An Analysis of Potential Conflicts Between the Stockholm Convention and its Parties' WTO Obligations

D. Dean Batchelder
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjil

Part of the Environmental Law Commons, and the International Trade Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjil/vol28/iss1/4

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
I. INTRODUCTION

This Comment examines the compatibility of the Stockholm Convention on Persistent Organic Pollutants with parties' WTO obligations under the GATT Agreement. The Stockholm Convention represents a broad-based attempt to regulate persistent organic pollutants (POPs), some of the most damaging chemicals to the environment and human health. The commitments that parties to the Stockholm Convention have undertaken to control POPs may implicate international trade commitments. Hopefully the discussion in this Comment may also be relevant to other multilateral environmental agreements (MEAs), especially those involving trade measures.

* J.D., University of Michigan Law School, May 2005; M.A., University of Chicago; B.A., Macalester College. I am grateful to Professor Robert Howse for his help with my research and to the Journal for its help in publishing this Comment. Mistakes and omissions are mine.

This Comment begins with a brief overview of the Stockholm Convention, followed by four possible ways the Convention could be implemented. It then considers obligations under the GATT in light of the Convention and these possible implementations. GATT Article III—the national treatment requirement—presents the first area of concern, in that the Stockholm Convention may require parties to treat like products differently. GATT Article XI—a prohibition on quantitative restrictions—is also relevant even though members are unlikely to implement the Convention in a manner that implicates this article. Finally, GATT Article XX—general exceptions to GATT obligations—may assist parties in arguing that implementation of the Stockholm Convention qualifies as permissible protection of natural resources or human health. Both the specific provisions and the chapeau, or the introductory paragraph to GATT Article XX, are relevant to these arguments.

To date, no WTO-based challenges have been brought against the implementation of an MEA. A number of environmental treaties, however, contain trade measures that are often critical to addressing the harm concerned (for instance, the Montreal Protocol, CITES, and the Basel Convention). Thus, the susceptibility of MEAs to challenges from the WTO regime is an important issue both for environmental law and international trade law.

II. THE STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS

A. Introduction

The Stockholm Convention on Persistent Organic Pollutants entered into force on May 17, 2004. Its primary obligations relate to POPs, which are long-lived, highly-mobile, toxic chemicals often found in pesticides and industrial chemicals and products. PCBs and DDT are two high-profile examples of POPs. These chemicals are harmful even in low doses, they bio-accumulate, and they present a significant transboundary problem, as they migrate easily. This mobility undermines domestic policies targeting them, necessitating a global approach to controlling POPs. While the Convention contains a number of provisions that deal with the

---

2. See WTO Comm. on Trade and Env't, Note by the Secretariat: Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements, WT/CTE/W/160/Rev.2 (Apr. 25, 2003).

problem in more nuanced ways. Article 3 provides the central controls of the regime by requiring the prohibition or restriction of pollutants included in the annexes.

The Convention lists chemicals to be eliminated in Annex A and those to be restricted in Annex B. It prohibits both the production and use of Annex A chemicals and permits importation of these chemicals only for environmentally sound disposal (ESD). Similarly, taking principles of prior informed consent into account, the Convention permits export only for ESD. Specific exemptions are available and override certain production, use, import, and export limits. A party may import a chemical only if it has a specific exemption for that chemical. Exportation of Annex A chemicals for purposes other than ESD is only permissible between parties that both have taken specific exemptions or between an exempted party and a certified nonparty.

The production and use of Annex B chemicals are severely restricted but not completely prohibited. Currently, the only chemical listed in Annex B is DDT, but the Convention includes provisions (as with Annex A) for adding chemicals to this category. Again, importing or exporting Annex B pollutants is only permitted for ESD. Specific exemptions for Annex B chemicals operate in the same way as for Annex A chemicals. Annex B also permits use of the chemicals in line with acceptable purpose guidelines.

Specific exemptions are temporary waivers to the above obligations that are available on a chemical-by-chemical basis. Acceptable purpose exceptions, which seem to operate as permanent versions of specific

---

4. The Stockholm Convention contains a number of provisions relating to intentionally and unintentionally produced chemicals, stockpiles and wastes, newly identified chemicals with POP-like characteristics, technical assistance, and the promotion of POP substitutes. Many of these provisions present challenging WTO-related questions beyond the scope of this Comment.
5. Stockholm Convention, supra note 3, art. 3.1(a)(i). See generally id. art. 6.1(d) (defining ESD).
6. Id. art. 3.2(b). Export for ESD is permitted with or without a specific exemption. See id. arts. 3.2(b)(i), 3.2(c).
7. See id. art. 3.2(b)(ii) (regarding production and use of specific chemicals).
8. Id. art. 3.2(a)(ii), Annex A, Part I.
9. Id. art. 3.2(b)(ii).
10. Id. Prior to exporting to nonparties, the importing state must certify that it is committed to protecting human health and the environment and that it will comply with the Convention in certain ways. See id. arts. 3.2(b)(i)–(iii).
11. Id. arts. 3.2(a)(i), 3.2(b).
12. Specific exemptions are listed in Annex A and Annex B. To utilize these exemptions, a state may register upon becoming a party. Id. art. 4.3. Unless an extension is granted, all specific exemptions expire five years after the date the Convention entered into force, on May 17, 2009. Id. art. 4.4.
exemptions, are available for Annex B chemicals. They permit the production and use, import, and export of Annex B chemicals with the same restrictions as those imposed on specific exemptions.

B. Implementation of Stockholm Convention Obligations

A WTO member cannot directly challenge an MEA; instead it must challenge a member’s domestic implementation of the agreement. As the Stockholm Convention permits parties some degree of latitude in implementing their obligations, for ease of analysis this Comment presents four possible implementation regimes, progressing from exacting to relaxed implementation of the Convention.

[1] A party may implement its obligations robustly. The party bans the production, use, import, and export of Stockholm Convention chemicals (SCCs) without exception—no specific exemptions or acceptable purposes are permitted.

[2] A party may implement its obligations strictly but allow exceptions for DDT. Here, the party bans the production, use, import, and export of SCCs but allows specific exemptions or acceptable purpose uses for DDT, presumably for fighting mosquitoes and malaria.

[3] A party may allow specific exemptions and acceptable purpose uses for pesticides unless effective non-POP-based substitutes are equally available. This permits the party to balance current and long-term human health and environmental concerns against immediate human needs (such as nutrition and food production) and economic needs (such as development, competitiveness concerns, or cash crop production) by allowing specific exemptions and acceptable purpose uses for pesticides. Developing states would be most likely to implement this option.

[4] A party may implement option [3] in light of less pressing health and developmental concerns. This would most likely be done in the developed world, where immediate human needs are not as urgent and the scope of available and effective POP substitutes is therefore much broader. This approach

---

13. Both the production and use of DDT is to be eliminated except for use by parties who have notified the Secretariat of their intention to use it as disease vector control per WHO guidelines. Id. Annex B, Part II.
14. Id. Annex B, Part I (regarding production and use); id. art. 3.2(a)(ii) (regarding importation); id. art. 3.2(b)(ii) (regarding exportation of Annex B chemicals).
allows numerous specific exemptions, though domestic economic concerns may motivate these exceptions.

III. WTO Analysis

A. Introduction

When implementing the Stockholm Convention, a party must consider GATT Articles III and XI. If a measure implementing the Convention focuses on the particular product as a product, then Article III will apply. As Article XI measures almost always violate members' GATT obligations—and as the policy goals relevant to the Convention may generally be met via Article III measures—I assume members will avoid Article XI measures. Ultimately, GATT Article XX may justify implementation in the face of challenges under Articles III and XI.

B. GATT Article III

Article III codifies the principle of national treatment. The Appellate Body has noted that the "general principle" of Article III is to ensure that domestic measures are not applied so as to protect domestic production. In particular, Article III:4 calls for equality of competitive conditions for domestic products and imported "like products." This does not protect a given market share or even access to a market; it simply aims at the maintenance of equality of competitive conditions.

---

15. The Agreement on Technical Barriers to Trade (TBT) is not discussed here as it has been interpreted infrequently and is beyond the scope of this Comment. However, that is not to say that the TBT is not relevant to the Stockholm Convention; given that it regulates members' use of technical regulations, it would be highly relevant to any implementation of the Convention. Such analysis is simply too hypothetical, and too specialized in its own right, to be treated here. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods—Results of the Uruguay Round, 33 I.L.M. 1154 (1994).

16. GATT, supra note 1, art. III.


18. GATT, supra note 1, art. III:4.

For Article III:4 to apply, the products at issue must be “like” and the treatment of the foreign product must be “no less favourable” than that afforded the domestic product.20 “Treatment no less favourable” requires equality of treatment, or nondiscriminatory treatment, rather than strict identity of treatment.21

Whether products are “like” must be considered on a case-by-case basis.22 As a framework for analyzing likeness, the criteria from the Border Tax Adjustment Report of 1970 have been adopted: “the properties, nature and quality of the product”; “the end-uses of the products”; “consumers’ tastes and habits”; and the products’ tariff classifications.23 As the ordinary meaning of “likeness” involves some ambiguity, the Appellate Body has considered Article III:4’s context—Article III:1—and noted that “likeness” is fundamentally concerned with the competitive relationship between the products at issue.24 Thus, the Border Tax Ad-


[T]he mere fact that imported products are subject under [the measure at issue] to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment. Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard of Article III is met.

Id. (emphasis added). See also Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, ¶ 137, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000). This standard ties back into Article III:1’s general principle of prohibiting protectionist measures: less favorable treatment of like imported products translates to protection of like domestic products. See Appellate Body Report, EC—Asbestos, supra note 17, ¶ 100. In determining whether there is less favorable treatment, the focus is on how, if at all, a measure that fails to treat like products equally alters the conditions of competition. See Appellate Body Report, Korea—Beef, supra, ¶ 137.

22. See Appellate Body Report, Japan—Alcohol, supra note 17, at 20–21 (noting that the scope of like products will expand or contract based on the particular provision at issue).
23. Appellate Body Report, EC—Asbestos, supra note 17, ¶ 85. See also GATT General Council, Report by the Working Party on Border Tax Adjustments, ¶ 18, L/3464 (Nov. 20, 1970) [hereinafter BTA 1970 Report]. The last element, tariff classification, was not part of the BTA 1970 Report criteria, but it has been widely used in the GATT/WTO dispute settlement process. See, e.g., Appellate Body Report, EC—Asbestos, supra note 17, ¶ 101 n.74 (noting that tariff classification was not a Border Tax Adjustments criteria, but has been included subsequently and listed other reports utilizing that criteria). While the Appellate Body has noted that the use of these criteria is not textually required such an approach to like product appears to be a de facto standard. See, e.g., Appellate Body Report, EC—Asbestos, supra note 17, ¶¶ 32, 86 (arguing that the purpose or effect of the regulatory distinction should determine the likeness of products rejected in favor of the BTA 1970 Report criteria).
justment Report criteria are to be examined in light of how they "influence the competitive relationship between products in the marketplace."\textsuperscript{25} End uses and consumer preferences address the presence or absence of a competitive relationship and are particularly significant when the products at issue are not physically similar.\textsuperscript{26} Health considerations may be considered under the rubric of physical properties and consumers' preferences.\textsuperscript{27}

The like product analysis under Article III:4 is the crucial consideration for the Stockholm Convention. If SCCs and their substitutes are like products, banning SCCs would drastically alter the competitive relationship between these products. An SCC producer or consumer will have a strong complaint if she can demonstrate likeness because implementation of the Convention may treat imported products more or less favorably.\textsuperscript{28} Likeness will depend upon a number of empirical issues, including facts about SCC substitutes, health concerns, and the relationship between the individual SCCs and their substitutes. Given the factual nature of the like product analysis, it is difficult to predict specific outcomes.

Generally speaking, SCCs and SCC substitutes can initially be presumed to be dissimilar. The particular chemicals are not likely to be physically identical; otherwise the substitutes would also be POPs and presumably would be banned. SCC substitutes can also be presumed to be less threatening to human health, making them less similar in terms of "the properties, nature and quality of the product." Further, if the end uses of the substitutes happen to be distinct, if they perform less effectively, or if consumers perceive the chemicals differently, a finding of likeness will prove more difficult.

Cutting against these considerations is the fact that consumers in developing states may prioritize the short-term needs these chemicals address—mosquito and malaria eradication with DDT, agricultural imperatives, or developmental needs—over long-term health concerns. Here, this greater tolerance of the health risks associated with SCCs

\textsuperscript{25} \textit{Id.} ¶ 114. Each of the adopted criteria may be assessed with respect to this influence.

\textsuperscript{26} \textit{See id.} ¶ 117–118. By requiring a higher showing of likeness in cases where the products are not physically identical, the Appellate Body has taken a narrow view of "like products" that tightly correlates with physical similarity. \textit{See id.} ¶ 136.

\textsuperscript{27} \textit{See id.} ¶¶ 114, 122.

\textsuperscript{28} It is unclear how the particular facts of the implementation will alter this analysis. It may be that the more exceptions granted, the fewer conflicts there will be, as permitting use or production of some SCCs (the most "like" their substitutes) will blunt like product challenges. Alternatively, it may be that a greater number of exceptions will exacerbate such challenges since, if the use or production of one SCC is allowed, it is not clear why others are not permitted.
makes it more probable that SCC substitutes will be found to be like SCCs.

A state implementing policy [2] could make a strong argument that DDT is not like its substitutes: it is by far the most effective anti-mosquito agent and it causes among the worst health and environmental harms. Regarding policy [3], the analysis is likely to be chemical-by-chemical. The differences between SCCs and SCC substitutes, however, will be much narrower and consumers may not differentiate between them the way they do with DDT and its substitutes. Regarding [4], consumers in developed states may be more likely to discriminate between SCCs and SCC substitutes, making a finding of likeness less probable.

To the extent specific SCCs are found to be like their substitutes, policy choices [3] and [4] would likely be violations of Article 111:4. It is less likely that DDT and its substitutes would be found like products, given its nearly unique mosquito controlling properties. Policy choice [1] seems relatively immune from challenge under Article 111:4 in that, as long as the measure affords treatment “no less favourable,” a state has met Article 111:4’s requirements.

C. GATT Article XI

Article XI eliminates members’ ability to limit or ban imports and exports through quotas, licensing regimes, or other related means. It states that no restrictions or prohibitions, excepting taxes and duties, shall be enacted on imported products or products to be exported. Such measures are generally obvious, forcing members to argue either that they are internal measures—and thus governed by Article III—rather than border measures or quantitative restrictions, or that the measure is justified under Article XX. Measures that directly address the product or its characteristics, such as those at issue in EC—Asbestos, will avoid being found in violation of Article XI, while prohibitive measures not concerned with the product qua product will not be exempted from Article XI analysis.

29. It is interesting that a finding of like products would be more difficult under policy [4] than [3], as this appears contrary to the thrust of Article XX; the policy reasons for [3] are more in line with Article XX(b). Policy [4] appears more like protectionism, as there are reasonably available policy alternatives (policies closer to [1] than [4]).
30. This article is part of the GATT’s policy of tariffication—the transformation of trade barriers from a variety of administrative controls into tariffs. This policy promotes transparency and ease of negotiation by revealing barriers to trade to members. See, e.g., Border Tax Note by the Secretariat, supra note 19, ¶ 5.
31. GATT supra note 1, art. XI:1. Article XI:2 lists several exceptions, none of which are relevant in this setting.
Again, to the extent they are able, members will likely wish to avoid Article XI measures as they are generally GATT-illegal. The differences between measures [1] through [4] are unlikely to change the analysis under Article XI; its only focus is on the way members implement their policy choices—border measures versus internal measures. The article is less concerned with the particulars of that policy choice, such as the presence or absence of a given exception.

As EC—Asbestos demonstrates, a member may achieve the same policy result, halting the risk from a particular source, through internal measures rather than through border measures. Thus, quantitative measures, to the extent they are adopted, should be converted to internal measures to avoid Article XI scrutiny. For example, the import and export restrictions in [1] could be implemented via a domestic production and use ban or a prohibitive tax.

IV. GATT ARTICLE XX ANALYSIS

Article XX permits exceptions to members' obligations based on a number of public policy justifications. Most relevant here are Articles XX(g)—exceptions related to the conservation of natural resources—and XX(b)—exceptions necessary to protect plant, animal, and human life and health. Members often invoke these provisions, and thus several panels and the Appellate Body have interpreted them. Still, claims under Article XX are rarely upheld; this is especially true for claims invoking the demanding "necessary" standard in Article XX(b). To date, EC—Asbestos is the only case that has upheld a broad restriction on trade under Article XX(b). Significantly, the measure at issue there imposed limits on trade for health reasons, just as the measures parties could adopt under the Stockholm Convention might impose health-based restrictions.

33. Members may be neither willing nor able to avoid Article XI: the member may not have the capacity to avoid border measures (internal controls would be more expensive or unenforceable); there may be domestic policy constraints; the member may believe it will not be challenged (as it is a powerful actor or as the domestic market for imports is quite small); or it may wish to make a statement about POPs (a "clean hands" policy).

34. Other exceptions are available, for example: Article XIX (safeguard measures); Article XXI (national security exceptions); and Article XXV(5) (providing a temporary waiver of certain obligations).
A member challenging a measure must first establish that there is a GATT violation. Analysis begins with the article allegedly violated and, only if a violation is found, does it continue to consider the Article XX claim. The specific exception claimed is considered first, and then the chapeau. Analysis under the specific provision focuses on the "general design" of the measure as opposed to its "application," which is the focus under the chapeau. Provisional justification under one of the specific provisions is not terribly burdensome for a well designed measure. Analysis under the chapeau, however, is more difficult and less certain, in part because it is a more searching analysis and, relatedly, because the focus is more on the application of a measure than merely a facial review.

A. GATT Article XX(g)

Article XX(g) excepts measures "relating to the conservation of exhaustible natural resources" from GATT obligations. Analysis under Article XX(g) proceeds through three elements: whether the measure concerns exhaustible natural resources, whether the measure "relat[es] to the conservation" of these resources, and whether the measure is made effective in conjunction with domestic restrictions. The primary difficulty in this context is shoehorning an implementation of the Stockholm Convention within the scope of the conservation of exhaustible natural resources.

The latter two requirements of Article XX(g) should not be difficult to satisfy. A GATT Panel interpreted "relating to" to require that the measure be "primarily aimed at" conservation while later decisions...

38. See, e.g., Appellate Body Report, United States—Import Prohibition of Shrimp and Certain Shrimp Products, ¶ 116, WT/DS58/AB/R (Oct. 12, 1998). It is of concern that at times the Appellate Body appears to relabel certain structural aspects of a measure as "applications" rather than "general design," and thus analyze the measure under the much more demanding, and less clear, chapeau. See, e.g., id. ¶¶ 183–184 (analyzing apparent "design" elements such as procedural protections, availability of appeal, and lack of a written decision, as "applications" and finding that the United States' procedural shortcomings constituted a violation of the chapeau). Even though the measure contested in this case was "unjustifiable," the flexibility that allows the Appellate Body to judge the structural elements of a measure under the chapeau's application analysis is of concern. Id. ¶ 184.
pear to have relaxed this somewhat.\textsuperscript{41} That a measure is not per se a conservation measure is not dispositive\textsuperscript{42} nor is there any "effects test" regarding the measure's actual impact on resource use or conservation.\textsuperscript{43}

The difficulty in applying Article XX(g) to an implementation of the Stockholm Convention is that it does not cover measures protecting the "environment" at large. The measure at issue must relate to the protection of a specific exhaustible natural resource. While this provision has been read quite broadly,\textsuperscript{44} it is not at all clear that the Stockholm Convention's general concern for the environment will suffice.

One way for a state to enlist the protection of Article XX(g) would be to focus on the harm POPs present to a specific resource. For example, states could act to protect fish stocks or other important animal resources whose survival POPs threaten.\textsuperscript{45} Or, parties could argue that POPs threaten a specific nonliving natural resource such as fresh water. A difficulty under such an approach is that the Convention as a whole imposes a variety of requirements that are not directly related to conservation of a particular natural resource, and therefore it may be too broad to appropriately "relate to" conservation.\textsuperscript{46}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{41} Appellate Body Report, \textit{Korea—Beef}, supra note 21, \textsection 161 n.104 (noting that measures indicating a "substantial relationship"—a close and genuine relationship of ends and means—or that are "reasonably related" to conservation have been upheld). The discussions in the Appellate Body following \textit{Canada—Salmon} increasingly focused on the relationship between the policy and the measure at issue rather than solely focusing on the primary aim of the measure. See, e.g., Appellate Body Report, \textit{U.S.—Shrimp}, supra note 38, \textsection 136.
\item\textsuperscript{42} Report of the Panel, \textit{Canada—Salmon}, supra note 40, \textsection 4.7.
\item\textsuperscript{43} Appellate Body Report, \textit{U.S.—Gasoline}, supra note 39, at 21.
\item\textsuperscript{45} The health threat posed by POPs must threaten the population as a whole; a threat to individuals within a population is unlikely to be sufficient for protective measures under Article XX(g). The ordinary meaning of "resources" focuses on the species rather than the individual, and a reading that applied Article XX(g) to individuals would invade the scope of Article XX(b), contrary to principles of treaty interpretation. Also, the Appellate Body's discussion of "exhaustible natural resources" in \textit{U.S.—Shrimp} (where it explicitly extended this provision to encompass living resources) focused on the species rather than the individual. Appellate Body Report, \textit{U.S.—Shrimp}, supra note 38, \textsection 128.
\item\textsuperscript{46} An alternative would be to pursue protection under Article XX(b), which permits measures for the protection of "human, animal, or plant life or health . . . ." This would perhaps permit measures to protect a narrower range of plants or animals, but it would require meeting the "necessary" standard, which is a heavier burden.
\item\textsuperscript{47} For example, prior informed consent standards do not have a readily apparent direct relationship with resource conservation; or, the implementation of the Convention may address chemicals that do not implicate the protected resource.
\end{itemize}
\end{footnotesize}
It is not clear that the Convention is appropriately focused to fit within Article XX(g), as it appears to focus on broader threats to the environment generally and to specific threats to human health. None of the above policy implementations appear sufficiently related to natural resources to find justification under Article XX(g), as the connection between implementation of the Convention and conservation will likely prove insufficient, even under the more flexible *Korea—Beef* standard; implementation cannot reasonably be said to enjoy a “close and genuine relationship” with achieving conservation goals.47

### B. GATT Article XX(b)

Given the difficulty of justifying a measure under Article XX(g), members would likely need to defend implementation of the Stockholm Convention under Article XX(b). Article XX(b) has two requirements: a measure must focus on protecting human, animal, or plant life or health, and it must be necessary to achieve the member’s elected level of protection.48 Demonstrating that measures implementing the Stockholm Convention aim to protect either human or animal life or health should be relatively straightforward, as a wealth of scientific data confirms the danger of POPs.49 The difficulty will be to demonstrate the necessity of measures adopted under the Convention.

Under the GATT, “necessary” depends on the absence of reasonably available alternatives that could achieve the elected level of protection. If a reasonably available, GATT-consistent—or, barring that, a reasonably available, less GATT-inconsistent—alternative exists that would achieve the same level of protection, the measure at issue cannot be said to be “necessary.” This analysis is closely tied to the policy goal of the measure, thereby giving members control over the scope of reasonably available alternatives. Members are free to determine the level of protection they desire.50 The focus is on the means by which a member

---

47. A focus on the environment, rather than a specific resource, could be treated more broadly under the TBT Agreement, which permits measures to protect the environment. Agreement on Technical Barriers to Trade, *supra* note 15, art. 2.2. This is an additional reason to conduct an analysis under that Agreement.


The Stockholm Convention

implements its chosen level of protection, not the choice of ends, and so the chosen level of protection defines the scope of the reasonably available alternatives. Thus, in an effort to insulate a measure from challenge, members may wish to adopt aggressive measures.

The meaning of "reasonably available" is context-dependent and has been defined as not "unreasonably burdensome, financially or technically", something less than "impossible", and something more than mere administrative difficulty. The standard will vary with a member's level of development. It will also depend on a weighing of factors related to the policy goal, how the policy helps effect that goal, and the importance of the goal. In a way, this restates the point that the higher the level of protection, the easier it is to demonstrate necessity.

C. The Chapeau

The opening paragraph of Article XX, referred to as the chapeau, enunciates three additional standards for reviewing a measure at issue. Measures must not be applied so as to constitute (1) arbitrary discrimination, (2) unjustifiable discrimination, or (3) a disguised restriction on international trade. Analysis under the chapeau is searching; the Appellate Body has repeatedly found that provisionally justified measures constitute violations of the chapeau.

Analysis under the chapeau is not clear, but fundamentally it appears to be an application of the principle of good faith, limiting overreaching by members. In U.S.—Gasoline, the Appellate Body utilized a "necessary"-like analysis to strike down a measure that was an

51. See Report of the Panel, U.S.—Section 337, supra note 21, ¶ 5.26. (noting that the issue is not the chosen level of protection, but rather how to achieve that level in a manner most consistent with the GATT).
55. See Panel Report, EC—Asbestos, supra note 35, ¶ 8.207 ("[R]easonably available measure[s] must be assessed in the light of the economic and administrative realities facing the Member but also by taking into account the fact that the State must provide itself with the means of implementing its policies.").
56. See Appellate Body Report, EC—Asbestos, supra note 17, ¶ 172 ("[T]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends." (quoting Appellate Body Report, Korea—Beef, supra note 21, ¶¶ 163, 166)).
57. GATT, supra note 1, art. XX, introductory paragraph. Further, arbitrary and unjustifiable discrimination are to be judged only between states "where the same conditions prevail." Id.
egregious violation of Article III. 58 In *U.S.—Shrimp*, the Appellate Body instead characterized its review as a balancing test, restating the purpose of the *chapeau* as an application of the principle of good faith: members should not abuse the exercise of their rights. 59 It described Article XX exceptions as "limited and conditional exception[s]..." 60

Balancing is a poorly chosen term—in reality the Appellate Body is defining, in a case-by-case manner, the extent to which exceptions are available to a member. But the Appellate Body has not presented or applied its standards with any degree of clarity. 61 Stated generally, the outcomes of *U.S.—Gasoline* and *U.S.—Shrimp* appear correct: members should apply measures transparently and protect due process rights; needless or unfair distinctions between domestic and foreign producers should not be allowed; and members should not operate based on informal knowledge or apply measures, even those which are facially neutral, so as to discriminate.

However, the Appellate Body’s method of analysis is troubling, and the standards it provides for judging future measures are unclear. Even granting that the purpose of the *chapeau*—ensuring a good faith implementation of the available exceptions—is by design extremely broad, the lack of clear standards is of concern. While the above general remarks will hold for cases where the measures are clearly inconsistent with the GATT, it is unclear how the analysis will operate in closer cases, such as those possible under the Stockholm Convention.

---

58. The Appellate Body rested its conclusion that the measure at issue violated the *chapeau* on language from the Panel decision, which found that the measure was not justified under Article XX(g) as there were "reasonably available" GATT-compliant alternatives. Appellate Body Report, *U.S.—Gasoline*, supra note 39, at 28–29. The Appellate Body argued that the measure was such a glaring violation of Article III that it was purposefully discriminatory and therefore was not entitled to protection under Article XX. *Id.*


[The *chapeau*] embodies the recognition . . . of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX . . . on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. . . . Thus a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.

*Id.*

60. *Id.* ¶ 157.

61. Further, there is no reason to believe that the Appellate Body is institutionally well-suited to conduct a balancing of incommensurate polices and values. This point is made by Steve Charnovitz as part of a review of Article XX cases. Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 *Yale J. Int’l L.* 59, 101 (2002).
D. Application to the Stockholm Convention

Again, it does not appear that any of the above implementations are sufficiently related to natural resources to find justification under Article XX(g). Such an argument appears tenuous in light of the Convention’s focus on human health and the breadth of implementation it requires. Even if a resource could be found that the Convention could be intended to conserve, the connection between the implementation of the Convention and conservation will likely prove insufficient. Even under the more flexible Korea—Beef standard, implementation cannot reasonably be said to enjoy a “close and genuine relationship” with achieving conservation goals.

For Article XX(b), none of the possible Stockholm Convention implementation choices would face difficulty in satisfying the requirement that they aim to protect human health and life. The “necessary” requirement is the more difficult prong of the analysis. By approaching the question in terms of the policy goal (according to the “reasonably available alternative” analysis above), a member could compellingly argue that implementations [1] and [2] are, in fact, necessary. Apart from the particular substance at issue, the argument for either of these should not substantially differ from that in EC—Asbestos: members are banning substances that are extremely harmful to human health and implementing a near zero-tolerance for the existence of such harms. That policy choice [2] permits DDT should not be problematic because the interpretation of “reasonably available alternatives” takes into account the member’s context, which should encompass the need for balancing health concerns with DDT use.62

Options [3] and especially [4] are more problematic: their policy goals are mixed, and a broad range of alternative policies could likely achieve the same lower level of protection. While the status of a member as a developing country may help under [3], developed countries would have more difficulty justifying policy [4], as their health needs are less pressing and they can access a greater range of alternatives.

Options [3] and [4] also face some difficulty under the balancing approach articulated in Korea—Beef. The mixed nature of these policies, which lowers the level of protection to which they aspire, opens them to greater challenge under this analysis: it is more difficult for a member to

---

62. While the use of DDT indicates a willingness to accept some health harms, it should not undercut a member’s ability to regulate other SCCs. DDT has been uniquely successful in the fight against malaria, which kills roughly a million people annually. Developing states have fewer resources, and so DDT substitutes may not be available, and administrative resources may be strained, making absolute measures easier to enforce than more permissive regulations.
claim that its policy contributes to the protection of human health. On this point, [1] and [2] are again relatively strong because the value they protect (human health) is of paramount importance, and again, given the zero-tolerance for continued exposure to POPs, a strict policy is crucial to achieving their goal.

It is far more difficult to predict the outcome of an analysis under the chapeau. To the extent good faith is assumed and extended to the application of these measures, members should be on solid footing. The impact of the differences between policy implementations is unclear, as the application of a measure is at issue, rather than the details of its particular design. Moreover, to the extent that panels and the Appellate Body retain elements of the “necessary”-like analysis of U.S.—Gasoline, members that have been successful under Article XX(b) will enjoy a strong position.

This outcome, at a general level, seems desirable from an environmental perspective. States should have the ability to enact strict measures and tailor their policies to their circumstances and levels of development. Thus, the sense that choices [1] and [2] are most permissible under the chapeau, while choices [3] and [4] are less permissible, seems appropriate. Again, the details of an implementation regime may greatly influence the outcome, and the WTO’s newfound deference to members’ responses to serious health threats may, of course, evaporate, but members may at least make a strong argument here.

An alternative argument for justification under the chapeau or under the “necessary” prong in Article XX(b) would emphasize that members implement Stockholm Convention measures pursuant to obligations under an MEA, thus creating a presumption of validity. Given the broad scope of necessity within Article XX(b), the fact that the measures are part of an MEA should work to the advantage of parties to the Convention. The existence of an MEA could be a statement of the importance of

63. This would of course be true of [3] and [4] (though an argument could be advanced against [4] on this score, especially if it is clear that economic considerations were important factors). The issue with this argument, however, is that the policy does not clearly help protect this value.

64. At least, they should be able to avoid the now obvious mistakes of the United States in U.S.—Gasoline and U.S.—Shrimp. Members must take care to act neutrally between trading partners, and it is important to utilize transparent and formalized procedures, rather than informal or ad hoc processes.

65. For example, even though DDT is environmentally objectionable, there are very good reasons for its utilization in countries afflicted by malaria and constrained in their response to this threat by development levels.

66. There are complex issues here (regarding the interaction of WTO and general public international law, or the interaction between party and nonparty obligations and how they operate under the WTO) that are crucial to the outcome of this argument but are far beyond the scope of this Comment.
the policy goal, thus making a finding of necessity and good faith easier. The presence of an MEA underscores the importance of the policy goal; it indicates the importance of the measure to achieving that goal; and it demonstrates the lack of discriminatory motives (and thus objectionable limits on trade) in implementing such measures. Finally, the lack of a multilateral solution played a crucial role in U.S.—Shrimp, and this argument also comports with the Appellate Body’s willingness to interpret (at least in limited cases) WTO obligations in light of MEAs (for instance, its interpretation of “natural resources” in U.S.—Shrimp), as well as with the trend toward reading Article XX broadly.

V. CONCLUSION

Given the transboundary nature of POPs, an international solution is required and trade measures are a vital part of this approach. In analyzing the Stockholm Convention, the focus of this Comment was on GATT Articles III and XX. Whether SCCs and their substitutes are “like products” will depend on the specific chemicals and the needs of customers, weighing physical similarity and consumer preferences. The success of Article XX arguments may well rest on how aggressively members choose to pursue a policy of eliminating POPs. An aggressive policy goal, combined with the importance of protecting the environment and human health, should help members prove their measures are at least provisionally justified, and perhaps survive scrutiny under the chapeau.

Trade measures are often at the core of MEAs, and so it is vital to implement measures that can coexist and meet both the requirements of international trade law and the needs and goals of international environmental law. The success of the Stockholm Convention could be an indication of broader possibilities and help elucidate possible paths for other MEAs. The Convention is an important MEA addressing a goal that would be difficult or impossible to address solely at a domestic level. The Convention could be implemented in a GATT-compliant manner, and it represents a negotiated, multilateral solution. If a treaty such as this cannot survive trade-based challenges, that certainly does not bode well for the ability of future agreements to address environmental problems through trade measures.