



An introduction to trade and environment in the WTO

Through its goals, rules, institutions and forward-looking agenda, the WTO provides an important means of advancing international environmental goals.

(.//dda_e/dda_e.htm)See also:

> [Negotiations, implementation and development: the Doha agenda \(.//thewto_e/minist_e/min01_e/mindecl_e.htm#tradeenvironment\) \(.//docs_e/legal_e/marrakesh_decl_e.htm\)](#), go hand in hand with the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. For WTO members, the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, on the one hand, and acting for the protection of the environment and the promotion of sustainable development, on the other, can and must be mutually supportive.

> [Hong Kong Ministerial Declaration \(.//thewto_e/minist_e/min05_e/final_text_e.htm#envir\)](#)

Sustainable development and environmental protection are goals of the WTO...

Allowing for the optimal use of the world's resources in accordance with the objective of [sustainable development \(sust_dev_e.htm\)](#) and seeking to protect and preserve the environment are fundamental to the WTO. These goals, enshrined in the Preamble of the [Marrakesh Agreement \(.//docs_e/legal_e/marrakesh_decl_e.htm\)](#), go hand in hand with the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. For WTO members, the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, on the one hand, and acting for the protection of the environment and the promotion of sustainable development, on the other, can and must be mutually supportive.

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Trade liberalization and stable and predictable trade conditions support the environment...

An important element of the WTO's contribution to sustainable development and protection of the environment comes in the form of furthering trade opening in goods and services to promote economic development, and by providing stable and predictable conditions that enhance the possibility of innovation. This promotes the efficient allocation of resources, economic growth and increased income levels that in turn provide additional possibilities for protecting the environment. The importance of trade's contribution to efforts on sustainable development and the environment has been recognized in such forums as the 1992 Rio Summit, 2002 Johannesburg Summit and 2005 UN World Summit.

Under WTO rules, members can adopt trade-related measures aimed at protecting the environment...

The commitment of WTO members to sustainable development and the environment can also be seen in [WTO rules \(envt_rules_intro_e.htm\)](#). In general terms the rules, with their fundamental principles of non-discrimination, transparency and predictability, help set the framework for members to design and implement measures to address environmental concerns. Moreover, WTO rules, including specialized agreements such as the [Agreement on Technical Barriers to Trade \(.//tbt_e/tbt_e.htm\)](#) (which deals with product regulations), and the [Agreement on Sanitary and Phytosanitary Measures \(.//sps_e/sps_e.htm\)](#) (which concerns food safety and animal and plant health), provide scope for environmental objectives to be followed and for necessary trade-related measures to be adopted. WTO rules set up the appropriate balance between the right of members to take regulatory measures, including trade restrictions, to achieve legitimate policy

objectives (e.g., protection of human, animal or plant life or health, and natural resources) and the rights of other members under basic trade disciplines. For example, [GATT Article XX \(envt_rules_exceptions_e.htm\)](#), on General Exceptions lays out a number of specific instances in which members may be exempted from GATT rules. The provision seeks, among other things, to ensure that environmental measures are not applied arbitrarily and are not used as disguised protectionism.

A number of WTO cases have covered environmental measures...

Since the entry into force of the WTO in 1995, the [WTO Dispute Settlement Body \(.dispu_e/dispu_e.htm#dsb\)](#) has had to deal with a number of disputes concerning environment-related trade measures. Such measures have sought to achieve a variety of policy objectives — from conservation of sea turtles from incidental capture in commercial fishing to the protection of human health from risks posed by air pollution. WTO jurisprudence has affirmed that WTO rules do not take precedence over environmental concerns.

The WTO's dispute settlement allowed a member in 2001 to maintain its ban on the importation of [asbestos \(edis09_e.htm\)](#), so it could protect its citizens and construction workers. In the [US — Shrimp \(edis08_e.htm\)](#) dispute, the WTO pushed members towards a strengthening of their environmental collaboration; it required that a cooperative environmental solution be sought for the protection of sea turtles between the parties to the conflict.

WTO institutions advance dialogue and understanding of trade and environment linkages...

The WTO also supports sustainable development and the environment through its specialized committees and bodies. One unique institutional venue is the [Committee on Trade and Environment \(wrk_committee_e.htm\)](#) (CTE). As a forum for dialogue on trade and the environment, the Committee is an incubator for ideas on how to move the discussion forward. Already, this is bearing fruit. Some issues first raised in the CTE have become fully-fledged negotiations — for instance, on fisheries subsidies and on the relationship between the WTO and multilateral environmental agreements (MEAs). Other WTO bodies are also important. For example, the committee administering the [Technical Barriers to Trade Agreement \(.tbt_e/tbt_e.htm\)](#) (which deals with regulations, standards, testing and certification procedures) is where governments share information on actions they are taking and discuss how some environmental regulations may affect trade.

The Doha Development Agenda and the environment...

The current [Doha Round \(.dda_e/dda_e.htm\)](#) of negotiations gives members a chance to achieve an even more efficient allocation of resources on a global scale through the continued reduction of obstacles to trade. The Round is also an opportunity to pursue win-win-win results for trade, development and the environment. For example, the Doha Round is the first time environmental issues have featured explicitly in the context of a multilateral trade negotiation and the overarching objective is to enhance the mutual supportiveness of trade and environment. Members are working to liberalize trade in goods and services that can benefit the environment. They are also discussing ways to maintain a harmonious co-existence between WTO rules and the specific trade obligations in various agreements that have been negotiated multilaterally to protect the environment. Other parts of the Doha negotiations are also relevant to the environment, for example aspects of the agriculture negotiations and also disciplines on fisheries subsidies. The Doha Development Agenda also has a section specifying the priority items in the CTE's regular work.

International efforts on the environment...

Since environmental problems often transcend national borders, the response must involve concerted action at the international level. WTO members have long recognized the need for coherence amongst international institutions in addressing global environmental challenges. The current negotiations on the WTO-MEA relationship provide a unique opportunity for creating positive synergies between the trade and environment agendas at the international level. In addition, there is regular and routine contact between the WTO Secretariat and secretariats of multilateral environmental agreements.

WTO rules and environmental policies: introduction

Measures aimed at protecting the environment come in various shapes and forms. Under WTO rules, as confirmed by WTO jurisprudence, members can adopt trade-related measures aimed at protecting the environment, subject to certain specified conditions. These measures are not necessarily discussed at the WTO. And those that come up for discussion are not necessarily raised as formal disputes; they are often raised and discussed at the Committee level. However, certain measures taken to achieve environmental protection goals may, by their very nature restrict trade and thereby impact on the WTO rights of other members. They may violate basic trade rules, such as the [non-discrimination](#) ([././thewto_e/whatis_e/tif_e/fact2_e.htm](#)) obligation and the [prohibition of quantitative restrictions](#) ([././res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article11](#)). The Appellate Body in [Brazil — Retreaded Tyres](#) ([./dispu_e/cases_e/ds332_e.htm](#)) recognized that such a tension may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns. This is why exceptions to such rules are particularly important in the trade and environment context.

These exceptions exist to ensure a balance between the right of members to take regulatory measures, including trade restrictions, to achieve legitimate policy objectives (e.g. the protection of human, animal or plant life and health, and natural resources) and the rights of other WTO members under basic trade rules. Since the entry into force of the WTO in 1995, the WTO [dispute settlement body](#) ([./dispu_e/dispu_e.htm](#)) has had to deal with a number of disputes concerning such measures. Four disputes are particularly relevant: the [US — Gasoline](#) ([edis07_e.htm](#)) case (clean air), the [US — Shrimp](#) ([edis08_e.htm](#)) case (turtles), the [EC — Asbestos](#) ([edis09_e.htm](#)) case (human life and health) and the [Brazil — Retreaded Tyres](#) ([./dispu_e/cases_e/ds332_e.htm](#)) case (human, animal and plant life and health).

So far, these disputes have been brought in relation to the application of GATT rules. Several other WTO agreements may be relevant to the protection of the environment as well. In particular, the [TBT Agreement](#) ([./tbt_e/tbt_e.htm](#)) and the [SPS Agreement](#) ([./sps_e/sps_e.htm](#)) seek to ensure that requirements that products must fulfil for environmental purposes do not create unnecessary obstacles to international trade. At the same time, these agreements recognize explicitly members' rights to protect animal or plant health and the environment at the level they choose. (See for more information "[Other relevant WTO texts](#)" ([issu3_e.htm](#))).

In light of the jurisprudence to date, it is fair to say that WTO rules provide ample space for environmental concerns to be accommodated. Even if a measure is found to be inconsistent with basic WTO disciplines, it may be justifiable under one of the exceptions, for example, if it pursues an environmental or human health objective and if its application does not reveal a protectionist intent.

WTO members have the right to adopt trade-related measures to protect the environment...

WTO members can adopt trade-related measures to protect the environment and human health and life as long as such measures comply with GATT rules, or fall under the exceptions to these rules. This right has been affirmed by panels and the Appellate Body time and again.

In the first case decided by the new [WTO dispute settlement body](#) ([./dispu_e/dispu_e.htm](#)), [US — Gasoline](#) ([edis07_e.htm](#)), the Appellate Body asserted WTO members' autonomy to determine their own environmental policies. The Appellate Body cautioned, however, that a balance needed to be maintained between market access obligations, on the one hand, and the right of members to invoke the environmental justifications foreseen in the GATT, on the other, so that one objective is not eroded or compromised by the pursuit of another.

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> For a more in-depth discussion of environment-related disputes, see [Environment-Related Disputes](#) ([edis00_e.htm](#)).

> [Secretariat background note](#) ([http://docsonline.wto.org/imrd/directdoc.asp?DDEDocuments/t/wt/cte/w203.doc](#)) on how GATT Article XX is applied in WTO dispute settlement rulings.

> [WTO Analytical Index on GATT Article XX](#) ([././res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article20](#)).

> The General Agreement on Trade in Services (the GATS) has a similar provision in its Article 14. See [WTO Analytical Index on GATS Article 14](#) ([././res_e/booksp_e/analytic_index_e/gats_e.htm#article14](#)).

... and even to be exempted from basic GATT provisions, as long as the measures are justified under Article XX

Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to environmental and human health protection: Articles XX(b) and (g) allow WTO members to justify GATT-inconsistent measures if these are either necessary to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources, respectively.

In addition, the introductory paragraph of Article XX (its "chapeau") has been designed to prevent the misuse of trade-related measures. Pursuant to the chapeau, an environmental measure may not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." These additional safeguards seek mainly to ensure that, by allowing a measure to be inconsistent with GATT rules through the use of exceptions, protectionism is not introduced through the back door.

- > [Key GATT disciplines \(envt_rules_gatt_e.htm\)](#)
- > [GATT exceptions \(envt_rules_exceptions_e.htm\)](#)
- > [Other relevant WTO texts \(issu3_e.htm\)](#)
- > [Environment-related disputes \(edis00_e.htm\)](#)

WTO rules and environmental policies: key GATT disciplines

Certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other members. They may violate basic trade rules, such as the non-discrimination obligation and the prohibition of quantitative restrictions. This is why exceptions to such rules, as contained in Article XX, are particularly important in the trade and environment context. Article XX being an exception clause, it comes into play only once a measure is found to be inconsistent with GATT rules.

The principle of non-discrimination

First, the principle of [non-discrimination](#) ([../thewto_e/whatis_e/tif_e/fact2_e.htm](#)) stipulates that a member shall not discriminate:

- ❑ between “like” products from different trading partners (giving them equally “most favoured-nation” or MFN status, [GATT Article I](#) ([../res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article1](#))); and
- ❑ between its own and like foreign products (giving them “national treatment”, [GATT Article III](#) ([../res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article3](#))).

“Like” products

If trade-related environmental or health measures are to be consistent with WTO rules, they cannot result in discrimination between “like” products. Therefore, the principle of non-discrimination raises two key questions: Are products at issue “like” products? If so, is the foreign product treated less favourably than the domestic product or than another foreign product?

To take an example from public health protection, in the [EC — Asbestos](#) ([edis09_e.htm](#)) case, which dealt with measures (prohibiting the import, sale and use of asbestos) to address the dangers posed to human health from an exposure to asbestos and products containing asbestos, Canada — the complainant — had to

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> For a more in-depth discussion of environment-related disputes, see [Environment-Related Disputes](#) ([edis00_e.htm](#)).

> WTO Analytical Index on GATT Articles I ([../res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article1](#)), III ([../res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article3](#)) and XI ([../res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article11](#)).

prove that products (containing asbestos) imported from Canada to France were like French domestic substitutes (PVA, cellulose and glass fibres) and that the French regulation accorded imported products "less favourable treatment" than like domestic products.

In fact, in this case, the Panel found that domestic and imported products were "like". However, the Appellate Body reversed this finding and explained that several criteria should have been taken into account by the Panel in the determination of likeness, including the competitive relationship between products, but also the "risk" to health posed by the two products, due to their different physical characteristics.

If two products are found to be "like", the question remains whether imported products are treated in a less favorable manner than domestic products. In the [US — Gasoline \(edis07_e.htm\)](#) case, for instance, the Panel ruled that a US measure aimed at regulating the composition and emission effects of gasoline in order to reduce air pollution in the United States violated Article III of the GATT: imported gasoline was effectively prevented from benefiting from sales conditions as favourable as domestic gasoline; therefore, the Panel found that imported gasoline was treated less favourably than domestic gasoline.

A related question: the issue of processes or production methods (PPMs)

An important question in relation to environmental measures is whether products may be treated differently because of the way in which they have been produced even if the production method used does not leave a trace in the final product, i.e. even if the physical characteristics of the final product remain identical (referred to as non-product-related processes and production methods).

When comparing two products, different processes or production methods (PPMs) used in the manufacture of such products do not per se render these products "unlike".

For instance, governments may want to discriminate between wood products derived from sustainably grown forest and wood where the production method is unknown. Under such a scenario, the determination of the likeness of the two types of wood may be particularly challenging. For such reasons, the analysis of likeness between two products should be carried out on a case-by-case basis, as pointed out by the Appellate Body in [EC — Asbestos \(edis09_e.htm\)](#).

Although not dealing with such questions in the context of GATT Articles I or III (the measure was an import ban found to be inconsistent with Article XI), the dispute in [US — Shrimp \(edis08_e.htm\)](#) provides an interesting example of a justifiable discrimination between products on the basis of PPMs. The dispute concerned the manner in which fishermen harvested shrimp. Certain production methods, involving the use of fishing nets and shrimp trawl vessels, resulted in a high rate of incidental killing of sea turtles, as turtles can be trapped and drowned by the nets used to harvest shrimp. The United States aimed to reduce the killing of turtles by imposing an import ban on shrimp harvested by methods which may lead to the incidental killing of sea turtles. In order to avoid the ban, exporters were required to demonstrate the use of TEDs (which limit the incidental catch of endangered sea turtles), or similar equipment, when harvesting shrimp. The Appellate Body viewed the United States' measure as directly connected to the policy of conservation of sea turtles. The measure was thus considered to be provisionally justified under Article XX(g).

The prohibition of quantitative restrictions

Certain environmental measures (such as bans) may also violate the second key discipline of the GATT, which is contained in [Article XI \(././res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article11\)](#), and provides, among other things, that restrictions on the importation or sale of products from other WTO members are prohibited. In the [US — Shrimp \(edis08_e.htm\)](#) case, the US embargo was found to be inconsistent with Article XI: the United States had prohibited the import of shrimp originating from non-certified countries, i.e. countries that did not use a technology known as TEDs.

- > [Introduction \(envt_rules_intro_e.htm\)](#)
- > [GATT exceptions \(envt_rules_exceptions_e.htm\)](#)
- > [Other relevant WTO texts \(issu3_e.htm\)](#)
- > [Environment-related disputes \(edis00_e.htm\)](#)

Criteria for the determination of like products

In WTO case law, four criteria have been used in determining whether products are "like":

- (i) the physical properties of the products;
- (ii) the extent to which the products are capable of serving the same or similar end-uses;
- (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and
- (iv) the international classification of the products for tariff purposes.

TEDs?

A TED (turtle excluder device) is a trapdoor installed inside a trawling net which allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

WTO rules and environmental policies: GATT exceptions

GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to the protection of the environment: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)).

GATT Article XX on General Exceptions consists of two cumulative requirements. For a GATT-inconsistent environmental measure to be justified under Article XX, a member must perform a two-tier analysis proving:

- ❑ first, that its measure falls under at least one of the exceptions (e.g. paragraphs (b) to (g), two of the ten exceptions under Article XX) and, then,
- ❑ that the measure satisfies the requirements of the introductory paragraph (the “chapeau” of Article XX), i.e. that it is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not “a disguised restriction on international trade”.

Environmental policies covered by Article XX

WTO members' autonomy to determine their own environmental objectives has been reaffirmed on a number of occasions (e.g. in [US — Gasoline \(edis07_e.htm\)](#), [Brazil — Retreaded Tyres \(./dispu_e/cases_e/ds332_e.htm\)](#)). The Appellate Body also noted, in the [US — Shrimp \(edis08_e.htm\)](#) case, that conditioning market access on whether exporting members comply with a policy unilaterally prescribed by the importing member was a common aspect of measures falling within the scope of one or other of the exceptions of Article XX.

In past cases, a number of policies have been found to fall within the realm of these two exceptions:

- ❑ policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing risks to human health posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tyres (under Article XX(b)); and
- ❑ policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air (under Article XX(g)).

Interestingly, the phrase “exhaustible natural resources” under Article XX(g) has been interpreted broadly to include not only “mineral” or “non-living” resources but also living species which may be susceptible to depletion, such as sea turtles. To support this interpretation, the Appellate Body noted, in the [US — Shrimp \(edis08_e.htm\)](#) case, that modern international conventions and declarations made frequent references to natural resources as embracing both living and non-living resources. Moreover, in order to demonstrate the exhaustible character of sea turtles, the Appellate Body noted that sea turtles were included in Appendix 1 on species threatened with extinction of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”).

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> Secretariat background note (<http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/wt/cte/w203.doc>) on how GATT Article XX is applied in WTO dispute settlement rulings.

> [WTO Analytical Index on GATT Article XX \(././res_e/booksp_e/analytic_index_e/gatt1994_e.htm#article20\)](#).

> [WTO Analytical Index on GATS Article XIV \(././res_e/booksp_e/analytic_index_e/gats_e.htm#article14\)](#).

Also in the US — Shrimp case, the Appellate Body accepted as a policy covered by Article XX(g) one that applied not only to turtles within the United States waters but also to those living beyond its national boundaries. The Appellate Body found that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

Degree of connection between the means and the environmental policy objective

In order for a trade-related environmental measure to be eligible for an exception under Article XX, paragraphs (b) and (g), a member has to establish a connection between its stated environmental policy goal and the measure at issue. The measure needs to be either:

- ❑ necessary for the protection of human, animal or plant life or health (paragraph (b)) or
- ❑ relating to the conservation of exhaustible natural resources (paragraph (g)).

To determine whether a measure is “**necessary**” to protect human, animal or plant life or health under Article XX(b), a process of weighing and balancing a series of factors has been used by the Appellate Body, including the contribution made by the environmental measure to the policy objective, the importance of the common interests or values protected by the measure and the impact of the measure on international trade. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

In the [Brazil — Retreaded Tyres \(./dispu_e/cases_e/ds332_e.htm\)](#) case, for instance, the Appellate Body found that the import ban on retreaded tyres was “apt to produce a material contribution to the achievement of its objective”, i.e. the reduction in waste tyre volumes. The Appellate Body also found that the proposed alternatives, which were mostly remedial in nature (i.e. waste management and disposal), were not real alternatives to the import ban, which could prevent the accumulation of tyres.

The Appellate Body also recognized in Brazil — Retreaded Tyres that certain complex environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. The Appellate Body pointed out that the results obtained from certain actions — for instance, measures adopted in order to address global warming and climate change — can only be evaluated with the benefit of time.

In [EC — Asbestos \(edis09_e.htm\)](#), the Appellate Body also found, as a result of a process of weighing and balancing a series of factors, that there was no reasonably available alternative to a trade prohibition. This was clearly designed to achieve the level of health protection chosen by France and the value pursued by the measure was found to be “both vital and important in the highest degree”. The Appellate Body made the point that the more vital or important the common interests or values pursued, the easier it was to accept as necessary measures designed to achieve those ends.

For a measure to be “**relating**” to the conservation of natural resources, a substantial relationship between the measure and the conservation of exhaustible natural resources needs to be established. In the words of the Appellate Body, a member has to establish that the means (i.e. the chosen measure) are “reasonably related” to the ends (i.e. the stated policy goal of conservation of exhaustible natural resources). Moreover, in order to be justified under Article XX(g), a measure affecting imports must be applied “in conjunction with restrictions on domestic production or consumption” (the even-handedness requirement).

In the [US — Gasoline \(edis07_e.htm\)](#) case, the United States had adopted a measure regulating the composition and emission effects of gasoline in order to reduce air pollution in the United States. The Appellate Body found that the chosen measure was “primarily aimed at” the policy goal of conservation of clean air in the United States and thus fell within the scope of paragraph (g) of Article XX. As far as the second requirement of paragraph (g) is concerned, the Appellate Body ruled that the measure met the “even-handedness” requirement, as it affected both imported and domestic products.

In the [US — Shrimp \(edis08_e.htm\)](#) case, the Appellate Body considered that the general structure and design of the measure in question were “fairly narrowly focused” and that it was not a blanket prohibition of the importation of shrimp imposed without regard to the consequences to sea turtles; thus, the Appellate Body concluded that the regulation in question was a measure “relating to” the conservation of an exhaustible natural resource within the meaning of Article XX(g). The Appellate Body also found that the measure in question had been made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).

The importance of the manner in which trade-related environmental measures are applied

The introductory clause of Article XX (its [chapeau](#) ([../docs_e/legal_e/gatt47_02_e.htm#articleXX](#))) emphasizes the manner in which the measure in question is applied. Specifically, the application of the measure must not constitute a “means of arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade”.

The chapeau requires that the measure does not constitute an abuse or misuse of the provisional justification made available under one of the paragraphs of Article XX, that is to say, is applied in good faith. In [Brazil — Retreaded Tyres](#) ([../dispu_e/cases_e/ds332_e.htm](#)), the Appellate Body recalled that the chapeau serves to ensure that members’ right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, not as a means to circumvent one member’s obligations towards other WTO members. In other words, Article XX embodies the recognition by WTO members of the need to maintain a balance between the right of a member to invoke an exception and the rights of the other members under the GATT.

WTO jurisprudence has highlighted some of the circumstances which may help to demonstrate that the measure is applied in accordance with the chapeau. These include relevant coordination and cooperation activities undertaken by the defendant at the international level in the trade and environment area, the design of the measure, its flexibility to take into account different situations in different countries as well as an analysis of the rationale put forward to explain the existence of a discrimination (the rationale for the discrimination needs to have some connection to the stated objective of the measure at issue).

The role of international coordination and cooperation

In the [US — Gasoline](#) ([edis07_e.htm](#)) decision, the Appellate Body considered that the United States had not sufficiently explored the possibility of entering into cooperative arrangements with affected countries in order to mitigate the administrative problems raised by the United States in their justification of the discriminatory treatment.

Moreover, in the [US — Shrimp](#) ([edis08_e.htm](#)) case, the fact that the United States had “treated WTO members differently” by adopting a cooperative approach regarding the protection of sea turtles with some members but not with others also showed that the measure was applied in a manner that discriminated among WTO members in an unjustifiable manner.

At the compliance stage, in [US — Shrimp](#) (Article 21.5), the Appellate Body found that, in view of the serious, good faith efforts made by the United States to negotiate an international agreement on the protection of sea turtles, including with the complainant, the measure was now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination.

The Appellate Body also acknowledged that, “as far as possible”, a multilateral approach is strongly preferred” over a unilateral approach. But, it added that, although the conclusion of multilateral agreements was preferable, it was not a prerequisite to benefit from the justifications in Article XX to enforce a national environmental measure.

The flexibility of the measure to take into account different situations in different countries

In the [US — Shrimp](#) case, the Appellate Body was of the view that rigidity and inflexibility in the application of the measure (e.g. by overlooking the conditions in other countries) constituted unjustifiable discrimination. It was deemed not acceptable that a member would require another member to adopt essentially the same regulatory programme without taking into consideration that conditions in other members could be different and that the policy solutions might be ill-adapted to their particular conditions.

In order to implement the panel and Appellate Body recommendations, the United States revised its measure and conditioned market access on the adoption of a programme comparable in effectiveness (and not essentially the same) to that of the United States. For the Appellate Body, in [US — Shrimp](#) (Article 21.5), this allowed for sufficient flexibility in the application of the measure so as to avoid “arbitrary or unjustifiable discrimination”.

The text of GATT Article XX

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

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

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

(Article XIV of the GATS contains the same introductory clause and the same paragraph (b) — but it does not contain an equivalent to paragraph (g))

The design of the measure

Finally, an environmental measure may not constitute a “disguised restriction on international trade”, i.e. may not result in protectionism. In past cases, it was found that the protective application of a measure could most often be discerned from its “design, architecture and revealing structure”. For instance, in US — Shrimp (Article 21.5), the fact that the revised measure allowed exporting countries to apply programmes not based on the mandatory use of TEDs, and offered technical assistance to develop the use of TEDs in third countries, showed that the measure was not applied so as to constitute a disguised restriction on international trade.

- > [Introduction \(envt_rules_intro_e.htm\)](#)
- > [Key GATT disciplines \(envt_rules_gatt_e.htm\)](#)
- > [Other relevant WTO texts \(issu3_e.htm\)](#)
- > [Environment-related disputes \(edis00_e.htm\)](#)

TEDs?

A TED (turtle excluder device) is a trapdoor installed inside a trawling net which allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

ENVIRONMENT: ISSUES

WTO rules and environmental policies: Other relevant WTO texts

Trade and environment interface is also addressed in a number of different WTO Agreements and Decisions.

- ❑ [The General Agreement on Trade in Services](#)
- ❑ [The Agreement on Technical Barriers to Trade](#)
- ❑ [The Agreement on Sanitary and Phytosanitary Measures](#)
- ❑ [The Agreement on Trade-Related Aspects of Intellectual Property Rights](#)
- ❑ [The Agreement on Subsidies and Countervailing Measures](#)
- ❑ [The Agreement on Agriculture](#)
- ❑ [Ministerial Decision on Trade and Environment \(issu5_e.htm\)](#)
- ❑ [A Decision on Trade in Services and the Environment \(issu6_e.htm\)](#)

The General Agreement on Trade in Services

Negotiated during the 1986–94 Uruguay Round, the General Agreement on Trade in Services (GATS) contains a [“general exceptions” clause, Article XIV](#) ([./././docs_e/legal_e/26-gats_01_e.htm#articleXIV](#)), similar to GATT Article XX.

The GATS article starts with an introduction (“chapeau”) that is identical to that of GATT Article XX.

Addressing environmental concerns, paragraph (b) allows WTO members to adopt policy measures that would normally be inconsistent with GATS if this is “necessary to protect human, animal or plant life or health” (identical to GATT Article XX(b)).

As under GATT, this must not result in arbitrary or unjustifiable discrimination and must not constitute protectionism in disguise.

The Agreement on Technical Barriers to Trade (TBT)

The WTO Agreement on Technical Barriers to Trade seeks to ensure that product specifications, whether mandatory or voluntary (known as technical regulations and standards), as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), do not create unnecessary obstacles to trade. In its preamble, the Agreement recognizes countries’ rights to adopt such measures to the extent they consider appropriate — for example, to protect human, animal or plant life or health, or the environment.

Moreover, members are allowed to take measures to ensure that their standards of protection are met. (This is known as adopting “conformity assessment procedures”).

Among the agreement’s important features are:

TIP: if you cannot print the right-hand column properly, set the printer to “landscape”

- ❑ **non-discrimination** in the preparation, adoption and application of technical regulations, standards, and conformity assessment procedures;
- ❑ avoiding **unnecessary obstacles** to trade;
- ❑ harmonizing specifications and procedures with **international standards** as far as possible;
- ❑ the **transparency** of these measures, through governments notifying them to the WTO Secretariat and establishing national enquiry points.

The Agreement on Sanitary and Phytosanitary Measures (SPS)

The WTO Agreement on Sanitary and Phytosanitary Measures deals with food safety, and human, animal and plant health and safety regulations.

It recognizes members' rights to adopt SPS measures but stipulates that they must be based on a risk assessment, should not create unnecessary obstacles to trade (should be applied only to the extent necessary to protect human, animal or plant life or health), and should not arbitrarily or unjustifiably discriminate between members where similar conditions prevail. The Agreement encourages members to adapt their SPS measures to the areas (regions, countries or parts of countries) that supply their imports.

The SPS Agreement complements the Technical Barriers to Trade Agreement. It allows members to adopt SPS measures for environmental purposes, but subject to such requirements as risk assessment, non-discrimination and transparency.

The Agreement on Trade-Related Aspects of Intellectual property (TRIPS)

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) refers explicitly to the environment in Section 5, which deals with patents.

It says (in paragraphs 2 and 3 of Article 27 — Arts 27.2 and 27.3 for short — of Section 5) that members can make certain inventions ineligible for patenting:

- ❑ **To protect human, animal or plant life or health, to avoid serious harm to the environment.** A member can exclude an invention from patentability if it believes the invention has to be prevented (within its territory) for these and certain other objectives.
- ❑ **Plants and animals.** Micro-organisms have to be eligible for patenting. So do non-biological and microbiological processes for the production of plants or animals. Invented plant varieties have to be also eligible for protection either by patenting, or by an effective system specially created for the purpose ("sui generis"), or a combination of the two. Otherwise, plants and animals do not have to be eligible for patenting.

These provisions are designed to address the environmental concerns related to intellectual property protection.

The TRIPS Agreement allows members to refuse to patent inventions that may endanger the environment (provided their commercial exploitation is prohibited as a necessary condition for the protection of the environment). For ethical or other reasons, they can also exclude plants or animals from patentability, subject to the conditions described above.

The Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies, which applies to non-agricultural products, is designed to regulate the use of subsidies. Under the Agreement, certain subsidies referred to as "non-actionable" are generally allowed. Amongst the non-actionable subsidies that had been provided for under Article 8 were subsidies used to promote the adaptation of existing facilities to new environmental requirements (Article 8.2(c)). However, this provision expired in its entirety at the end of 1999. It was intended to allow members to capture "positive environmental externalities" when they arose.

The Agreement on Agriculture

Adopted during the 1986–94 Uruguay Round, the WTO Agriculture Agreement seeks to reform trade in agricultural products, and provide a basis for market-oriented policies.

In its preamble, the agreement reiterates members' commitment to reform agriculture in a manner that protects the environment.

Under the agreement, domestic support measures with minimal impact on trade (known as "green box" policies) are allowed and are excluded from reduction commitments — they are listed in Annex 2 of the Agreement. Among them are expenditures under environmental programmes, provided that they meet certain conditions. Again, the exemption enables governments to capture "positive environmental externalities"..

Relevant decisions

Two ministerial decisions addressing environmental issues were adopted at the end of the Uruguay Round.

A ministerial **Decision on Trade and Environment** ([issu5_e.htm](#)) created the Committee on Trade and Environment (CTE) ([wrk_committee_e.htm](#)), with the aim of making international trade and environmental policies support each other. The decision contains the work programme of the CTE ([wrk_committee_e.htm](#)).

Ministers also adopted a **Decision on Trade in Services and the Environment** ([issu6_e.htm](#)). It instructs the CTE to examine and report on the relationship between services trade and the environment, including the issue of sustainable development, in order to determine if any modifications of GATS Article XIV are required. The CTE has taken up this issue as part of its work programme.

More information:

> Explanations of the main WTO agreements, with links to the legal texts ([../thewto_e/whatis_e/tif_e/agrm1_e.htm](#))