
Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO

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Jochem Wiers, *Trade and Environment in the EC and the WTO, A Legal Analysis*. Groningen: Europa Law Publishing, 2003

Sandrine Maljean-Dubois (ed.), *Droit de l'Organisation Mondiale du Commerce et protection de l'environnement*. Brussels: Centre d'Etudes et de Recherches Internationales et Communautaires (CERIC)/ Bruylant, 2003

Richard Steinberg (ed.), *The Greening of Trade Law, International Trade Organizations and Environmental Issues*. Lanham, MD: Rowman & Littlefield Publishers, 2002

Fiona MacMillan, *WTO and the Environment*. London: Sweet & Maxwell, 2001

Abstract

WTO jurisprudence, in particular in the area of trade and environment, continues to evolve. Books on the same topic roll off the academic presses as never before. Yet, not all of these publications have fully appreciated the dramatic change that took place with the shift from GATT to the WTO, especially the more nuanced decisions by the Appellate Body. This essay reviews four recent books on trade and environment. It sets the debate in a wider framework and then focuses on the extent to which trade rules genuinely prohibit ecological state intervention. Its main objective is to dispel some of the GATT-inspired myths that keep haunting the WTO, in particular to point at the narrowed scope of prohibited discrimination, the accepted extra-territorial effect of certain regulations (including the possibility to justify regulations based on process or production methods) and the increased relevance, including before WTO panels, of environmental agreements negotiated outside the WTO.

Trade and environment is a topic that has been discussed *ad nauseam*. So why read this essay, let alone the books it is reviewing? The fact of the matter is that, first, the debate

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remains unresolved and continues to evolve with new judicial and treaty-making activity; and, second, much ill-informed material has been published on the topic, hence, a rigorous and unbiased analysis can still capture an audience.

The latest harvest of trade and environment books includes two monographs, one by Jochem Wiers (Dutch Ministry of Foreign Affairs), another by Fiona MacMillan (Professor at Birkbeck College, University of London). Wiers' book is a doctoral thesis written under the supervision of Professors Jan Jans and Friedl Weiss of the University of Amsterdam. Wiers examines and compares the extent to which WTO and EC trade law permit domestic regulations enacted to protect the environment. He does so through a meticulous analysis of treaty provisions and, especially, case law focusing exclusively on internal regulations (leaving aside taxation, subsidies and export controls, a pity given that the book is close to 500 pages long). Wiers is quick to 'emphasize the different contexts and backgrounds of the trade liberalization commitments in the EC and WTO' and, therefore, opines that 'it appears inconceivable that the WTO could achieve . . . similar effects for WTO rules in its Members' legal orders as the ECJ has done for European law'. (at 417) At the same time, he rightly points out that '[c]onsidering the different contexts in which they operate, the similarities between the relevant provisions and their interpretations are striking'. (at 343) Interestingly, for both the EC and the WTO, Wiers' overall conclusion is that '[t]reaty changes are not needed' given that 'the relevant rules in both the EC and the WTO provide sufficient room for a balanced outcome of disputes on trade and environmental protection'. (at 419) MacMillan uses a broader canvas (albeit in 275 pages, excluding annexes) also covering the institutional landscape (with an excellent overview of international institutions addressing environmental policy) and the trade and environment angle of access to genetic resources and traditional knowledge, biotechnology, trade in services and multinational corporations. MacMillan's broader perspective is clearly enriched by her background in intellectual property rights (especially copyrights) and commercial law (she edited a two-volume treatise on *International Corporate Law*, Hart Publishing, 2000/2002). The book's overall emphasis (influenced heavily by Professor David Kennedy's critical analysis of international economic law) is on the 'contributions to and constraints of [the] . . . proliferating actors and interests [states, international institutions, corporations, NGOs] on the shape of global environmental regulation and policy'. (at 252) Another recurring theme in her book is 'the actual or potential conflicts [also referred to as 'a kind of schism' (at 266)] between the regime of international economic law . . . and the public international environmental law regime'. Unlike Wiers, MacMillan is of the view that drastic changes are needed: MacMillan advocates the creation of a new World Environment Organization that 'unites and transcends the WTO system and the public international environmental system' (at 272); 'more immediately', she points to 'a wide range of areas in which amendment or clarification would be desirable and would considerably contribute towards the greening of the WTO'. (at 264)

The other two books addressed in this essay are edited volumes, one under the supervision of Richard Steinberg (University of California, Los Angeles), the other the

result of a collective research project by the *Centre d'Etudes et de Recherches Internationales et Communautaires* (CERIC) at the University of Aix-Marseille III. The Steinberg volume (with contributions by, amongst others, James Cameron, Gregory Shaffer, Damien Geradin and Julie Soloway) was written with reference to the main theories in political science (realism, institutionalism and liberalism), offering chapters on relevant WTO institutions and the major regional approaches to trade and environment (EC, NAFTA, FTAA and APEC). The book's focal point is on 'differences between the way international trade organizations address environmental issues, on the explanations for those differences, and on the development of a U.S. strategy for handling trade-environment issues in international organizations'. (at vii) Steinberg himself closes the book with an 'environment-friendliness' ranking of international organizations. Not surprisingly, the EU tops his list, followed by NAFTA. The GATT/WTO is classified as 'little environment friendly rule development' and, at the bottom of the ranking, are groupings like MERCOSUR, APEC and AFTA, branded as 'no environment friendly hard law'. (at 288) According to Steinberg, these divergent results are 'mostly a result of bargaining among the organization's members' (at 288) and state 'power and interests' (at 293); the involvement of rich countries leads to greener institutions; deeper integration is greener. While Wiers can accept the status quo and MacMillan sees a clear need for a World Environment Organization, Steinberg concludes that 'those who want trade-environment rules to develop in an environment-friendly manner may be ill-advised to move these issues into nontrade fora: It is precisely by linking trade and environment that the developed countries have gained the leverage necessary to yield environment-friendly developments.' (at 297) The CERIC collection is divided into two parts: the first one, on substantive WTO law (with a heavy focus on multilateral environmental agreements as well as developing countries); the second, on how WTO law is enforced (conflicts of law and jurisdiction, treaty interpretation, precaution and burden of proof, *amicus curiae* and scientific experts). The first part includes contributions by Marie-Pierre Lafranchi, Francis Snyder and Nathalie Thome. The second part was written largely by H el ene Ruiz Fabri, Laurence Boisson de Chazournes and Theofanis Christoforou.

If Wiers' book is the detailed and unbiased (trade) lawyer's account of the state-of-play of WTO and EC jurisprudence in the field, MacMillan's work offers the broader (though necessarily less detailed) perspective of the intellectual property lawyer, taking cognizance also of institutions, technology and economics. If the Steinberg volume contributes the American (liberal, pro-environment) perspective cast in terms of political science, the CERIC collection adds the French-European take on the debate, approaching it rather from the spectrum of public international law.

This review essay makes no attempt to do justice to the wide array of topics and perspectives developed in the four books. Rather, the four books are used (some may call it abused) as a sample (or excuse) for this author to dispel some common misunderstandings on how trade and environment interrelate, how the WTO deals with this relationship and how this fits into the wider landscape of international governance.

1 Trade and Environment: Seeing Both the Forest and the Trees

In a nutshell, the tension between trade and environment can be summarized as follows.

First, treaties *liberalizing* trade can harm the environment. In this sense, trade and environment may *conflict* in at least four ways:

- (i) more trade and economic activity may result in more environmental degradation;
- (ii) the competition brought about by free trade may put pressure on governments to lower environmental standards (the so-called ‘race to the bottom’);
- (iii) trade agreements may prevent governments from enacting certain environmental regulations; and
- (iv) trade law may prohibit the use of trade sanctions or preferences, be it as sticks or carrots to ensure the signing up to, or compliance with (international) environmental standards.

Second, trade *restrictions* or *distortions* can harm the environment. In this sense, trade liberalization and environmental protection go *hand in hand* in at least three ways:

- (i) trade liberalization should lead to higher levels of development and make available resources for environmental protection (the Environmental Kuznets Curve);
- (ii) trade-distorting subsidies and other support for over-production (activities generally disliked by trade law), be it in the fisheries or agricultural sectors, can deplete environmental resources; and
- (iii) trade restrictions on the provision of cross-border services or technology to recycle or otherwise limit environmental harm can delay or prevent the efficient protection of the environment.

This overview, as well as the diversity of approaches found in the four books discussed, demonstrates the multi-faceted nature of the trade and environment debate (law, politics, economics, technology, etc.). In this sense, the purely legal-textual analysis offered by Wiers has its limits: it provides a strictly top-down approach of what the rather scarce and not always consistent or relevant case law states, rather than a bottom-up approach that would set out the existing environmental problems and assess the available instruments to resolve those problems in a way consistent with WTO/EC trade law. Indeed, given the absence of any analysis of environment-specific problems and solutions, Wiers’ book is, in the end, more about domestic regulation generally speaking and how WTO and EC jurisprudence restrict it, rather than a trade and environment treatise. While MacMillan and Steinberg take a more holistic approach, Daniel Esty’s *Greening the GATT* (1994) and Hudec and Bhagwati’s two volume *Fair Trade and Harmonization* (1996) remain, in my view, the best mix of legal, economic and political analysis on the market.

At the same time, for the international lawyer, it is important to see the forest through the trees. For us, the ultimate questions remain:

- (i) can a given environmental measure be enacted consistent with international trade law? (i.e., the *negative* question of the extent to which trade law *prevents* certain forms of environmental protection); and
- (ii) how can international trade regimes *positively* contribute to a healthier environment?

The first question brings us back to the different *instruments* available to protect the environment.

2 Choosing the Right Instrument to Achieve Environmental Objectives

When it comes to protecting the environment, a long series of instruments is available and the choice of instrument is crucial for consistency with trade law. The starting point should be: Is there a need for the government to intervene *at all* or can the market deal with the problem? For example, if European consumers are, indeed, completely unwilling to eat hormone-treated beef (be it for health, environmental or moral reasons), will consumers themselves not drive beef *with* hormones off the market? If so, why should public authorities intervene (other than, perhaps, through labelling requirements)? Indeed, intervention by the regulator, say, a ban on hormone-treated beef, may raise the question of whether the regulator *responded* to genuine and pre-existing consumer concerns or whether these concerns were rather *triggered* or *created* only after and because the government had intervened.

Second, once so-called negative environmental externalities do arise (i.e., harm to the environment is *not* internalized in price levels nor neutralized through normal market forces), trying to protect the environment by means of *trade policy* (for instance, import bans or tariffs) is rarely the best solution. Instead, the problem is better dealt with at its roots, for example, by providing tax or other incentives not to pollute or to switch to cleaner production methods. When it comes to convincing *other* countries to protect *their* environment or global environmental commons, using trade restrictions is also a second or third-best option (and even then of questionable efficacy in terms of actually improving the environment) as compared to negotiating higher or common minimum standards with other countries.

At the same time, price-based intervention and regulatory oversight other than through trade policy in the strict sense (be it in the form of labels simply to inform consumers or a ban or other restriction on the production or sale of certain goods or services) can still have an impact on trade and therefore fall under the scrutiny of trade law. And this is where the central and ever-recurring question in trade law arises: Is the government really intervening to protect the environment (in which case the measure stands) or is it rather intervening to protect domestic producers (in which case the measure cannot be tolerated)? Where do we draw the line and how do we decide on what side of the line a particular measure falls?

All trade regimes have to deal with this question and each provides its own particular answer. The centrality of the question makes comparative research

extremely fruitful, be it along the lines of Wiers (comparing the WTO to the EC, as was done previously by Geert Van Calster,¹ although Wiers was able to add crucial new WTO cases such as *EC–Asbestos*), Steinberg (adding NAFTA, FTAA and APEC) or the earlier but excellent work of Damien Geradin (juxtaposing EC to US trade law).²

3 Instruments that are Discriminatory *versus* those that are Origin-Neutral

In all trade regimes a distinction is made between, on the one hand, policies that discriminate imports as against domestic products (be it *de jure* or *de facto*) and, on the other hand, policies that are origin-neutral or indistinctly applicable. The former are, in principle, prohibited on the ground that if one is really concerned about the environment there is no need to treat imports any differently to domestic products. Treating domestic products better is equated with protectionism. Yet, in both EC and WTO law even *discriminatory* measures can be justified under a limited and *closed* list of policy justifications (respectively in Article 30 EC Treaty and Articles XX/XXI GATT). Under the dormant commerce clause of the US Constitution no such closed list is provided for and, in principle, *any* legitimate state goal can be invoked to justify discriminatory restrictions on inter-state commerce.

In EC law even *non-discriminatory* obstacles to trade are prohibited unless they can be justified with reference to some legitimate, non-protectionist objective (the so-called mandatory requirements, a non-exhaustive list of justifications created through the *Cassis de Dijon* line of case law³). A similar position is taken in US law, although under the so-called *Pike* test non-discriminatory obstacles to inter-state trade are made subject to a somewhat more intrusive balancing test, comparing the cost of regulation to the benefits derived from it.⁴

In GATT law, on the contrary, *non-discriminatory* policies *cannot* be challenged: countries can do whatever they want as long as they do not discriminate imports as against domestic production. But this was changed in 1995 with the introduction of new WTO agreements on technical and health-related barriers to trade: such barriers are now disciplined (in particular, they must be necessary, least-trade restrictive or based on science) *even if they do not discriminate against imports*.⁵ This adds a major new limitation on the regulatory autonomy of WTO Members. It goes toward the tougher

¹ G. Van Calster, *International & EU Trade Law, The Environmental Challenge* (2000). Unlike Wiers, Van Calster also addresses eco-taxes and labels as well as subsidies and trade measures taken pursuant to international environmental agreements. For another treatise of the same type, even more recent than that by Wiers, see F. Ortino, *Basic Legal Instruments for the Liberalisation of Trade. A Comparative Analysis of EC and WTO Law* (2004).

² D. Geradin, *Trade and the Environment* (1997).

³ Case 120/78, '*Cassis de Dijon*' [1979] ECR 649.

⁴ *Pike v. Bruce Church* 397 US 137 (1970).

⁵ See WTO Agreement on the Application of Sanitary and Phytosanitary Measures and WTO Agreement on Technical Barriers to Trade.

EC/US approach of presuming that any obstacle to trade is illegal unless justified. Fortunately (at least for those who believe that legitimate justifications for obstacles to trade are difficult to pin down *ex ante* and without variation over time), as done through case law in the EC, the list of legitimate policy justifications under the WTO Agreement on Technical Barriers to Trade (TBT Article 2.2) is an *open* one (similar to the 'mandatory requirements' in the ECJ case law under Article 28, but in contrast, however to the *closed* list of justifications available for discriminatory measures under EC Article 30 and GATT Articles XX/XXI).

At the same time, the EC seems yet again a development ahead of WTO law in that it now excludes from the purview of its trade rules non-discriminatory *selling arrangements* that do not lay down requirements to be met by goods but regulate, for example, whether they can be sold on Sunday or can be resold at a loss (*Keck* line of case law⁶). The WTO has not yet been faced with the question of whether such selling arrangements violate WTO rules (e.g. GATT Article XI). Since many EC scholars question the *Keck* ruling, it is unclear whether the WTO needs a similar carve-out.

4 Expanding the Exceptions in EC Article 30 and GATT Article XX? The Irony of the WTO's Political and Judicial Impasse

As Wiers argues, with the broad definition now given to 'discriminatory measures' in EC/WTO law, i.e., also including measures that discriminate imports only *in their effect* (albeit completely unintended), does it still make sense to give preferential treatment to non-discriminatory measures in that only those measures can be justified under the *open* list of legitimate objectives (discriminatory measures, in contrast, can be excused only on the grounds *explicitly* listed in EC Article 30/GATT Articles XX/XXI)? Should not all measures, with the exception perhaps of *de jure* origin-based discriminations, be justifiable on an equal footing? In other words, should not also measures that can now only be justified with reference to the *closed* list of exceptions in EC Article 30 and GATT Article XX/XXI be justifiable with reference to *any* legitimate objective, the way it is done currently in the EC under *Cassis de Dijon* for indistinctly applicable measures and in the WTO under TBT Article 2.2 for technical barriers to trade? If it turns out that the exception is not met, nothing is lost and the measure would still be prohibited.

In EC law, the European Court of Justice may openly turn in that direction (after all, it was the ECJ itself that created the back-door of mandatory requirements); in the WTO, with its less activist judiciary, it is hard to imagine that the Appellate Body would expand the list of GATT Articles XX/XXI exceptions in any explicit way (for instance, so as to include a more explicit environmental exception or exceptions related to fundamental human rights or cultural diversity). In this sense, GATT Article XX is a first GATT phantom that keeps haunting the WTO.

⁶ Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097.

And here lies the irony: while one would expect the global WTO regime to give *more leeway* to states to regulate (as compared to the much more integrated EC system), the opposite is true: the list of legitimate policy justifications under GATT is *more limited* than that under EC Articles 28/30 as interpreted by the ECJ. This is, oddly enough, not *despite* the loosely integrated nature of the WTO, but *as a result* of it: (i) because of the wide diversity between WTO members and the consensus requirement for any change to occur (other than through case law), WTO members *cannot* and *do not want* to open the Pandora's box of renegotiating GATT exceptions, let alone engage in an attempt to harmonize their domestic regulations; and (ii) the WTO judiciary, in turn, although it can act *without* the consensus of WTO members, feels insecure and illegitimate to actively add to the agreed list (in 1947!) of exceptions, if only because it realizes that subsequent legislative correction or harmonization is very unlikely, if not impossible (as compared to, for example, the possible legislative response in the EC in the form of, for example, uniform EU-wide environmental standards following a negative ruling by the ECJ). Steinberg is, therefore, right to conclude that 'deeper integration is greener'. (at 290) However, the absence of further clarifications of, or additions to, GATT Articles XX/XXI is not so much the result of a grand power struggle between states, but a consequence rather of the consent-requirement to adapt the GATT to modern needs and the corresponding reluctance of the WTO judicial branch to engage in far-reaching judicial activism.

5 Stopping the 'Mission Creep' of Trade Rules: Differential Treatment is Not Necessarily Discriminatory, Let Alone Protectionist: (EC–Asbestos as the WTO Equivalent of *Keck*?)

The limited scope of GATT exceptions available to justify discrimination provides all the more reason to narrowly interpret the *very notion* of prohibited discrimination as it is used in WTO rules. Two important limitations come to mind.⁷

First, before concluding that there is *de facto* discrimination (i.e., before condemning any environmental measure that is origin-neutral on the statute books), one ought to demonstrate at least a *disparate impact on imports* (albeit only in the form of hurting competitive *opportunities* of imports). It should not suffice that the measure treats two

⁷ In addition, note the recent Appellate Body ruling on EC — *Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, circulated on 7 April 2004. In that case, the Appellate Body refused to adopt the position that making *any* distinction amounts to discrimination (a position espoused by the panel as well as the complainant, India). Rather, the Appellate Body focused its definition of discrimination on a prohibition of 'distinguishing among *similarly-situated* beneficiaries' (at para. 153, emphasis added).

like products differently.⁸ To give an example, if a country gives a tax or other advantage to products made in a particular environmentally friendly way, such policy should not be found discriminatory unless it can at least be shown that the burden of the policy falls disproportionately heavily on imports. If not, where is the protection offered to domestic production? Put another way, if Japan taxes one alcoholic product much more highly than another, before discrimination-to-be-equated-with-protectionism can be found it should at least be shown that the type of *less highly* taxed alcohol (i.e., shochu) is predominantly *domestically* produced, i.e., that the much *more highly* taxed product (i.e., vodka) is predominantly imported.⁹

This, in my view, crucial requirement of disparate impact — which ought to apply to *both* forms of discrimination in the GATT, namely national treatment (Article III) and most-favoured nation treatment (Article I) — was hinted at most recently by the Appellate Body in *EC–Asbestos*:¹⁰

even if two products are ‘like’ [say, electricity produced with coal is like electricity produced with nuclear energy], that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of ‘like’ *imported* products ‘less favourable treatment’ than it accords to the group of ‘like’ *domestic* products . . . 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 favourable treatment’ than that accorded to the group of ‘like’ *domestic* products.

The prerequisite of disparate impact on imports is a restriction on the concept of discrimination itself that should put a needed brake on the creeping WTO regulation of domestic intervention. In some way, it may become the functional equivalent of the *Keck* ruling by the ECJ in that both rulings, after a period of broadly interpreting trade disciplines, impose certain limits that preserve the regulatory autonomy of states.

Second, before concluding that there is discrimination in violation of GATT rules (in particular GATT Article III), a measure must, according to established case law, (i) be ‘applied . . . so as to afford protection to domestic production’ (in the event of an internal tax measure that differentiates between directly competitive or substitutable products under GATT Article III:2, second sentence), or (ii) accord ‘less favourable’ treatment to imports (for non-tax measures under GATT Article III:4). Differential treatment between comparable products, even if it has a disparate impact on imports (as explained above) should not necessarily suffice to find a violation of GATT Article III. In addition, it must (at least under GATT Article III:2, second sentence) be shown that the measure’s application is protectionist (discrimination with a disparate impact

⁸ See Davey and Pauwelyn, ‘MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”’, in T. Cottier and P. C. Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (2000), at 38–41 and Ehring, ‘De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation — Treatment or Equal Treatment?’, 36 *J. of World Trade* (2002) 921.

⁹ See Appellate Body Report, *Japan — Taxes on Alcoholic Beverages* (*Japan — Alcoholic Beverages II*), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, where the Appellate Body did not explicitly endorse this requirement of disparate impact on imports.

¹⁰ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* (*EC — Asbestos*), WT/DS135/AB/R, adopted 5 April 2001, at para. 100, emphasis in original.

on imports, which can be incidental and/or inadvertent, is not enough). One of the ways to demonstrate protectionism is, according to the Appellate Body in *Chile — Alcoholic Beverages*, to examine ‘the statutory purposes or objectives — that is, the purpose or objectives of a Member’s legislature and government as a whole — to the extent that they are given objective expression in the statute itself.’¹¹

In that case, for example, Chile offered four explanations for imposing higher taxes on most imported alcohol than on most domestic alcohol (revenue collection; eliminating type distinctions; discouraging alcohol consumption; and minimizing regressive taxes). However, none of these four explanations were found to be convincing, hence, ‘the conclusion of protective application reached by the Panel becomes very difficult to resist, in the absence of countervailing explanations’.¹²

Put differently, if a country can logically explain why a difference in treatment occurs (say, a lower tax on green electricity), such explanation may show that protectionism was not behind the measure (even though the tax has a disparate impact on imports). In contrast, if none of the justifications given are logically convincing, by default, the measure can be seen as protectionist, i.e., ‘applied . . . so as to afford protection to domestic production’ in violation of GATT Article III.

The *Chile — Alcoholic Beverages* dispute concerned a tax measure under GATT Article III:2, second sentence. However, given that the language of ‘applied . . . so as to afford protection to domestic production’ in GATT Article III:1 also informs and provides context for GATT Article III:4 on non-tax measures (such as sales restrictions or eco-labels), the requirement of ‘less favourable’ treatment in GATT Article III:4 could, in my view, be interpreted along the same lines.¹³ As the Appellate Body in *EC–Asbestos* noted: ‘The term “less favourable treatment” expresses the general principle, in Article III:1, that internal regulations “should not be applied . . . so as to afford protection to domestic production”’.¹⁴ The same approach can be defended for discrimination under GATT Article I (MFN).

¹¹ Appellate Body Report, *Chile — Taxes on Alcoholic Beverages* (*Chile — Alcoholic Beverages*), WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 62. The Appellate Body added, however, that ‘the subjective intentions inhabiting the minds of individual legislators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters’.

¹² *Ibid.*, para. 72.

¹³ Note, however, that in *EC–Bananas*, the Appellate Body explicitly rejected the idea that measures in violation of GATT Art. III:4 must satisfy the separate requirement of ‘applied so as to afford protection’ (Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas* (*EC–Bananas III*), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591). This requirement, found in GATT Art. III:1, applies only for tax measures under GATT Art. III:2, second sentence; not for internal regulations under GATT Art. III:4. Besides the fact that this ruling is contestable, there remains scope to interpret the condition of ‘less favourable’ treatment for imports (which is an explicit condition under GATT Art. III:4) in a way that includes reference to the ‘so as to afford protection’ requirement in GATT Art. III:1.

¹⁴ Appellate Body Report on *EC–Asbestos*, para. 100.

6 Other GATT Myths that Keep Haunting the WTO

A different line of inquiry, occupying considerable space in all four books reviewed, addresses the question of whether countries can punish environmentally harmful *conduct* that takes place *outside* their borders (say, fishing shrimp abroad in a way that kills sea turtles), to be distinguished from regulating the importation or sale of *products* that, in and of themselves, may cause harm once entering the market (say, products containing asbestos or pesticides).

A First Myth: Environmental Protection Cannot Distinguish Based on How Products Were Produced Nor Can It Have Extraterritorial Effect

For reasons that defy understanding, publicists (including most of the authors whose work is reviewed here, Wiers being the notable exception¹⁵) continue to express the view that the WTO permits product-based distinctions (say, a ban on products containing asbestos), but categorically prohibits regulations based on differences in production or process methods (infamously referred to as PPMs), such as a ban on shrimp based on how they were caught. This is done mostly with reference to two unadopted GATT panel reports in the tuna/dolphin saga. Officially, those panel rulings are not even public documents. Given the Appellate Body case law on the matter, the value of these two GATT reports is almost nil. Yet, they occupy lengthy discussions in all four books under review.

MacMillan, for example, states: 'unilateral measures designed to secure extrajurisdictional environmental protection will be unlikely to fall within the Article XX exception'. (at 10) The CERIC book, in turn, argues: 'il est impossible de taxer les produits importés à raison de leur processus de production non écologique, quand bien même une taxe identique frapperait les produits nationaux similaires'. (at 85)¹⁶ The Steinberg book, finally, submits that 'WTO doctrine does not permit considering the means by which a product is made to distinguish between products'. (at 41)

The truth is that regulations based on PPMs — say, an obligation to buy 'green' electricity — can also (i) pass the non-discrimination test under GATT Article III; and (ii) even if they *do* violate basic GATT obligations (such as GATT Articles I, III or XI¹⁷) still be justified under GATT Articles XX/XXI (that is, they can be excused on the ground of public morals, national security, health or environmental protection). Hence, although some PPM-based measures will violate GATT, others will not.

Firstly, through WTO case law, the notion of 'like' or 'directly competitive or

¹⁵ Wiers rightly notes at 266: 'many officials, policy makers, non-governmental organizations and academics still assume that the WTO simply prohibits unilateral PPM-based measures. At the time of writing, three years after the Appellate Body report in *US-Shrimp-Turtle*, the WTO website contains a similar statement'.

¹⁶ CERIC, at 85. For a similar statement see CERIC, at 263, 'It is impossible to tax imported products based on their non-ecological production process, even if an identical tax were levied on like domestic products' (author's translation).

¹⁷ GATT Art. XI imposes a general prohibition on quantitative border restrictions not applied to domestic products.

substitutable' (DCS) products under GATT Article III has been restricted considerably. It no longer suffices to show that two products are *physically* the same (say, electricity is electricity) for there to be an obligation to treat them in the same way. Rather, it is essentially the market place of consumers that decides whether products are like/DCS:¹⁸ if consumers do make sufficient difference between 'green' and other electricity (or between 'natural' and GMO food) so can the government, the logic being that any governmental intervention (say, a lower tax on green electricity or a label on GMO food) will then not alter the conditions of competition between green and non-green electricity or between 'natural' and GMO food since consumers do not regard them as sufficiently substitutable in the first place.

In addition, as explained above, even if the two types of electricity are sufficiently similar and there is hence a differential treatment between like/DCS products, this does not suffice for a violation of GATT Article III. Moreover, it must be shown that (i) there is a *disparate impact on imports* (e.g., most imported electricity is non-green, whereas most domestic electricity is green) and (ii) at least for DCS products under GATT Article III:2, second sentence (though, in my view, also for non-tax measures under Article III:4), the discrimination must be shown to be protectionist (this can be done, *inter alia*, by checking whether or not any *non*-protectionist motive could logically explain the measure).

Secondly, even if GATT Articles I, III or XI are violated, GATT Articles XX/XXI can still justify such violation even if the measure at issue differentiates on the basis of PPMs, i.e., based on conduct that occurs abroad (say, the fishing of shrimp or the generation of electricity abroad). The Appellate Body decision eventually upholding the US ban on imports of shrimp caught in ways that endanger sea turtles, is living proof of this possibility.¹⁹ This decision shows that GATT Article XX does not categorically prohibit measures with an extraterritorial application or effect, once again, a reality often overlooked in the books reviewed here. As the Appellate Body famously stated:

It appears to us ... that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.²⁰

At the same time, the *Shrimp/Turtle* ruling does not mean that GATT Article XX permits *any* environmental measure, regardless of the nature and extent of its territorial scope. In *Shrimp/Turtle*, the measure was justified under GATT Article XX, *inter alia*, because (i) the sea turtles protected were internationally recognized as

¹⁸ For GATT Art. III:2, see Appellate Body Report, *Japan–Taxes on Alcoholic Beverages* ('*Japan–Alcoholic Beverages II*'), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97; for GATT Art. III:4, see *EC–Asbestos*.

¹⁹ Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products–Recourse to Article 21.5 of the DSU by Malaysia* ('*US–Shrimp (Article 21.5–Malaysia)*'), WT/DS58/AB/RW, adopted 21 November 2001.

²⁰ Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products* ('*US–Shrimp*'), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 121.

endangered species, migratory and swimming both in the high seas and waters of several coastal states, including those of the US; and (ii) the US did eventually permit *all* shrimp actually caught with turtle protection devices, including those originating in a *country* that does *not* meet US standards.

Put differently, GATT Article XX requires at least two types of nexus. First, it will only apply if there is a sufficient nexus between the regulating country and the environmental risk at hand (not, for example, if the risk is purely internal to the foreign country; however, risk to global environmental commons or risk of *cross-border* environmental damage into the regulating country ought to qualify). Second, GATT Article XX requires a sufficient nexus between the actual product that is banned and the environmental risk at hand: if the shrimp is banned only because it was caught in a country with non-US policies in place, this nexus is not likely to be strong enough (if not, one risks the slippery slope of justifying a ban on just about every product simply because the exporting country has policies in place that the importing country dislikes, be it a lack of environmental protection, the continued imposition of the death penalty or insufficient support for the war on terrorism). However, if the shrimp is banned because it was specifically caught by fishermen not using turtle protection devices, the nexus is tight enough.

As Wiers points out (at 139), in integrated regimes such as the EC or the US, it comes rather naturally not to tolerate actions aimed at correcting environmentally harmful conduct in other member states (thereby somewhat contradicting Steinberg's point that deeper integration is necessarily greener (at 290)). After all, one of the main objectives of these regimes is to create a single market and harmonization of environmental standards at the EC/US federal level is not only a distinct possibility but also a stated aim. Hence, when the ECJ/US federal courts declare such unilateral action to be illegal, the legislative branch can intervene and seek agreement on similar action at an EC/US-wide level. In negatively integrated regimes such as the WTO, where positive harmonization is far more difficult to achieve, it should come as no surprise that in some situations unilateral action with extraterritorial effect will have to be tolerated, albeit as a last resort measure to address the collective action problem of protecting a global environment in a consent-based international legal system.

Crucially, as of 1995, PPM-based measures (even if they fail under GATT) can also be justified under the new WTO Agreement on Technical Barriers to Trade (TBT): (i) the TBT Agreement explicitly covers measures relating to 'product characteristics or their related processes and production methods',²¹ as well as measures addressing 'terminology, symbols, packaging, marking or labeling requirements as they apply to a product, *process or production method*;²² (ii) as noted earlier, in contrast to the exhaustive GATT Article XX list, TBT measures can be justified under an open list of

²¹ TBT Annex 1, para. 1 defining 'technical regulation' (emphasis added). See also para. 2 defining 'standard'.

²² *Ibid.*

‘legitimate objectives’; and, finally, (iii) once a measure is justified under the TBT Agreement, such justification trumps any violation of the more general GATT.²³

In sum, the above-quoted statements from at least three of the four books reviewed are misleading, factually incorrect and foster unwarranted hostility against the WTO. There are good reasons to criticize the WTO. However, the allegation that it does *not* permit any PPM-based distinctions nor environmental regulations with an extraterritorial application or effect, is *not* one of them.²⁴

B Second Myth: Environmental Treaties Must Be Incorporated into the WTO or Be Justified under GATT Article XX

Another GATT myth that, in my view, keeps haunting the WTO is that somehow multilateral environmental agreements (MEAs) do not have any self-standing value before a WTO panel. Put differently, this myth states that when countries conclude an MEA, this MEA, and the implementing measures it calls for, must still pass the GATT Article XX test or be explicitly incorporated in the WTO treaty, *even for the relation between WTO Members that are parties also to the MEA*. MacMillan, for example, assumes the existence of two self-contained regimes. She laments (at 42) that ‘the real problem here is the rigid separation in international law between public international law and international economic law’. Hélène Ruiz Fabri, in the CERIC publication (at 363), is of the view that WTO panels can only apply WTO covered agreements, not any other rules of international law such as MEAs (even if the disputing parties are bound by the MEA). In the same publication, Laurence Boisson de Chazournes comes to the same conclusion. Wiers as well (at 215) assumes that MEAs must pass the GATT Article XX test or be explicitly incorporated into WTO agreements, before the WTO can accept them. All these assertions are based on what I think is a common confusion between, on the one hand, the limited jurisdiction of WTO panels (panels can only find violations of WTO obligations) and, on the other hand, the law that WTO panels can refer to and apply when examining the validity of those WTO claims (the separate question of applicable law, in particular, the law that the regulating country can invoke in its defence which, in my view, potentially

²³ See the conflict rule giving preference to the TBT Agreement over GATT in the *General Interpretative Note to Annex 1A of the Marrakesh Agreement Establishing the WTO*.

²⁴ Wiers may be more correct when he states in his conclusion, at 424: ‘in *US-Shrimp-Turtle*, the Appellate Body has possibly been even a little too “green”, by allowing a unilateral PPM-based measure that targeted government rather than producer behaviour in the exporting country, without making it clear that such measures must remain highly exceptional so as not to endanger the multilateral nature of the trade system’.

includes all international law that is binding as between the disputing parties, including MEAs).²⁵

First, the WTO treaty is like any other treaty and hence automatically interacts with other rules of international law, including MEAs. Contrary to what MacMillan implies, there is not, and should not be, a schism between public international law and international economic law: international economic law, including WTO law, is a *full part of* public international law. Unless the WTO treaty were to *explicitly rule out* the application of other rules of international law, the WTO treaty must be examined in the context of these other rules, notably other treaties binding as between the disputing parties. These other treaties may prevail over the WTO treaty or may have to give way to it, depending on the conflict rules in either treaty or, in the absence of such explicit rules, based on conflict rules of general international law (e.g., *lex posterior* and *lex specialis*). As a result, even if the *jurisdiction* of WTO panels is limited to the enforcement of claims under WTO covered agreements, any such WTO claims must be examined in the context of other rules of international law binding on the disputing parties. Hence, if an MEA explicitly permits or even obliges the imposition of a certain trade restriction, such restriction, though possibly a violation of WTO rules, can be justified by the MEA, as between WTO Members party also to the MEA (and this *without* having to pass the GATT Article XX test).²⁶

Whether this MEA defence prevails over a WTO violation will then depend on the applicable conflict rules. In the WTO, no such explicit rules exist, hence in most cases the MEA is likely to prevail either as the later treaty in time or the more specific one. In contrast, before a NAFTA panel, NAFTA trade rules are stated to *prevail* over MEAs (NAFTA Article 103) unless the MEA is explicitly listed in NAFTA Article 104 or NAFTA Annex 104.1. Consequently, rather than *more* environmentally friendly (as Steinberg argues at 283), NAFTA is, at least in this respect, giving *less* deference to MEAs. As Julie Soloway notes in the Steinberg book (at 160), ‘the exemption [in NAFTA Article 104] is limited to the enumerated agreements and excludes the UN Convention on Biological Diversity and the UN Framework Convention on Climate Change. Moreover, there will be difficulties in adding any future MEAs to the list, as expansion would require agreement by all three NAFTA parties’.

One of the agenda items for the current Doha Negotiations is the settling of ‘the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)’.²⁷ The agenda point adds, however,

²⁵ In so doing, she refers, at 384–385, to the Appellate Body report on *EC–Poultry* (Appellate Body Report, *European Communities — Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031) where the complainant Brazil was not permitted to make claims of violation under a bilateral Brazil-EC agreement. This, in my view, correctly confirms the limited *jurisdiction* of WTO panels (Brazil can only submit claims of violation under WTO covered agreements). However, it does not say anything about the law that panels can refer to and apply when examining the validity of such WTO claims (the separate question of *applicable law*).

²⁶ See Pauwelyn, ‘Winning a WTO Dispute Based on Non-WTO Law: Questions of Jurisdiction and Merits’, 37 *Journal of World Trade* (2003) 997.

²⁷ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 31.1.

that '[t]he negotiations shall be limited in scope to the applicability of such existing WTO rules *as among parties to the MEA in question*'.²⁸ This agenda item was put forward by countries, like the EC, who want to give preference to MEAs. However, by pushing this agenda point they have more to lose than to gain. As argued above, MEAs are already at this time likely to prevail over WTO rules, especially as between parties to both treaties. In my opinion, there is no need to explicitly confirm the relevance of MEAs, especially not as a potential defence before WTO panels. The agenda item, on the contrary, gives the wrong impression, as though MEAs need confirmation by the WTO before they can play a role before WTO panels. If the item had been focused on WTO Members not party to the MEA, the concern would be a real one and WTO waivers might have been needed. However, as between WTO Members that are also party to the MEA there is no need to reconfirm at the WTO what has already been agreed to elsewhere. The WTO is not some constitutional-type super-regime whose blessing is needed before countries can conclude treaties elsewhere.

This controversy played out recently in the specific area of combating the traffic in so-called conflict or blood diamonds, mined and sold by rebels in Africa to sponsor internal strife and terrorism. Under the UN umbrella, the so-called Kimberley Scheme was formed, whereby participants agreed to certify rough diamonds and to ban all trade in conflict diamonds, including a complete ban on all diamonds from countries not participating in the scheme.²⁹ Was it necessary to reconfirm the need for those trade restrictions at the WTO? Not, in my view, as between WTO Members party also to the Kimberley Scheme. If need be, these WTO Members could rely on the Kimberley Scheme as a self-standing defence even before a WTO panel. However, the trade restrictions on third parties, that is, WTO Members *not* party to the Kimberley Scheme, are more problematic in that third parties could not be bound by the Kimberley Scheme. As against such countries, any trade restriction must be justified under normal GATT exceptions. This line of thinking was confirmed when in May 2003 all WTO Members agreed to grant a waiver for trade restrictions imposed on non-participants in the Kimberley Scheme on condition that such restrictions were consistent with that scheme.³⁰ In other words, WTO Members implied that *as between participants* to the scheme no waiver was needed. There, the Kimberley Scheme itself would justify the trade restriction, even before a WTO panel; only restrictions on non-participants needed a waiver.

Clearly, if international standards or guidelines with which WTO Members never agreed (such as WHO standards on hormone-treated beef or sardines, never accepted

²⁸ *Ibid.*, emphasis added.

²⁹ See Kimberley Process Certification Scheme at <http://www.kimberleyprocess.com/news/documents.asp?Id=68>

³⁰ WTO General Council, *Proposed Agenda*, WT/GC/W/498 (13 May 2003) Item VI. The text of the waiver can be found in the revised waiver request WTO Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Communication*, G/C/W/432/Rev.1 (24 Feb. 2003). Although it could be argued that even for trade restrictions on *non*-participants, no waiver was needed, see Pauwelyn, 'WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for Conflict Diamonds?', *Michigan Journal of International Law* (2003) 1177.

by the EC but played out against it before WTO panels) can provide a safe-haven for trade restrictions (any restriction that conforms to such standard is presumed to be consistent with WTO rules³¹), why should not *legally binding* MEAs to which two disputing parties have explicitly agreed provide a similar safe-haven or defence?³²

7 Too Green or Not Green Enough?

To argue that MEAs can constitute a self-standing defence against a claim of violation of WTO rules as between WTO Members bound by the MEA is, of course, not the same as saying that the WTO should itself make environmental standards. Let each organization create its own rules (after all, it is the very same states that are involved in both fora) and have each of them then take account of the rules created by the other. Surely, the WTO can do more for the environment than simply *permitting* a trade restriction because it is based on an MEA (it can, for example, ban fishery subsidies or restrictions on trade in environmental services). But one cannot expect, nor should, the WTO engage in the exercise of making MEAs.

In this sense, Steinberg's classification of the WTO 'trade-environment rules' as 'less well developed and less environment friendly ... than in various other trade organizations, such as the NAFTA and the EU' (at 280) is not all that helpful, even misleading. While Steinberg sees the WTO as not green enough, Wiers comes to the conclusion that 'the Appellate Body has possibly been even a little too "green"'. (at 424) Of course, as Steinberg comments, 'the GATT/WTO approach will not likely increase environmental protection in countries with relatively weak standards' (at 280) but this is very much like being disappointed that a bakery does not sell meat. Let the WTO worry about reducing trade barriers, and MEAs work on protecting the environment. At the same time, whatever rules each of these institutions produce, these rules ought to be mutually accepted by both institutions, at the very least as between countries that are parties to both (and hence *created* and *agreed to* both set of rules).

Rather than continuously reliving the GATT's myths and past excesses (be it cases such as *US-Tuna/Dolphin* or the GATT's splendid isolation from the rest of international law, i.e., MacMillan's 'schism between international economic law and public international law'), let us embrace and carefully examine the Appellate Body's more nuanced approach in cases such as *US-Shrimp/Turtle* and *EC-Asbestos*, as well as the WTO's increasing openness to other regimes of international law, including MEAs. The CERIC conclusion (at 20) may, therefore, be more to the point:

³¹ See Article 3.2 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and Article 2.5 of the WTO Agreement on Technical Barriers to Trade.

³² Granted, these WHO international standards or guidelines provide a safe-haven because WTO agreements say so explicitly, but there is no need for the WTO to explicitly confirm *treaties* as between WTO members bound by them. Indeed, the reference to international standards or guidelines was explicitly needed since without it these standards or guidelines (not being treaties) had no legal force and certainly no party who had rejected them in the first place could ever be held by them at the WTO.

Cette réintégration — c'est presque d'une 'normalisation' — du droit commercial dans l'ordre juridique international s'avère particulièrement essentielle dès lors qu'il s'agit de faire échec à la désarticulation de ce dernier ... Même si dans certains domaines une clarification voire révision des règles serait utile (taxation, accords environnementaux multilatéraux par exemple), si dans d'autres les débats doivent se poursuivre (normes environnementales par exemple), notre recherche marque de nombreux progrès sur les voies d'une articulation, et incitent assez largement à l'optimisme s'agissant des perspectives d'avenir.³³

³³ "This re-integration — rather almost a "normalization" — of trade law in the international legal order is particularly essential given that it is about stopping the fragmentation of the latter ... Even if in certain areas a clarification or even revision of the rules would be useful (for example, taxation and multilateral environmental treaties), and in other areas the debate must continue (for example, on environmental regulations), our research points at numerous advancements toward such linkage, and draws us quite considerably to optimism when it comes to the future." (author's translation).