it is apt to produce a material contribution. Evidence demonstrating a measure’s contribution to the regulatory goal in the past or present would be strong indications of a genuine relationship between the measure and its regulatory objective. However, just because a contribution is not immediately observable does not mean that it cannot be justified under Article XX (b).\(^{130}\)

Furthermore, when considering ‘reasonably available’ alternatives, the AB has demonstrated enhanced sensitivity to the complexity of the regulatory environment. First, relying on Article XX as a defense, a responding party needs to bear the burden of proof by making a prima facie case that its measure is ‘necessary’. For this purpose, the responding party needs to put forward evidence that enables a panel to assess the challenged measure in light of the relevant factors to be ‘weighed and balanced’ in a given case. However, it is not the responding party’s burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those


\(^{130}\) WTO Appellate Body Report, Brazil – Retreaded Tyres, above n 128, para 151.
measures achieves the desired objective. It is only after the complaining party raises a WTO-consistent alternative measure that the responding party will be required to demonstrate why its challenged measure remains necessary in the light of this alternative.\footnote{WTO Appellate Body Report, \textit{United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)}, WT/DS285/AB/R, adopted 7 April 2005, paras 309–11.} Second, ‘necessary’ is a property of the measure itself, and it cannot be determined by reference to the efforts undertaken by a Member to \textit{negotiate an alternative measure}. In \textit{US – Gambling}, the AB rejected Antigua’s contention that its engagement in consultations with the USA, with a view to arriving at a negotiated settlement that achieves the same objective, was an appropriate alternative because consultations are a process, the results of which are uncertain and therefore not capable of comparison with the measure at issue.\footnote{Ibid, paras 316–17.} Third, complementary measures are not ‘reasonably available alternatives’. Frequently, two or more measures may \textit{each} be necessary in order to achieve a particular regulatory goal. In other words, they have different effects and work cumulatively, rather than interchangeably, towards a broader regulatory scheme. In this sense, the necessity of one measure is not undermined by the availability of another measure that will advance the same regulatory goal.\footnote{Ben McGrady, ‘Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures’, 12(1) Journal of International Economic Law 153 (2009), at 166–68.} In \textit{Brazil – Retreaded Tyres}, the AB pointed to the preventive nature of the import ban and the remedial character of other measures and concluded that all these measures constitute mutually supportive elements of a comprehensive policy to deal with waste tyres.\footnote{Appellate Body Report, \textit{Brazil – Retreaded Tyres}, above n 128, para 211.} This recognition should increase the likelihood that some types of measures will be considered necessary, particularly where a Member adopts a range of measures to achieve an overarching regulatory goal.\footnote{See McGrady, above n 133, at 154.}

Finally, in applying the weighing and balancing test to determine ‘necessary’, the AB has followed a \textit{de facto} value-based approach.\footnote{Michael M. Du, ‘Autonomy in Setting Appropriate Level of Protection under the WTO Law: Reality or Rhetoric?’, 13(4) Journal of International Economic Law 1077 (2010), at 1100–01.} If the value at stake is high, human health and safety or environment protection for example, the AB tends to respect the Member’s judgment and consider ‘necessary’ very strict enforcement aimed at even zero risk, even if that means a very heavy burden on imports. It is only when the regulatory objective relates to some less important interests, such as reduction of consumer confusion or prevention of commercial fraud, and the proposed alternative is considerably...
less restrictive of trade, that the AB will be more likely to condemn a challenged regulation. Whether such a pragmatic approach complies with the WTO texts is controversial as clearly the AB does not have a legitimate role in ranking the importance of values that fall within the scope of Article XX provisions.\textsuperscript{137} On the other hand, it does not make much sense either to stipulate a very low level of tolerance to any worthy non-trade values, such as reduction of consumer confusion of domestic/foreign beef if the cost is seriously impeding an imported product from the market place.\textsuperscript{138}

C. The deferential standard of review in scientifically complex disputes

Standard of review in the WTO dispute settlement describes the nature and intensity of panels’ scrutiny of the legal validity of a WTO Member’s domestic regulatory decisions.\textsuperscript{139} It marks the boundary of a Member State’s discretion, and determines the power of WTO panels to investigate, evaluate, and judge the acts of a Member State against its legal obligations.\textsuperscript{140} If we agree that WTO panels should respect national government determinations up to some point, that point is the crucial issue that has sometimes been labeled the ‘standard of review’.\textsuperscript{141} When the AB addressed standard of review for the first time in \textit{EC – Hormones I} ten years ago, it cautioned that the applicable standard of review must reflect the ‘balance established…between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves’.\textsuperscript{142}

In \textit{EC – Hormones I}, the AB concluded that Article 11 of the \textit{Understanding on Rules and Procedures Governing the Settlement of Disputes} (DSU) ‘articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels reviewing the assessment of facts under the SPS Agreement’.\textsuperscript{143} Article 11 of the DSU requires WTO panels to make an

\textsuperscript{137} Steve Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’, 27 Yale Journal of International Law 59 (2002), at 101 (The WTO has no institutional competence for weighing incommensurate values, such as the exporting interests of one country against the environmental interests of another).

\textsuperscript{138} See Weiler, above n 6, at 144.


\textsuperscript{142} WTO Appellate Body Report, \textit{EC- Hormones I}, above n 81, para 115.

\textsuperscript{143} Ibid, paras 115 and 116.
'objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of conformity with the relevant covered agreements...'.

The catch-all phrase ‘objective assessment’ that would apply to all disputes is singularly unhelpful. It is couched in rather broad terms that do very little to provide substantive guidance on the nature and intensity of the scrutiny that panels should apply in reviewing national measures. For example, should a WTO panel review the cases involving a non-discriminatory measure aiming at protecting human health and safety with the same strict scrutiny as a clearly discriminatory measure? To what extent should a margin of error be excused on the part of WTO Members? When should WTO panels respect a national authority’s own risk assessment, if that risk assessment differs from panel-appointed experts’ evaluation? What, exactly, are the differences between ‘objectiveness assessment’ and the more familiar terms such as ‘de novo’ review or a standard of reasonableness? The enigmatic ‘objective assessment’ does not provide useful answers to these questions. As a result, despite the apparent generality of Article 11 as a universal standard of review to both questions of facts and questions of law across WTO Agreements other than the Anti-dumping Agreement, the nature and intensity of WTO panels’ scrutiny on national measures remains unclear.

Indeed, although the AB rejected de novo review as a proper standard to be applied by WTO panels, several commentators suggested that it is this standard of review which panels are close to applying under the SPS Agreement. ‘Objective assessment’ allows the panel to determine the existence, quality and sufficiency of scientific evidence supporting the SPS measure in question. This would arguably entitle the panel to impose its own view of the scientific evidence. Such a reading assumes a rather intrusive standard of review which is not significantly deferential to national authorities’ findings. In evaluating the threshold issue of whether there is a risk, for example, it is easy to substitute the risk sensibility of the adjudicator or of the expert witness for that of the administrative agency of the importing state.

The AB’s ruling in EC – Hormones II represents a paradigm shift in the standard of review in scientifically complex disputes. In this case, the AB

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reversed the tide of *de novo* review in SPS disputes. First, WTO panels’ mandate is limited to the assessment of the risk assessment performed by the WTO Members, and not to find the scientific ‘truth’.\(^{148}\) WTO panels’ review of national SPS measures must be conducted in the light of the Member’s regulatory objectives and risk assessment approach. As long as a Member’s risk assessment meets the minimum scientific validity requirement, WTO panels are expected to respect the Member’s decision even if WTO panels and scientific experts prefer another scientific ‘truth’. Second, the panel is expected to consider all relevant facts and an adequate explanation should be given if some divergent opinions are dismissed.\(^{149}\) In other words, the appreciation of facts and weighing of scientific evidence will no longer be a *de facto* exclusive zone for panels. The AB is willing to play a more active role in making sure that panels have adequately considered divergent scientific opinions. Third, the AB has quietly loosened the specificity requirement in risk assessment. It suffices to show that the substance at issue is one of the factors contributing to the risk. A separate, causal relationship between the substance and risk is no longer required.\(^{150}\) Finally, the AB made it clear that the determination of ‘insufficient scientific evidence’, which triggers the availability of precautionary measures under the Article 5.7 of the SPS Agreement, must be evaluated in the light of the WTO Members’ chosen level of protection and new scientific evidence. An existing risk assessment only has probative value, but is not dispositive.\(^{151}\)

These new developments indicate that the AB is in the process of formulating a new standard of review for SPS disputes. The new standard will likely be more procedurally focused and less intrusive into the domestic regulatory order. Given the inherent scientific uncertainty and the latitude of WTO Members in conducting risk assessments, the new changes established in *EC – Hormones II* seem to provide more policy space for a WTO Member to justify its SPS measures.

### D. The limits of WTO adjudication

In Section II.D, I discussed the ‘trip-wire texts’ of the WTO Agreements that reflect diplomatic fudges by negotiators. As WTO texts are ambiguous and open to interpretation, the AB has certain extent of discretion to interpret the WTO Agreements in a deferential manner that accords more autonomy to WTO Members if needed. The recent case law discussed in this part

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\(^{149}\) See Du, above n 147, at 453–54.


\(^{151}\) Ibid, para 697.
demonstrated such a move. However, there are limits as to how far WTO panels can go in this direction. As the gatekeeper of the WTO Agreements, the WTO judicial body is bound by many factors. One immediate hurdle is the requirement of Article 3.2 of the DSU, which states that the AB should ‘clarify the existing provisions’ of the covered WTO Agreements ‘in accordance with customary rules of interpretation of public international law’. In doing so, the AB cannot ‘add to or diminish the rights and obligations provided in the covered agreements’. The AB also confirmed that the treaty interpretation rule contained in the Vienna Convention on the Law of Treaties (VCLT) has attained the status of a rule of customary or general international law. Article 31(1) of the VCLT requires that the start of WTO interpretation is to find out the ordinary meaning of the WTO texts. If the WTO texts are straightforward, the AB is left with little room to interpret the texts in a different manner.

Take Article XX as an example. As discussed in Section II.B, Article XX was drafted to the effect that if a domestic regulatory measure is found to accord less favorable treatment to imports in violation of Article III, the national treatment principle, the regulating government must seek to justify that different treatment by proving that it is ‘necessary’ or ‘related to’ some legitimate non-trade values. The defending party must also bear the burden of proof that the measure was adopted in consistent with Article XX. As Horn and Weiler forcefully argued, this norm-justification dichotomy between Article III and Article XX raises a troubling question of constitutional identity, the way a society wants to understand its internal hierarchy of values. There is no reason to believe that liberalized trade should prevail over the competing values, such as human health and safety and protection of environment. Arguably, the later-drafted Agreement on Technical Barriers to Trade (TBT Agreement) has overcome such a strong pro-trade dichotomy. Nevertheless, for many measures that do not fall into the definition of ‘technical regulation’ or ‘technical standard’ in the TBT Agreement, the GATT 1994 still applies. As the structural dichotomy is embodied in the texts of the GATT 1994, it is impossible for the WTO judicial body to rectify it since it does not have such authority. In addition, Article XX provides a closed list of legitimate objectives to justify government intervention. This is out of step with the many challenges that a

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153 DSU, Arts 3.2 and 19.2.
155 See McRae, above n 64, at 226.
156 See Horn and Weiler, above n 90, at 31.
modern government is facing today. Again, the WTO judicial body is not in a position to expand the list so as to better handle the newly emerging challenges.

The same problem exists in the SPS Agreement. The AB in \textit{EC – Hormones I} held that the WTO AB can not endorse a domestically very popular, but scientifically unsound SPS measure.\textsuperscript{158} Even if it was argued that the standard of review as adopted by the AB in the recent high-profile \textit{EC – Hormones II} case was much more deferential than it previously did,\textsuperscript{159} it remains doubtful whether the procedurally focused and less intrusive standard of review is capable of solving all the tensions.\textsuperscript{160}

In response to concerns that the current WTO texts may not be capable of dealing with a variety of challenges, prominent WTO practitioners have made various ambitious proposals to clarify or amend the WTO texts. For example, Matsushita proposed that the WTO consider the incorporation of a provision into Article XX of the GATT 1994 which would specifically address environmental issues. Such a provision would state that measures relating to environmental protection are exempted from disciplines of the GATT 1994 on the condition that they comply with the requirement of the chapeau.\textsuperscript{161} The current Director-General of the WTO, Pascal Lamy, made a proposal in 2004 while he was the EU Commissioner for Trade, that the future WTO rules introduce an additional safeguard provision to protect national ‘collective preferences’.\textsuperscript{162}

Granted, authoritative interpretations or an amendment of WTO Agreements are clearly better means to handle the tensions between trade liberalization and national regulatory autonomy in the GATT/WTO regime. Since the role of the WTO judicial body is a limited one, both proposals are attractive from a nationalist’s perspective, despite their alleged weaknesses.\textsuperscript{163} However, in view of the institutional constraints of the current WTO structure as discussed in Section II.B above, such proposals are not likely to be adopted in the near future.

\textsuperscript{158} See \textit{Appellate Body Report, EC–Hormones I}, above n 81.

\textsuperscript{159} See Du, above n 147, at 458.

\textsuperscript{160} Andrew Lang, \textit{World Trade Law after Neo-Liberalism} (Oxford: Oxford University Press, 2011, forthcoming) 341–42. I thank Andrew for sharing his work with me.


IV. CONCLUSION

It has often been argued that an irreconcilable conflict between national regulatory autonomy and WTO disciplines does not exist in the GATT/WTO regime. A state effectively can pursue any given regulatory objective by means of other than protectionist trade restrictions and free trade commitments do not reduce regulatory heterogeneity. As the AB eloquently argued in *US – Reformulated Gasoline*:

WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirement of the General Agreement and the other covered agreements.

But this begs the question of how to decide whether the disputed measure is a disguised protectionist device or has been adopted for legitimate regulatory purposes. To meet the challenge, the GATT/WTO regime has developed sophisticated legal tools across a number of Agreements. To what extent these legal tools have provided stable legal criteria to ferret out protectionism without running the risk of excessive intrusion into national regulatory autonomy is controversial. In this connection, it is worth repeating that the inability to determine whether another nation’s policy choices are made on legitimate or illegitimate grounds is a serious problem for the international trading system, especially insofar as one of the prevailing norms is ‘reciprocity’ in trading relationships.

This article has sought to provide a clearer conceptual ground as to what national regulatory autonomy means in international economic law and why it merits a deferential treatment despite the legalization of the GATT/WTO regime. I also highlight recent WTO case law which marks the start of a better balancing between trade liberalization and national regulatory autonomy. I submit that the pendulum has swung in favor of affording more policy space to nation states in the GATT/WTO regime.

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166 Marceau and Trachtman, above n 73, at 9–76.


Of course, to highlight the importance of national regulatory autonomy in the GATT/WTO system is not to say that reciprocity is no longer a fundamental norm in the multilateral trade system. Undoubtedly, it is. Neither do I argue that the ground should be tilted decisively in favor of more regulatory autonomy to WTO Members when we try to untangle the perennial puzzle of how to strike a proper balance between national sovereignty and multilateral trade disciplines.\textsuperscript{169} Indeed, to lay undue emphasis on either one is not theoretically justifiable or practically possible. What I am arguing in this article is only that, first, even if free trade is the telos of the GATT/WTO system, the WTO judicial body should be acutely sensitive to national regulatory autonomy in light of the reasons that I outlined in Section II. Second, for a long time, the GATT/WTO jurisprudence has given priority to trade liberalization and this has caused some frictions with national sovereignty. In turn, it has generated a wide debate on the legitimacy of the WTO as a powerful international trade court. Finally, in view of the uncertainty of WTO treaty texts, the AB has certain extent of discretion to interpret the text in a deferential manner. Compared with its previous case law, the AB has demonstrated a willingness to accord more regulatory autonomy to WTO Members within all the constraints that it has to deal with. However, there are limits as to how far WTO panels can go. Authoritative interpretations or even amendment of WTO Agreements may be called for in order to solve the problem.

It should be stressed that my argument that we are witnessing the rise of national regulatory autonomy in the GATT/WTO regime does not eclipse the fact that many lingering uncertainties remain. Under Article III:4, for example, although the case law has revived the possibility that regulatory purpose will be considered when interpreting ‘less favorable treatment’ in Article III:4, we are still awaiting another affirmative ruling to show us that a non-protectionist explanation is indeed able to salvage an otherwise discriminatory measure from running afoul of Article III. Similarly, under Article XX of the GATT 1994, although the new case law has loosened the rigidity of the sub-paragraphs, there are legitimate concerns that some of the rigidities in the old GATT case law may be read into the chapeau.\textsuperscript{170} The recent brief clarification of the purpose of the chapeau as simply a search for a plausible cause or the rationale of the discrimination may not be enough to dissipate all the concerns.\textsuperscript{171} Finally, the recent \textit{Australia – Apples} case

\textsuperscript{170} See Gaines, above n 64, at 743.
is also a sobering reminder that the standard of review may differ among WTO Agreements and even different provisions. How to better balance trade liberalization and national regulatory autonomy in the GATT/WTO regime thus remains a worthy research project for international economic law practitioners.

172 In Australia – Apples, when analyzing whether New Zealand’s proposed alternative measures meet Australia’s appropriate level of protection, the panel stated that it had to be careful not to ‘slip into conducting a de novo review’. On appeal, the AB criticized the panel’s caution as misplaced. The AB argued that caution not to conduct a de novo review is appropriate where a panel reviews a risk assessment conducted by the importing Member’s authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim. This implies that the standard of review may differ between Article 5.1 and Article 5.6 of the SPS Agreement. See WTO Appellate Body Report, Australia – Measures Affecting the Importation of Apples from New Zealand (Australia – Apples), WT/DS367/AB/R, adopted on 17 December 2010, para 356.