

# *Climate Labelling and the WTO*

## *The 2010 EU Ecolabelling Programme as a Test Case under WTO Law*

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### A. INTRODUCTION AND LEGAL BACKGROUND

#### I. Labelling as an Instrument of Climate Protection

Environmental labelling is increasingly used as an instrument of climate protection.<sup>2</sup> This is underlined, for example, by the EU climate change programme, in which various labelling schemes are employed. Cases in point are the EU's oft-discussed voluntary ecolabelling scheme, which takes a life-cycle approach, and its mandatory labelling scheme for cars<sup>3</sup>. A further example is the recent discussion on "CO<sub>2</sub> backpacks" in the UK and Austria, i.e. labels on the amount of CO<sub>2</sub> emissions generated by the national and international transportation of foodstuffs.<sup>4</sup> After the dubious outcome of the multilateral 2009 Copenhagen Climate Conference,<sup>5</sup> the importance of instruments of this type may augment even further.

Both mandatory and voluntary labelling schemes risk contravening WTO law: while mandatory labels restrict market access for non-complying products, labels that are granted under a voluntary scheme are meant to improve the perceived attractiveness of products that

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<sup>2</sup> For an overview of measures employed in various countries cf. the pertinent database of the International Energy Agency (<http://iea.org/textbase/pm/grindex.aspx>, last visited 19 February 2010); see also Green, *Climate Change, Regulatory Policy and the WTO. How Constraining are Trade Rules?*, JIEL 8 (2005), p. 143, at pp. 150 ff; Charnovitz, *Trade and Climate: Potential Conflicts and Synergies*, Pew Center Working Paper, 2003, pp. 4 ff (available at [www.noconference.pewclimate.org/docUploads/Beyond\\_Kyoto\\_Trade.pdf](http://www.noconference.pewclimate.org/docUploads/Beyond_Kyoto_Trade.pdf), last visited 19 February 2010); cf. also the study by the Swedish Kommerskollegium/National Board of Trade, *Climate and Trade Rules – Harmony or Conflict?*, 2004, pp. 39 ff (available at [www.kommers.se/upload/.../Climate%20and%20trade%20rules.pdf](http://www.kommers.se/upload/.../Climate%20and%20trade%20rules.pdf), last visited 19 February 2010).

<sup>3</sup> As a main pillar of its regulatory strategy for the car sector, the EU has adopted a directive providing for labels that inform consumers on the fuel economy and CO<sub>2</sub> emissions of new passenger cars (Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars [2000] OJ L 12/16); further climate-related labelling mechanisms are included in various other EU instruments, cf. e.g. Article 7 of Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases, [2006] OJ L 161, 14 June 2006, p. 1, which introduces a mandatory labelling scheme for fluorinated gases; the Member States have instituted a series of different voluntary and mandatory labelling schemes, cf. e.g. the preamble of Council directive 92/75/EEC.

<sup>4</sup> On this cf. the information provided by the Austrian Ministry for the Environment, *Der „CO<sub>2</sub>-Rucksack“ von Lebensmitteln*, 2008 (available at <http://lebensmittel.lebensministerium.at/article/articleview/55395/1/1471>, last visited on 19 February 2010); on CO<sub>2</sub> backpacks see also Schmidt, *Carbon accounting and carbon footprint – more than just diced results?*, *International Journal of Climate Change Strategies and Management* 1 (2009) 1, pp. 19-30 (available at [www.emeraldinsight.com/1756-8692.htm](http://www.emeraldinsight.com/1756-8692.htm), last visited on 19 February 2010).

<sup>5</sup> For a first analysis of this conference cf. International Institute for Sustainable Development, *Earth Negotiation Bulletin* 12 (2009) 459, 1 ff (available at <http://www.iisd.ca/climate/cop15/>, last visited on 22 February 2010).

are awarded the label;<sup>6</sup> hence, such labels may negatively affect the competitive conditions of other products, *possibly* disadvantaging imported products.

Labelling schemes according to which information on a product's environmental impacts over its life-cycle is included in a pertinent label fall into the category of process-based labels. It is well-known to WTO experts that such labelling schemes – in particular those based on ‘non-product-related processes and production methods’<sup>7</sup> – raise a considerable number of issues under WTO law.

This contribution examines the EU's voluntary eco-labelling scheme which was revised in 2000<sup>8</sup> and 2010<sup>9</sup>. Due to its life-cycle approach, which since the scheme's inception has taken into account e.g. energy consumption during production and use (besides further environmental impacts), this scheme has been intensely debated in trade and academic circles since its first version was introduced in 1992.<sup>10</sup> The new 2010 EU scheme similarly considers the whole life cycle of products, including ‘the most significant environmental impacts, in particular the *impact on climate change*’.<sup>11</sup> Therefore, and in view of the broad range of issues raised by it, this scheme presents a model test case under WTO law also for other climate-related labelling schemes and ecolabelling schemes more generally.

## II. Process-Based Measures, Process-Based Labelling, and WTO Law: The Main Questions

Labelling programmes such as the EU scheme that take into account a given product's environmental impacts raise a classic set of questions in WTO law: these revolve around the issue of whether and to what extent a WTO Member is allowed to introduce measures affecting trade in goods that are concerned with process and production methods (PPMs) which are not related to the goods concerned in the sense of bearing on their physical characteristics (‘non-product-related PPMs’ or ‘NPR PPMs’).<sup>12</sup>

The notion ‘non-product-related PPM requirements’ is derived from the 1979 GATT Agreement on Technical Barriers to Trade<sup>13</sup> and primarily refers to measures that target the production of goods, i.e. the stage before they are placed on the market.<sup>14</sup> It is held by many WTO Members and a majority of publicists that such process-based measures are to be

<sup>6</sup> For a taxonomy of labelling schemes cf. below, pp. ##.

<sup>7</sup> For details on this notion cf. below, pp. ##.

<sup>8</sup> Regulation (EC) No 1980/2000 of the European Parliament and the Council of 17 July 2000 on a revised Community eco-label award scheme [2000] OJ L 237/1.

<sup>9</sup> Cf. Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010 (in the following: EU Ecolabel Regulation).

<sup>10</sup> Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme [1992] OJ L 99/1; on this see e.g. Forgó, *Europäisches Umweltzeichen und Welthandel*, 1999; Tietje, *Voluntary Eco-Labelling programmes and Questions of State Responsibility in the WTO/GATT Legal System*, JWT 29 (1995) 5, p. 123 with further references.

<sup>11</sup> Article 6(3) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>12</sup> On the notions of non-product related and product related PPMs cf. e.g. Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at pp. 73-74, who defines non-product related PPMs as ‘measures that relate to processes that do not impart any distinguishing characteristics to the final product’. Cf. also the definition provided by Canada in a communication to the WTO Committee on Trade and the Environment (‘Non-product-related (NPR) PPMs describe a process or production method which does not affect or change the nature, properties, or qualities of (nor discernible traits in or on) a product.’; cf. Canada, *Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for informal, structured discussions*. Communication from Canada, WTO Doc. WT/CTE/W/229, 23 June 2003).

<sup>13</sup> Cf. e.g. Charnovitz, *The law of environmental ‘PPMs’ in the WTO: debunking the myth of illegality*, Yale Journal of International Law 27 (2002) 1, p. 59, at p. 65.

<sup>14</sup> Cf. OECD, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*, OECD Doc OCDE/GD(97)137, 1997, 10 ff.

treated differently from product-related regulations under WTO law. Thus, it has repeatedly been held for example that physically similar products that differ only in their production or processing methods must be regarded as like products and must always receive identical treatment; this would incur the consequence that any measures that differentiate between like products on the basis of NPR PPMs would inevitably violate clauses like Article III of the GATT.<sup>15</sup> It has also been argued that NPR PPM-based measures invariably have to be found to be *de facto* discriminatory, even when they are drafted in origin-neutral terms, on the basis that such measures alter competitive conditions.<sup>16</sup> Furthermore, it has been held that such measures need to be justified under the GATT, even if they are non-discriminatory; moreover, it has even been contended that justification may be impossible in respect of such measures.<sup>17</sup>

This doctrine, which treats products and processes differently, is often referred to as the ‘product-process doctrine’, even though – in view of the many variants just mentioned – there is no uniform doctrine. These various views have in common that they break with the GATT system as it relates to ‘standard’, i.e. product-related, measures, which, for example, are not questioned if they are neither *de jure* nor *de facto* discriminatory, and which can be justified in case they discriminate against foreign products. With the entry into force of the TBT Agreement in 1995, the additional question has arisen whether this Agreement applies to non-product related PPM requirements. While the product-process divide is relevant for the status, under WTO law, of NPR PPM-based measures in general, a closely related, but partly self-standing discussion has arisen as to the status of NPR PPM-based environmental *labelling* schemes, which serve to promote products that are perceived as environmentally friendly due to their production and processing methods.

The afore-described issues are largely unresolved in WTO practice and academic debate.<sup>18</sup> Their importance is evident, however, given that measures addressing production requirements are significant tools of environmental policy-making in line, in particular, with the rectification-at-source principle. Thus, environmental PPM requirements in general and PPM-based labelling schemes in particular can be used to address *local* concerns in the regulating state or another state, *transboundary* pollution as well as transboundary living resources, and *global* concerns like climate change and the protection of the ozone layer.<sup>19</sup> Hence, if process-based measures affecting trade were prevented by WTO disciplines to a greater degree than product-related measures, the resulting structural imbalance might be perceived as problematic from an environmental point of view.

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<sup>15</sup> Cf. the brief discussion of views expressed in the literature in Pauwelyn, *Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO*, EJIL 25 (2004), p. 575, at pp. 585-586, who does not share this view himself. The view described seems to be taken also by Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at pp. 75 ff and 79; Tietje, *Voluntary Eco-Labeling programmes and Questions of State Responsibility in the WTO/GATT Legal System*, JWT 29 (1995) 5, p. 123, at pp. 139 et passim; and Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, Georgetown International Environmental Law Review 11 (1999) 3, p. 599, at p. 621 *et passim*.

<sup>16</sup> Cf. Puth, *WTO und Umwelt. Die Produkt-Prozess-Doktrin*, 2003, pp. 251 ff.

<sup>17</sup> On this cf. also Charnovitz, *The law of environmental ‘PPMs’ in the WTO: debunking the myth of illegality*, Yale Journal of International Law 27 (2002) 1, p. 59, at pp. 75 ff with extensive further references; Howse/Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, EJIL 11 (2000) 2, pp. 249 ff; Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in: Bronckers/Quick, (eds.), *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, 2000, pp. 187 ff; Pauwelyn, *Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO* (2004) 25 EJIL, 575, 585 ff.

<sup>18</sup> Cf. Puth, *WTO und Umwelt. Die Produkt-Prozess-Doktrin*, 2003, p. 30 et passim; *Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO* (2004) 25 EJIL, 575 ff, 585 ff.

<sup>19</sup> Cf. OECD, ‘Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures’, OCDE/GD(97)137, 15 ff.

## B. OVERVIEW OF THE 2010 EU ECOLABELLING SCHEME

The EU had first introduced an ecolabel scheme in 1992<sup>20</sup> which has attracted considerable attention in the literature and international fora.<sup>21</sup> In 2000, the EU introduced a revised ecolabelling mechanism which built upon the principles, but abrogated the legal basis of the 1992 scheme.<sup>22</sup> Like the 1992 regime, this mechanism established a voluntary ecolabel award scheme that intended to promote products with a reduced environmental impact during their entire life cycle. Given that the 1992 and 2000 mechanisms have not proven successful,<sup>23</sup> the EU decided, in 2009, to amend the ecolabelling scheme once more.<sup>24</sup>

Like the former ones, the new 2010 mechanism pursues a life cycle approach on a voluntary basis,<sup>25</sup> aiming at reducing the negative impact of consumption and production of products on the environment, health, climate and natural resources.<sup>26</sup> It is administered by the EU in cooperation with independent competent bodies of the Member States<sup>27</sup> and the European Union Eco-Labeling Board (EUEB).<sup>28</sup> Like its predecessors, it strives to promote products which appear more environmentally friendly, during their entire life cycle, than other similar products<sup>29</sup> (for the purpose of the EU scheme, the term “products” also encompasses services)<sup>30</sup>. Therefore, the ecolabel criteria are set by reference to groups of similar products,<sup>31</sup> so that only products with superior environmental performance within a given group may receive the EU label.<sup>32</sup> Relevant criteria are, in particular, a product’s “most significant environmental impacts” including the impact on climate change, nature and biodiversity, energy and resource consumption, emissions, as well as its durability and reusability, and social and ethical aspects.<sup>33</sup> Labels are to be awarded on the basis of

<sup>20</sup> Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme [1992] OJ L 99/1.

<sup>21</sup> Cf. e.g. Forgó, *Europäisches Umweltzeichen und Welthandel*, 1999; Tietje, Voluntary Eco-Labeling programmes and Questions of State Responsibility in the WTO/GATT Legal System, JWT 29 (1995) 5, pp. 123 ff with further references.

<sup>22</sup> Regulation (EC) No 1980/2000 of the European Parliament and the Council of 17 July 2000 on a revised Community eco-label award scheme [2000] OJ L 237/1.

<sup>23</sup> An impact assessment of the scheme revealed that it did not achieve its objectives as it suffered from low awareness of the label and slow uptake by industry; only 26 product groups were covered by this scheme, and merely around 500 companies were using this label. On this, cf. EU Commission, Proposal for a Regulation of the European Parliament and of the Council on a Community Ecolabel scheme, COM(2008) 401 final.

<sup>24</sup> Cf. Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010, replacing Regulation (EC) 1980/2000.

<sup>25</sup> On the distinction between voluntary and mandatory labelling schemes as well as other classification criteria for such schemes, cf. *infra*, pp. ##.

<sup>26</sup> Cf. Recital 5 of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>27</sup> Competent bodies are defined as ‘the body or bodies, within government ministries or outside, [which are] responsible for carrying out the tasks provided for’ in the EU ecolabelling regulation (cf. Art. 4(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010)).

<sup>28</sup> See *infra* in the following text.

<sup>29</sup> Cf. e.g. Recital 5 of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>30</sup> Cf. Article 2(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>31</sup> Art. 3(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>32</sup> Recital 5 of the preamble of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010)

<sup>33</sup> Art. 6(3) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

continuously updated scientifically based information, taking into account appropriate internationally recognized standards.<sup>34</sup>

Relevant labelling criteria are set and reviewed in a procedure which involves the Commission, the Member States, competent bodies, the European Union Ecolabelling Board (EUEB) and other stakeholders. The EUEB consists of representatives of competent national bodies and other interested parties. Member States must ensure that the composition of the competent bodies, within Ministries or outside, guarantees their independence and neutrality and that their rules of procedure warrant transparency and the involvement of all interested parties at the national level.<sup>35</sup> Following consultation of the EUEB, the Commission, Member States, competent bodies and other stakeholders, which have demonstrated relevant expertise, may initiate and lead the development or revision of EU Ecolabel criteria for a given product group.<sup>36</sup> Operators wishing to use the EU Ecolabel have to apply to the aforementioned competent bodies. They can do so also for products originating *outside* the EU.<sup>37</sup> Upon award of the label, the competent body is to conclude a *contract* with the applicant which lays down the terms of use of the label.<sup>38</sup> Ecological criteria were set out, already under the 2000 scheme, for the award of the ecolabel for a series of products, including personal and portable computers, television sets, dishwashers, washing machines, and tourist accommodation services.<sup>39</sup>

### C. ISSUES IN WTO LAW

Although the EU scheme also covers environmental labelling of services,<sup>40</sup> the present analysis focuses on labelling of goods for reasons of space constraints and the complexity of the issues that present themselves already in the goods sector. For the same reasons, and since these issues have been treated at length elsewhere, this contribution does not address the questions of the unilateral and purported extraterritorial character of NPR PPM-based measures and labelling schemes.<sup>41</sup> It first tries to classify main types of labelling schemes, then turns to the question of the applicability of the GATT and the TBT Agreement to voluntary labelling mechanism such as the EU scheme, and finally examines central issues in substantive WTO law.

#### I. Taxonomy of Labelling Schemes

Generally speaking, it is possible to categorize labelling schemes pursuant to three criteria, that is (i) the issue of government involvement (whether the scheme is administered by public authorities or privately sponsored); (ii) its legal effect (whether labelling is mandatory or

<sup>34</sup> Art. 6 of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>35</sup> Art. 4(2) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>36</sup> Art. 4 – 8 of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>37</sup> Article 9(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>38</sup> Article 9 of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>39</sup> For an overview of the great number of legal acts cf. <http://ec.europa.eu/environment/ecolabel> (last visited on 19 February 2010).

<sup>40</sup> Cf. Article 2(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010) and the preceding section of the text.

<sup>41</sup> Cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 95 ff, 172 ff, 319 ff.

voluntary); and (iii) its scope (whether it applies to product-related characteristics and product-related PPM, or whether it – also or exclusively – covers non-product-related PPM).<sup>42</sup>

Labelling schemes administered by public bodies can be subdivided into mandatory and voluntary ones. A labelling system is regarded as mandatory, when the award of the label functions as a legally binding market access requirement; otherwise it is classified as voluntary.<sup>43</sup> A scheme which functions on a voluntary basis may nonetheless affect the competitive relationship between similar products, and it is normally even meant to bring about this effect: this follows from the common understanding that voluntary labelling schemes are designed to “inform consumers and thereby promote consumer products which are determined to be environmentally more friendly than other functionally and competitively similar products”.<sup>44</sup> Moreover, both mandatory and voluntary schemes – whether privately or state-administered – can be further distinguished into product-related approaches and non-product-related PPM based labelling. This yields the following taxonomy:

(1) Mandatory government-administered labelling schemes based on product-related characteristics, including product-related PPM.

(2) Mandatory government-administered labelling schemes – additionally or exclusively – based on non-product-related PPM.

(3) Voluntary government-administered labelling schemes based on product-related characteristics, including product-related PPM.

(4) Voluntary government-administered labelling schemes – additionally or exclusively – based on non-product-related PPM.

(5) Privately-sponsored labelling schemes based on product-related characteristics, including product-related PPM.

(6) Privately-sponsored labelling schemes – additionally or exclusively – based on non-product-related PPM.

These labelling schemes raise partially divergent questions under WTO law.<sup>45</sup> The EU ecolabelling mechanism corresponds to type 4 of this taxonomy, given that it is preponderantly administered by public authorities, is voluntary in nature (i.e. market access is not *de jure* dependent on the fulfilment of the underlying labelling criteria), and includes non-product-related (NPR) PPM-based requirements due to its life-cycle approach.

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<sup>42</sup> Cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 343 ff, where the issues raised under these types of labelling schemes are discussed; see also Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, *JWT* 38 (2004) 1, pp. 69 ff; and Trüeb, *Umweltrecht in der WTO*, 2001, pp. 448-449, who adopts essentially the same categorization, but refers also to other possible classifications in fn 268; see also Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, *Georgetown International Environmental Law Review* 11 (1999) 3, at pp. 599 ff for a slightly different categorization; Green, *Climate Change, Regulatory Policy and the WTO. How Constraining are Trade Rules?*, *JIEL* 8 (2005), p. 143, at p. 150; Buck/Verheyen, *International Trade Law and Climate Change – a Positive Way Forward*, 2001, pp. 15 ff (available at [library.fes.de/pdf-files/stabsabteilung/01052.pdf](http://library.fes.de/pdf-files/stabsabteilung/01052.pdf), last visited on 19 February 2010); Dröge et al, *National Climate Change Policy – Are the New German Energy Policy Initiatives in Conflict WTO Law?*, 2003 (German Institute for Economic Research discussion paper 374), 13 ff (available at <http://econpapers.repec.org/paper/diwdiwpp/dp242.htm>, last visited on 19 February 2010).

<sup>43</sup> Cf. e.g. Tietje, *Voluntary Eco-Labeling programmes and Questions of State Responsibility in the WTO/GATT Legal System*, *JWT* 29 (1995) 5, p. 123; Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, *Georgetown International Environmental Law Review* 11 (1999) 3, p. 599, at p. 605; Dröge et al, *National Climate Change Policy – Are the New German Energy Policy Initiatives in Conflict WTO Law?*, 2003 (German Institute for Economic Research discussion paper 374), 13 ff (available at <http://econpapers.repec.org/paper/diwdiwpp/dp242.htm>, last visited on 19 February 2010).

<sup>44</sup> Cf. the OECD definition of voluntary labelling schemes in OECD, *Environmental Labelling in OECD Countries*, OECD Report 12, 1991.

<sup>45</sup> Cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 343 ff with further references.

## II. Applicability of the TBT Agreement, and of the GATT

### 1. *Applicability of the TBT Agreement*

The issue of whether voluntary, government-administered NPR PPM-based labelling schemes come under the TBT Agreement has been designated as one of the most debated questions in the discussions of the WTO Committee on Trade and the Environment.<sup>46,47</sup> Whereas the EU, Switzerland and Canada have expressed the view that such labels are covered by the TBT Agreement (and do not constitute *per se* violations of the agreement),<sup>48</sup> some developing WTO Members have been arguing that the negotiating history of the TBT Agreement shows that NPR PPM-based measures are not covered by the TBT Agreement, as its drafters had no intention of ‘legitimizing’ NPR PPM-based measures.<sup>49</sup> The view that such labelling schemes do not come under the purview of the TBT Agreement is also maintained in recent academic writings,<sup>50</sup> and is even regarded as the prevailing opinion.<sup>51</sup>

Regarding this contention, however, it has to be stressed that the relevant negotiating history of the TBT Agreement can be characterized as being ambiguous at best, and that systematic-teleological interpretation quite clearly leads to the conclusion that the TBT Agreement is applicable to NPR PPM-based measures in general and – by implication – to labels in particular.<sup>52</sup> The contrary stance taken by several writers and notably developing countries sometimes appears to be based on the misunderstanding that the non-applicability of the TBT Agreements would *per se* prohibit the introduction of NPR PPM-based requirements by other (developed) WTO Members. The core of this possible misunderstanding seems to be rooted in the misconception that the TBT Agreement *permits* measures that otherwise would be prohibited. However, the TBT Agreement does not introduce permissions; rather, it lays down new obligations, i.e. disciplines that apply in addition to those of the GATT, in particular. Hence, its purported non-applicability would not imply that NPR PPM-based requirements would be *per se* prohibited (such measures may, however, come under the purview of the GATT<sup>53</sup>). Moreover, if one takes the view that the TBT Agreement imposes disciplines that tend to be *stricter* than those of the GATT, then (developing) countries that are troubled by the spectre of NPR PPM-based labelling schemes arguably should in fact advocate the TBT Agreement’s applicability.

Additionally, it has to be noted that the TBT Committee has decided in 1997 that the “obligation to publish notices of draft standards containing *voluntary labelling requirements* under paragraph L of the [TBT Code of Conduct] is not dependent upon the kind of

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<sup>46</sup> Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at p. 80.

<sup>47</sup> The present and the following section draw on Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 319 ff and 342 ff.

<sup>48</sup> Cf. EC, *Labelling for Environmental Purposes. submission by the European Communities under Paragraph 32(iii)*, WTO Doc WT/CTE/W/225, 6 March 2003, para. 28 (c) (available at [www.wto.org](http://www.wto.org), last visited on 19 February 2010); regarding Switzerland and Canada cf. Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at pp. 80 ff.

<sup>49</sup> Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at pp. 80 ff.

<sup>50</sup> Cf. e.g. Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at pp. 80 ff; cf. also Puth, *WTO und Umwelt. Die Produkt-Prozess-Doktrin*, 2003, pp. 217-218; Tietje, *Voluntary Eco-Labelling programmes and Questions of State Responsibility in the WTO/GATT Legal System*, JWT 29 (1995) 5, p. 123, at p. 134.

<sup>51</sup> Cf. Trüeb, *Umweltrecht in der WTO*, 2001, p. 453, who does not share this point of view, however.

<sup>52</sup> Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 319 ff and 342 ff.

<sup>53</sup> See *infra*, next subsection in the text.

information provided on the label”.<sup>54</sup> Despite a pertinent disclaimer,<sup>55</sup> this decision can arguably be interpreted as an indication that there is some convergence of views at least that NPR PPM-based labels should not be regarded as being *per se* excluded from the scope of the TBT Agreement.<sup>56</sup>

Hence, if one takes the view that NPR PPM-based labelling schemes are not exempted from the scope of the TBT Agreement, then the EU ecolabelling mechanism, being voluntary in nature, must comply fully with the TBT Agreement and its Code of Good Practice in particular.

## 2. *Applicability of the GATT*

Since voluntary labelling schemes are meant to affect the competitive conditions among similar products, the question arises whether such mechanisms come under the purview of the GATT, which, pursuant to the General Interpretative Note to Annex 1A, applies beside the TBT Agreement to the extent there is no conflict between both agreements. This leads to the issue of the attribution of (partially) private conduct, which risks impinging on the order set up by GATT disciplines, to WTO Members.<sup>57</sup> Importantly, the same question would arise, if a panel followed the stance, which has been refuted in the preceding section, that the TBT Agreement does not apply to the EU scheme: this scheme would then be governed solely by the GATT. Both considerations constitute reasons why one should examine the applicability of the GATT to voluntary governmental labelling schemes.

As noted, if a product is considered eligible for the award of the EU label, the competent national body is to conclude a *contract* with the applicant, which covers its terms of use.<sup>58</sup> The “competent body” may arguably be a governmental or a private body.<sup>59</sup> In either case, it must be independent,<sup>60</sup> so that the contract can be concluded between a *private* party on the one hand and an *independent* governmental or *private* body on the other.

In such instances, it has repeatedly been questioned whether eventual distortions of competitive conditions can be attributed to the state. As this issue has already been dealt with in detail elsewhere,<sup>61</sup> it shall be recalled in the present context that several GATT panel

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<sup>54</sup> Cf. Committee on Technical Barriers to Trade, First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, WTO Doc G/TBT/5, 19 November 1997, para. 12.

<sup>55</sup> The decision has been taken ‘without prejudice to the views of Members concerning the coverage and application of the Agreement’; cf. *ibid.*

<sup>56</sup> Moreover, concerning the issue of justification of NPR PPM-based labelling schemes that may incur trade effects, the interpretative guidance ensuing from the 2002 World Summit on Sustainable Development (WSSD) conclusions should be taken into account, which explicitly call for voluntary “consumer information tools to provide information relating to sustainable production and consumption” (cf. para. 15(e) of the Implementation Plan of the 2002 World Summit on Sustainable Development (WSSD), available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)). Expressed in the words of the EU, “it is logical that WTO Members should continue to support in the WTO what they have called for at the WSSD (cf. EC, *Labelling for Environmental Purposes. submission by the European Communities under Paragraph 32(iii)*, WTO Doc WT/CTE/W/225, 6 March 2003, para. 13).

<sup>57</sup> See also Tietje, *Voluntary Eco-Labeling programmes and Questions of State Responsibility in the WTO/GATT Legal System*, JWT 29 (1995) 5, p. 123, at pp. 123 ff; Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, Georgetown International Environmental Law Review 11 (1999) 3, p. 599, at pp. 599 ff.

<sup>58</sup> Article 9.1 of Regulation 1980/2000.

<sup>59</sup> Cf. Article 4(1) (“body or bodies, within government ministries or outside,...”).

<sup>60</sup> Article 4(2) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>61</sup> Cf. Vranes, *The Single Euro Payments Area (SEPA) and its Compatibility with the GATS Disciplines on Financial Services*, Journal of World Trade 42 (2008) 3, p. 508, at pp. 523 ff; Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 383 ff with further references.



reports have analysed this question.<sup>62</sup> Although these decisions were rendered under individual GATT provisions (namely Articles III:4, XI:1 and XXIII:1(b) of the GATT, respectively), the uniform and generalizable underlying theme is that under the GATT the conduct of private persons will be attributed to the state, when they are sufficiently influenced through ‘incentives and disincentives...to act in [this] particular manner’.<sup>63</sup> This approach, which also interlocks with public international law guidelines and theoretical considerations in jurisprudence,<sup>64</sup> is teleologically justified by the fact that the GATT is concerned with non-discriminatory market access and competitive conditions on the internal market, which may also be influenced indirectly by the state through behaviour which appears not to emanate from it in form, but does so in substance.

It follows by implication that the EU environmental labelling scheme can be attributed to public authorities under the GATT, in view of the facts that the system as such has been established by EU legal acts,<sup>65</sup> that it is preponderantly administered by the EU and that the private bodies involved act, in large part, under mandates of the EU Commission and EU Member States.<sup>66</sup>

In sum, and this corrects a frequent misunderstanding,<sup>67</sup> the EU’s voluntary ecolabelling scheme is neither exempted from, nor prohibited per se under the disciplines of the TBT Agreement or the GATT solely due to its reliance on life cycle considerations. Hence, the scheme and existing and future implementing measures must be fully in compliance with the disciplines of these agreements.

### III. Likeness

It is particularly disputed whether and how the fact that a regulatory measure is concerned with non-product-related production and processing measures affects the likeness analysis under central WTO trade in goods provisions such as Article III of the GATT and analogous clauses in the TBT Agreement.<sup>68</sup> As noted, the fact that several authors take the view that physically similar products that differ only in their production or processing methods must be

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<sup>62</sup> Panel report, *Canada – Administration of the Foreign Investment Act*, L/5504, BISD 30S/140, adopted on 7 February 1984 (*Canada – FIRA*), para. 5.4; panel report, *Japan – Restrictions on Imports of Certain Agricultural Products*, L/6253, adopted on 22 March 1988, para. 5.4.1.4.; panel report, *Japan – Trade in Semi-Conductors*, BISD 35S/116, adopted on 4 May 1988, paras. 106 ff; panel report, *EEC – Regulation on Imports of Parts and Components*, L/6657 - BISD 37S/132, adopted on 16 May 1990 (EEC - Parts and Components), para. 5.21; confirmed by the panel report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted on 25 September 1997 (EC – Bananas III), paras. 7.179-7.180; panel report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.49.

<sup>63</sup> See also the panel report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.49.

<sup>64</sup> Vranes, *The Single Euro Payments Area (SEPA) and its Compatibility with the GATS Disciplines on Financial Services*, *Journal of World Trade* 42 (2008) 3, p. 508, at p. 523.

<sup>65</sup> Cf. the analogy in the GATT Panel Report, *EEC - Restrictions on Imports of Apples from Chile*, L/5047, adopted 10 November 1980, BISD 27S/98, in which the panel held that detrimental effects could be attributed to a state, if the pertinent regulatory system as a whole has been established by the state and its operation depended on the fine-tuning through administrative decisions and public financing (at para. 12.8).

<sup>66</sup> Cf. above, pp. ##.

<sup>67</sup> Cf. e.g. Buck/Verheyen, *International Trade Law and Climate Change – a Positive Way Forward*, 2001 (available at [library.fes.de/pdf-files/stabsabteilung/01052.pdf](http://library.fes.de/pdf-files/stabsabteilung/01052.pdf), last visited on 19 February 2010), p. 16 et passim (‘eco-labelling schemes which take into consideration the non-product related environmental impacts of products might *per se* be prohibited under the TBT Agreement, although the legal analysis remains inconclusive’) and Charnovitz, *Trade and Climate: Potential Conflicts and Synergies*, Pew Center Working Paper, 2003, p. 9 (available at [www.noconference.pewclimate.org/docUploads/Beyond\\_Kyoto\\_Trade.pdf](http://www.noconference.pewclimate.org/docUploads/Beyond_Kyoto_Trade.pdf), last visited 19 February 2010) with further references. Charnovitz himself does not share this view.

<sup>68</sup> This section is based on Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 191 ff and 323 ff.

regarded as like products would – according to many writers – incur the consequence that they must always receive identical treatment. In other words, regulatory distinctions based on environmentally (un-)friendly NPR PPMs would be prohibited (subject to eventual justification under clauses like Article XX of the GATT, unless one does take the view that even justification is impossible for process-based measures<sup>69</sup>). Therefore, the present section first analyses the notion of ‘like products’ in the GATT and the TBT Agreement on a general level. It then moves on to the specific nexus between likeness of products and NPR PPMs. In the last subsection, the results of this analysis are applied to the EU labelling scheme.

### 1. *Likeness in the GATT and the TBT Agreement*

This section first examines the meaning of ‘like’ and ‘like products’ in the GATT. It then turns to the interpretation of the similar wording of Article 2.1 of the TBT Agreement and the analogous provision of Article D of the Code of Good Practice (Annex 3 of the TBT Agreement), which applies to non-mandatory labelling requirements.<sup>70</sup>

Given that the terms ‘like’ and ‘like products’ are not explicitly defined in Article III:4 of the GATT (nor in Article III:2 first sentence of the GATT, Article 2 of the TBT Agreement or Article D of the Code of Good Practice which will be analysed later), one has to turn to the context of these terms and the object and purpose of Article III, and eventually of the GATT and WTO law more generally.<sup>71</sup>

A close part of this context is Article III:1, according to which internal taxation and internal regulation ‘should not be applied to imported or domestic products *so as to afford protection to domestic production*’. Article III:1 is not a norm that is applicable to a concrete case in itself, but constitutes an *interpretative principle* that is relevant for the interpretation of Article III as a whole,<sup>72</sup> as ensues from its wording.<sup>73</sup> Being an interpretative principle, it is of special importance for construing the term ‘like products’ in Article III:4 (and Article III:2 for that matter).

Although the exact import of this clause is subject to intense debate in academic writing, there is consensus in general that Article III:1 makes it clear that the function of Article III as a whole is the avoidance of protectionism, a reading which is in line with the overall *telos* of WTO law.<sup>74</sup> Therefore, contextual as well as teleological arguments point to the importance

<sup>69</sup> Cf. below, pp. ##.

<sup>70</sup> Cf. the TBT Agreement, Annex 1, Article 2.

<sup>71</sup> Cf. Article 31 VCLT.

<sup>72</sup> A different approach has been taken by the GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206, which, after having found the products at issue to be unlike, continued its examination of the measure at issue, asking whether this measure was applied to imported or domestic products ‘so as to afford protection to domestic production’ (paras. 5.76-5.77). This move can only be explained if one considered Article III:1 as a *lex generalis* which is to be applied subsidiarily, when no violation under Article III:2 or III:4 can be found. This approach could only be based on the view, just rejected, that Article III:1 is regarded as a norm which is in itself applicable to concrete cases. The view presented in the text above is also confirmed by WTO dispute settlement practice: cf. Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS9/AB/R, WT/DS10/AB/R, adopted on 1 November 1996 (Japan – Alcohol II), section H.2, in which the AB held that Article III:1 informs the rest of Article III, albeit in different form, depending on the individual provisions (‘Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a *guide to understanding and interpreting* the specific obligations contained in Article III:2 and in the other paragraphs of Article III...’).

<sup>73</sup> Cf. the text of Article III:1, pursuant to which ‘internal taxes and other internal charges, and laws, regulations and requirements...*should* not be applied...*so as to afford protection*’; cf. also Berrisch, *Das Allgemeine Zoll- und Handelsabkommen*, in Priess/Berrisch (eds.), *WTO-Handbuch*, 2003, p. 71, at para. 32.

<sup>74</sup> See also Hudec, ‘Like Product’: The Differences in Meaning in GATT Articles I and III, in: Cottier/Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, 2000, p. 101, at pp.

of avoiding protectionism in favour of domestic products as the relevant background for interpreting the term ‘like products’. Moreover, a regulatory intervention, in order to be protectionist in nature, requires that there be a competitive relationship between the domestic products protected and the disfavoured foreign products, since otherwise the protectionist effect would not normally be felt. Hence, Article III should be understood as being primarily concerned with products that are in such a *competitive relationship*.<sup>75</sup> Therefore, the term ‘like products’ should be interpreted as a term requiring an examination of the legally required intensity of the competitive relationship between domestic and foreign products.

This is further corroborated by the fact that Article III:2 second sentence, as clarified by the Note ad Article III, refers to ‘directly competitive or substitutable’ products: it follows from the two-sentence structure of Article III:2 and the wording of Article III:2 second sentence<sup>76</sup> that this sentence is meant to function as a subsidiary clause which shields ‘directly competitive or substitutable’ (DCS) products from protectionist interventions. Hence, DCS products can be regarded as a broader category which *comprises* like products as a subgroup, in which the competitive relationship is even more evident.<sup>77,78</sup>

*In sum*, the context established by Article III:1 and Article III:2 second sentence as well as the *telos* of Articles III:2 and III:4 and the overall object and purpose of WTO law indicate that ‘likeness’ in Article III should be interpreted against the background of protectionism: ‘like products’ should primarily be understood to mean products that are in a *competitive relation* that is even *closer* than that of DCS products.

The decisive question is therefore that of when competition does exist between two products. It is obvious that competition inherently depends on *consumer perception*: even products that differ in their physical appearance and in respect of other criteria may be competitive, if they are regarded as equivalent – that is as being interchangeable to a sufficient degree – by consumers; by the same token, products which appear quite similar

104-105; the fundamental purpose of avoiding protectionism and guaranteeing competition is also confirmed by the drafters of the GATT, cf. e.g. the GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958, BISD 7S/60, para. 13.

<sup>75</sup> Cf. also Hudec, ‘Like Product’: The Differences in Meaning in GATT Articles I and III, in: Cottier/Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, 2000, p. 101, at pp. 103 ff; Appellate Body report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted on 5 April 2001 (EC – Asbestos), para. 117; Horn/Mavroidis, *Still Hazy after all these Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination*, EJIL 15 (2004) 1, pp. 61 ff have similarly argued with regard to tax discrimination that, if consumers treat two products as unlike, then dissimilar taxation is unlikely to have considerable impact.

<sup>76</sup> ‘Moreover, no contracting party shall *otherwise* apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principle set forth in paragraph 1.’ This clause has to be read in conjunction with the Note Ad Article III; otherwise it would appear to be inapplicable for lack of precision. See also Berrisch, *Das Allgemeine Zoll- und Handelsabkommen*, in Priess/Berrisch (eds.), *WTO-Handbuch*, 2003, p. 71, at para. 57 with further references to jurisprudence.

<sup>77</sup> Thus, the Appellate Body regards like products as a ‘subset’ of DCS products. While DCS products are in direct competitive relationship, like products are ‘perfectly substitutable’ according to the Appellate Body, cf. Appellate Body report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, adopted on 17 February 1999, para. 118.

<sup>78</sup> In a comparative law perspective, this consideration is also reflected in the jurisprudence of the ECJ regarding Article 90 ECT, which contains an analogous two-tier structure that was precisely modelled after Article III:2 of the GATT: in its decisions, the ECJ appears to regard the standards of ‘likeness’ and ‘directly competitive or substitutable’ as different degrees on a common scale of decreasing competitive intensity. For a discussion of relevant ECJ case law cf. Demaret, *The Non-Discrimination Principle and the Removal of Fiscal Barriers to Intra-Community Trade*, in: Cottier/Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, 2000, p. 171, at pp. 175 ff; see also Stumpf, *Commentary on Article 90 EC-Treaty*, in: Schwarze (ed.), *EU-Kommentar*, 2000, p. 1144, para. 26; for an overview of relevant case law cf. e.g. Waldhoff, *Commentary on Article 90 EC-Treaty*, in: Calliess/Ruffert (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2<sup>nd</sup> edn, 2002, p. 1233, para. 18.

with regard to criteria such as physical characteristics may theoretically be treated as dissimilar and non-competitive by consumers.

This focus on competition not only has the consequence of making the perspective of consumers central to the determination of likeness. Since *consumer* perception will normally be influenced above all by *product-related* criteria, it is a further corollary of this view that the relevance of the perspective that a regulator may have on the similarity of products finds no obvious confirmation in Articles III:2 and III:4. In other words, regulator-related interests should not normally be regarded as relevant in the determination of likeness.<sup>79</sup>

Similarly, it is not convincing that international environmental agreements should automatically be relevant in the determination of likeness,<sup>80</sup> since government interests, even if they are expressed in international agreements, cannot be regarded to be relevant *per se* in the likeness context as it is structured by the GATT.<sup>81</sup> A third consequence (to be examined in the next subsection) of the submission that the pertinent perspective in the determination of likeness is the perspective of consumers is that it appears possible that even *processing methods* which do not physically affect the product, are regarded, by consumers, as rendering otherwise like products unlike.<sup>82</sup>

It is submitted that this interpretation of the term ‘like products’ clearly converges with pertinent GATT/WTO dispute settlement practice, which – in relying on the 1970 report of the *Working Party on Border Tax Adjustments* (BTA) – in particular refers to the following criteria in the determination of likeness ‘the product’s *end-uses* in a given market; *consumers’s tastes and habits*, which change from country to country; the *product’s properties, nature and quality*’.<sup>83</sup> It can be argued that these criteria in general reflect the aforementioned focus on competition and consumer perspective.<sup>84</sup> The central importance of

<sup>79</sup> Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 200-215.

<sup>80</sup> This is submitted e.g. by Fauchald, Flexibility and Predictability under the World Trade Organization’s Non-Discrimination Clauses, JWT 37 (2003), p. 443, at p. 461.

<sup>81</sup> In order to avoid misunderstandings it must be stressed, however, that international agreements which subject trade in certain goods to specific disciplines may be regarded as establishing with particular evidence that underlying state interests are *prima facie* legitimate in the context of Article XX, and can be seen as well established reasons for judicial deference in that respect. Moreover, if there is a conflict between such agreements and Articles III and XX of the GATT, these GATT norms may even become inapplicable. On this cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 39 ff, 69 ff, and 358 ff.

<sup>82</sup> Cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 323-324 for a detailed discussion of, and further references on, this particular issue.

<sup>83</sup> Report of the Working Party on Border Tax Adjustments, BISD 18S/97, para. 18. On the approach of GATT panels and the WTO Appellate Body cf. also Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS9/AB/R, WT/DS10/AB/R, adopted on 1 November 1996 (Japan – Alcohol II), p. 22 with further references on jurisprudence; and Appellate Body, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted on 5 April 2001 (EC – Asbestos), paras. 88 ff with further references on jurisprudence in fn 58.

<sup>84</sup> See also Fauchald, Flexibility and Predictability under the World Trade Organization’s Non-Discrimination Clauses, JWT 37 (2003), p. 443, at p. 453; Trachtman, Lessons for the GATS from Existing WTO Rules on Domestic Regulation, in: Mattoo/Sauvé (eds.), *Domestic Regulation and Service Trade Liberalization*, 2003, p. 57, at pp. 63-64. The criterion of physical characteristics of products can be considered as quite reliable indicators of substitutability (cf. also Hudec, ‘Like Product’: The Differences in Meaning in GATT Articles I and III, in: Cottier/Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, 2000, p. 101, at p. 103). Moreover, the BTA criteria may constitute important proxies for consumer perception, if there are no relevant data available; similarly, end-uses can be regarded as indicators of competition (cf. Horn/Mavroidis, Still Hazy after all these Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination, EJIL 15 (2004) 1, p. 61, at pp. 63). More problematic, however, is judicial recourse to evidence from other markets, where consumer preferences may differ, as is emphasized by the Border Tax report itself (ibidem: ‘consumers’s tastes and habits, which *change from country to country*’).

competition and the inherently intertwined perspective of consumers have meanwhile also been explicitly highlighted in Appellate Body jurisprudence.<sup>85</sup>

Despite the emphasis on competition and consumer perspective, there remains a plurality of criteria in any given case, some of which may militate in favour of likeness, while others may indicate dissimilarity. Therefore, it seems appropriate that the Appellate Body has cautioned that the notion of likeness (possibly) varies, its scope depending on the applicable GATT non-discrimination provision, its context and the concrete case.<sup>86</sup>

This consideration is relevant also with respect to Article 2.1 of the TBT Agreement and Article D of the Code of Good Conduct, where the term ‘like products’ is pivotal as well and where it remains undefined, too. Just as in the GATT, one therefore has to examine the context and telos of this provision. It then quickly becomes clear that Article 2.1, Article D and the TBT Agreement more generally, like the GATT, are concerned with abolishing ‘unnecessary obstacles to international trade’<sup>87</sup> and, hence, with ensuring international competition. This, and the fact that the TBT Agreement can be regarded as a concretisation of the GATT, implies that the arguments, which have just been presented above with regard to the GATT, apply within the TBT context as well. Therefore, in Article 2.1 of the TBT Agreement and the analogous provision of Article D of the Code of Good Conduct as well, ‘like products’ should be understood to mean products that are in a close competitive relationship, a determination that has to be made primarily from the perspective of consumers.

## 2. *Likeness and NPR PPM-Based Measures*

It has been contended that the ‘most logical conceptual basis’ for a product-process doctrine, which distinguishes between regulation of products and NPR PPM-based measures, is the concept of ‘likeness’ in the ‘like product’ test of GATT Article III.<sup>88</sup> According to this view, by redefining the likeness concept, a panel could comply with its ‘belief’<sup>89</sup> that ‘the relevant community recognizes a normative obligation to limit a certain activity in a certain way’.<sup>90</sup>

This approach converges with views pursuant to which divergent PPMs cannot affect the likeness of otherwise similar products.<sup>91</sup> Such an approach to the concept of likeness is hardly

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Furthermore, the correlation between the criteria of tariff classification and tariff bindings on the one hand and the degree of competitive relation and consumer perspective on the other appears less direct.

<sup>85</sup> Appellate Body report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted on 5 April 2001 (EC – Asbestos), paras. 101 ff. This approach has arguably been implicitly underlying most GATT/WTO decisions that have relied on the Border Tax report’s set of criteria. This is also true of the decisions preceding the disputed ‘aim and effects’ rulings in *US – Malt* (GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206) and in *US – Taxes on Automobiles* (GATT Panel Report, *United States – Taxes on Automobiles* (‘Gas Guzzler’), DS31/R, 11 October 1994 (unadopted)); thus, the relevance of the perspective of consumers is emphasized in particular in the 1987 *Japan – Alcohol I* panel report, at para. 5.6 (panel report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216 - 34S/83, BISD 34S/83, adopted on 10 November 1987 (Japan – Alcohol I)); according to Horn/Mavroidis, *Still Hazy after all these Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination*, EJIL 15 (2004) 1, p. 61 as well, the perspective of consumers has been central in panel decisions before this case.

<sup>86</sup> Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS9/AB/R, WT/DS10/AB/R, adopted on 1 November 1996 (Japan – Alcohol II), chapter H.1.

<sup>87</sup> Cf. Article 2.2. and the preamble of the TBT Agreement.

<sup>88</sup> Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in Bronckers/Quick, *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, 2000, p. 187, at pp. 198-200.

<sup>89</sup> Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in Bronckers/Quick, *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, 2000, p. 187, at p. 199.

<sup>90</sup> *Ibid.* 199.

<sup>91</sup> Cf. e.g. the GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206, para. 5.19; see also the panel report, *United States – Standards for*

defensible. The crux of the issue arguably lies in the fact that the terms ‘product-related’ and ‘non-product-related’ seem to imply a (quasi-)scientific approach: if traces of a given process or production method are not physically ascertainable in the final product, then the PPM in question is regarded as non-product-related.<sup>92</sup> This issue must, however, be distinguished from that of the likeness judgment, which is not exclusively concerned with the *physical* traceability of a given process or production method in the final product, but – as has been explained above – with the competitive relation that prevails between the products in question.

Given that the competitive relationship is inherently influenced by consumer perception,<sup>93</sup> it follows that PPMs which do not leave physical traces in the final product (and which are *not* product-‘related’ in any physically ascertainable way) may nonetheless be perceived, by consumers, as being ‘related’ to the product: if such PPMs are prone therefore to affect the competitive relation on the market, then this may constitute an indication that otherwise similar products may be unlike nonetheless.

This eventual indication of unlikeness must be balanced with other relevant indications militating in favour of likeness, however. It has rightly been emphasized in recent writings that a product’s different production history may render it unlike other products,<sup>94</sup> even if this will be the exceptional case rather than the rule.<sup>95</sup>

### 3. *Likeness and the EU Ecolabelling Scheme*

The EU labelling scheme well exemplifies the risks of (inadvertent) discriminatory treatment of imported products that are inherent in the setting of labelling criteria. As noted, the ecolabel is awarded to those *products within a given product group* that fulfil the labelling criteria defined by the EU. Under the Community scheme, product group means ‘a set of products that serve *similar purposes* and are *similar in terms of use*, or have *similar functional properties*, and are *similar in terms of consumer perception*’.<sup>96</sup> This definition largely overlaps with the definition of like products in the TBT Agreement and the GATT that was suggested above. Nonetheless, since the determination of likeness is a context-related value judgment, some products which may not be found ‘like’ in terms of WTO law may be included in the same product group under the EU labelling scheme. Inversely, products, which are not included in a product group that is defined under the EU scheme, may have to

*Reformulated and Conventional Gasoline*, WT/DS2/R, adopted on 20 May 1996 (US – Gasoline), para. 6.12; Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, JWT 38 (2004) 1, p. 69, at pp. 75 ff and 79; Tietje, *Voluntary Eco-Labeling programmes and Questions of State Responsibility in the WTO/GATT Legal System*, JWT 29 (1995) 5, p. 123, at p. 139 et passim; and Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, Georgetown International Environmental Law Review 11 (1999) 3, p. 599, at p. 621 et passim.

<sup>92</sup> Cf. e.g. the definition provided by Canada in a communication to the CTE (‘Non-product-related (npr) PPMs describe a process or production method which does not affect or change the nature, properties, or qualities of (nor discernible traits in or on) a product’; cf. Canada, *Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for informal, structured discussions*, Communication from Canada, WTO Doc WT/CTE/W/229, 23 June 2003).

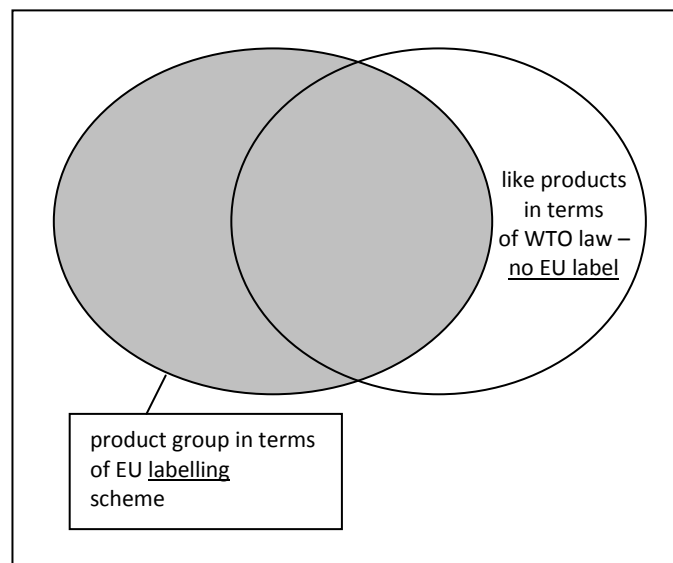
<sup>93</sup> Cf. above, pp. ##.

<sup>94</sup> Green, *Climate Change, Regulatory Policy and the WTO. How Constraining are Trade Rules?*, JIEL 8 (2005), p. 143, at p. 160.

<sup>95</sup> Cf. also Marceau/Trachtman, *GATT, TBT and SPS: A Map of Domestic Regulation of Goods*, in: Ortino/Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003*, 2004, p. 275, at pp. 322 ff; Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, AJIL 91 (1997), p. 268, at p. 290; Quick/Lau, *Environmentally Motivated Tax Distinctions and WTO Law – The European Commission’s Green Paper on Integrated Product Policy in Light of ‘Like Product’ and ‘PPM’-Debates*, JIEL 6 (2003), p. 419.

<sup>96</sup> Article 3(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

be considered, under WTO law, to be ‘like’ the products encompassed in the EU product group; hence, like products risk being excluded from having access to an ecolabel. This raises the risk of discrimination that will be discussed in the next subsection.



#### IV. Less Favourable Treatment

The EU ecolabelling regime does not introduce *de jure* discriminatory treatment, as it does not explicitly differentiate between products on the basis of their origin, given that the EU ecolabel can also be awarded, under the same conditions, to products originating outside the EU.<sup>97</sup> However, the fact that products that are not eligible, in terms of EU law, for the EU label, may appear, in terms of WTO law, ‘like’ other products that are awarded the EU label incurs the risk of *de facto* discrimination under Article III:4 of the GATT and Article D of the Code of Good Practice (i.e. the aforementioned counterpart of Article 2.1 of the TBT Agreement) which applies to non-mandatory labelling requirements.

Since the notion of *de facto* discrimination is disputed in WTO law in general and as regards NPR PPM-based measures in particular, the next subsection addresses these issues. The second subsection then deals with the question of whether the EU Ecolabelling scheme constitutes less favourable treatment in the sense of the GATT and the TBT Agreement.

##### 1. PPM Requirements and the Concept of *de facto* Discrimination

The product-process doctrine, pursuant to which regulation of products on the one hand and NPR PPM-based measures on the other is to be treated differently under WTO law, is also intricately intertwined with the so-called ‘diagonal test’ in determining the existence of *de facto* discrimination and the so-called ‘aims and effects’ or ‘regulatory purpose’ approach to likeness, which is a complement of the diagonal test.<sup>98</sup>

The ‘diagonal test’ is a method that strives to determine whether regulatory treatment is *de facto* discriminatory. It does so by merely comparing a disadvantaged subgroup of foreign like products (subgroup 2 in the diagram) with that of the most-favoured subgroup of domestic like

<sup>97</sup> Cf. Article 9(1) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>98</sup> On this and the following cf. Ehring, *De Facto Discrimination in World Trade Law. National and Most-Favoured-Nation Treatment – or Equal Treatment?*, JWT 36 (2002), p. 921; and Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 223 ff, 231 *et passim*.

products (subgroup 3 in the diagram), even if the latter subgroup consists of very few products.<sup>99</sup> Thereby, this test disregards whether there also exists a subgroup of foreign like products (subgroup 4 in the diagram) that receives treatment similar to that accorded to the most-favoured domestic subgroup (subgroup 3 in the diagram). Therefore, the diagonal test also disregards whether the proportions of the favoured and disfavoured subgroups are equal for domestic and imported products.

This is problematic, given that according to the traditional approach to discrimination, a measure is *de facto* discriminatory, if it produces a *disproportionate disparate impact* on foreign products,<sup>100</sup> a view which is confirmed by the object and purpose of Article III, i.e. the prevention of protectionism. According to this traditional view, one has to compare the treatment accorded to the two *entire groups* of like domestic products (comprising subgroups 1 and 3) and like foreign products (comprising subgroups 2 and 4), a method also applied e.g. by the European Court of Justice (ECJ).<sup>101</sup> Thus, the ECJ inquires into whether imported products preponderantly fall into the disadvantaged group (sub-group 2) and whether domestic products preponderantly fall into the class of privileged products (sub-group 3).<sup>102</sup> More precisely, the ratio between domestic favoured and disfavoured products must be roughly equivalent to the ratio between foreign favoured and disfavoured products.<sup>103</sup> Meanwhile, this approach has arguably also been applied by the Appellate Body in its much discussed *Asbestos* ruling.<sup>104</sup>

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<sup>99</sup> Cf. Ehring, *De Facto Discrimination in World Trade Law. National and Most-Favoured-Nation Treatment – or Equal Treatment?*, JWT 36 (2002), p. 921, where a similar diagram is used.

<sup>100</sup> Cf. e.g. the panel report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.85, which defined *de facto* discrimination as ‘measures which have a *disparate impact* on imports’ and clarified that ‘the complaining party is called upon to make a detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure’); incidentally, the US as complainant also relied on this concept, cf. *ibid*; on this notion cf. also Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, in: Hudec (ed.), *Essays on the Nature of International Trade Law*, 1999, p. 359, at p. 360; Ortino, *WTO Jurisprudence on De Jure and De Facto Discrimination*, in: Ortino and Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003*, 2004, p. 217, at pp. 241 ff; cf. also the approach taken in EU law in the following text.

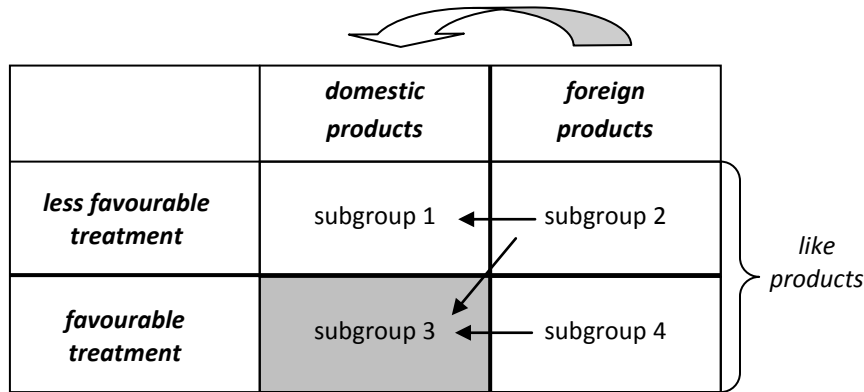
<sup>101</sup> On this cf. e.g. Epiney, *Umgekehrte Diskriminierungen. Zulässigkeit und Grenzen der discrimination à rebours nach europäischem Gemeinschaftsrecht und nationalem Verfassungsrecht*, 1995, pp. 55 ff.

<sup>102</sup> Cf. e.g. ECJ, Case 112/84, *Humblot*, [1985] ECR 1367, para. 14; ECJ, Case 168/78, *Commission v. France*, [1980] ECR 347, para. 25; ECJ, Case 243/84, *John Walker*, [1986] ECR 875, para. 23; for references to recent ECJ case law see also Ehring, *De Facto Discrimination in World Trade Law. National and Most-Favoured-Nation Treatment – or Equal Treatment?*, JWT 36 (2002), p. 921, at p. 949.

<sup>103</sup> Cf. Ehring, *De Facto Discrimination in World Trade Law. National and Most-Favoured-Nation Treatment – or Equal Treatment?*, JWT 36 (2002), p. 921, at pp. 964 ff, referring also to the ECJ decision in Case C-167/97, *Seymour-Smith and Perez*, [1999] ECR I-623, paras. 63-64. In this case, the ECJ regarded ratios of 77.4/22.6 among men versus 68.9/31.1 among women as not constituting an inequivalence sufficient to be considered as discrimination.

<sup>104</sup> Appellate Body report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted on 5 April 2001 (EC – Asbestos), para. 100; for a detailed discussion cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 238 ff.





The aforementioned connection between PPM requirements and the diagonal test is shown e.g. by a finding in the panel report in *US – Malt* (rendered under the largely analogous provision of Article III:2 of the GATT), which concerned tax credits granted to small domestic breweries. In alluding to the product-process doctrine, this panel first ruled that production- or producer-related characteristics do not affect the nature of the product at issue. In its view, ‘beer produced by large breweries is not unlike beer produced by small breweries’. It then went on to argue that ‘even if Minnesota were to grant the tax credits on a non discriminatory basis to small breweries inside and outside the United States, imported beer from large breweries would be “subject ... to internal taxes ... in excess of those applied ... to like domestic products” from small breweries and there would still be an inconsistency with Article III:2, first sentence’.<sup>105</sup> This dictum constitutes an application of the ‘diagonal test’ to determining whether regulatory treatment is *de facto* discriminatory, which – as has just been explained – merely compares a disadvantaged subgroup of foreign like products (in casu: beer produced by large foreign producers) with that of the most-favoured subgroup of domestic like products (beer produced by small domestic producers). As has just been pointed out, this test overlooks that there may also exist a subgroup of foreign like products (in casu foreign like beer from foreign small producers) that receives treatment equivalent to that accorded to the most-favoured domestic subgroup; and it overlooks that the proportions of the favoured and disfavoured subgroups may, in a given case, actually be equal for domestic and imported products. Put differently, the panel’s approach disregards that it may be possible to draw distinctions in treatment between like products *even on the basis of production methods* that do not incur geographically disparate impacts on domestic and foreign products and do not, therefore, amount to *de facto* discriminatory treatment in terms of WTO law.

Furthermore, in this context, recent academic writings<sup>106</sup> appear to have overlooked that panel practice meanwhile has rightly found that process-based measures do not constitute a special case under the standard of differential treatment. Thus, in 2000, the *Canada – Automotive* panel rightly decided that a PPM-related import duty exemption ‘cannot be held

<sup>105</sup> The relevant finding reads: ‘The Panel further noted that the parties disagreed as to whether or not the tax credits in Minnesota were available in the case of imported beer from small foreign breweries. The Panel considered that beer produced by large breweries is not unlike beer produced by small breweries. Indeed, the United States did not assert that the size of the breweries affected the nature of the beer produced or otherwise affected beer as a product. Therefore, in the view of the Panel, even if Minnesota were to grant the tax credits on a non-discriminatory basis to small breweries inside and outside the United States, imported beer from large breweries would be “subject ... to internal taxes ... in excess of those applied ... to like domestic products” from small breweries and there would still be an inconsistency with Article III:2, first sentence.’ Cf. the GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206, para. 5.19 (emphasis added).

<sup>106</sup> An exception is Charnovitz, *The law of environmental ‘PPMs’ in the WTO: debunking the myth of illegality*, *Yale Journal of International Law* 27 (2002) 1, p. 59, at p. 85.

to be inconsistent with Article I:1 *simply* on the grounds that it is granted on conditions that are *not related to the imported products* themselves. Rather, we must determine whether these conditions amount to *discrimination* between *like products* of different origins.<sup>107</sup> The panel explained condemnations of process-based measures in earlier GATT practice,<sup>108</sup> some of which had in fact employed the formula ‘not related to the product’,<sup>109</sup> by pointing out that these cases had been concerned with discriminatory measures.<sup>110</sup>

Hence, the panel’s reasoning a contrario confirms what has just been argued, namely that non-discriminatory non-product related PPM requirements should be regarded as being consistent with non-discrimination disciplines of the GATT such as Article III:4, when they do not incur disparate impacts between foreign and domestic like products.<sup>111</sup> Although this decision has been rendered under Article I of the GATT, the panel’s reasoning is clearly transposable to Article III as well. This view is also in conformity with academic writings according to which process-based measures should be regarded as being GATT-consistent, if they do not constitute country-wide (i.e. directly discriminatory) measures.<sup>112</sup>

## 2. *Less Favourable Treatment and the EU Ecolabelling Scheme*

As has been explained above, under the EU Ecolabelling scheme there is a risk that products that are not eligible, in terms of EU law, for the EU label, may appear, in terms of WTO law, ‘like’ other products that are awarded the EU label. Such geographically disparate impact – *if* it occurs – risks being compounded twofold. On the one hand, imported products which are new on a given national market often particularly depend on the use of marketing means like labels for successful market penetration. On the other hand, the EU scheme envisages the promotion of labelled products and the labelling mechanism itself;<sup>113</sup> this, too, tends to reinforce the competitive disadvantages of products that are not covered by the scheme.

Hence, theoretically there is a risk of disparate impacts on like domestic and foreign products that amounts to *de facto* discrimination, *if* foreign products turn out to be disproportionately affected by the EU scheme. Whether this theoretical risk materializes in practice depends on a factual analysis which is beyond the scope of this paper, as such an analysis would have to be conducted for any given product group individually. The important point to note, however, is the fact that NPR PPM-based regulations in general and NPR PPM-

<sup>107</sup> Panel report, *Canada — Certain Measures Affecting the Automotive Industry*, WT/DS/142/R, adopted on 19 June 2000, para. 10.30 (emphasis added).

<sup>108</sup> Cf. the panel report, *Belgian Family Allowances (Allocations familiales)* (BISD 1S/59), para. 3, and the panel report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras. 14.143 ff.

<sup>109</sup> Cf. the panel report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, para. 14.143.

<sup>110</sup> Panel report, *Canada — Certain Measures Affecting the Automotive Industry*, WT/DS/142/R, adopted on 19 June 2000, para. 10.25 ff.

<sup>111</sup> It ensues from the panel’s considerations that it also draws this conclusion itself. Cf. in particular para. 10.40, where it holds: ‘...we do not contest the validity of the proposition that Article I:1 does not prohibit the imposition of origin-neutral terms and conditions on importation that apply to *importers*...’.

<sup>112</sup> Cf. Charnovitz, *The law of environmental ‘PPMs’ in the WTO: debunking the myth of illegality*, *Yale Journal of International Law* 27 (2002) 1, p. 59, at pp. 61, 67 ff; see also Howse/Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, *EJIL* 11 (2000) 2, p. 249, at p. 252, who address this issue under Article III of the GATT. On this see also Petersmann, *International Trade Law and International Environmental Law. Prevention and Settlement of International Environmental Disputes in GATT*, *JWT* (1993), p. 43, at p. 68.

<sup>113</sup> Article 12 of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, *OJ L* 27/1, 30 January 2010).

based labelling schemes in particular do not *per se* amount to *de facto* discriminatory treatment.<sup>114</sup>

## V. Justification of NPR PPM-based Labelling Schemes

There is also disagreement as to whether and under which conditions NPR PPM-based measures in general, and process-based labelling schemes in particular, can be justified under the GATT and the TBT Agreement. These issues are analysed in the next two subsections.

### 1. Justification and NPR PPM-based Measures in General

A further variation of the product-process doctrine has been developed under Article XX, the general exceptions clause of the GATT. In especially, the two unadopted *Tuna* panel reports led to a widespread belief<sup>115</sup> that unilaterally imposed PPM requirements addressing extrajurisdictional<sup>116</sup> concerns are *per se* incapable of justification under Article XX. If this view were correct, it would be relevant for NPR PPM-based measures which, like the EU ecolabelling scheme, also address transboundary and/or extrajurisdictional concerns and global commons like the world climate.

In these reports, it was essentially held that such measures do not come under the ambit of Article XX, because otherwise a WTO Member could ‘unilaterally determine ... policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement’,<sup>117</sup> and because the NPR PPM requirements at issue were introduced ‘so as to force other countries to change their policies with respect to persons and things within their own jurisdiction’.<sup>118</sup> Not least due to the wide support for the *Tuna I and II* rulings by GATT contracting parties,<sup>119</sup> it was often held that process-based measures cannot be reconciled with Article XX, even though a subsequent, albeit unadopted, report again indicated that a process-based measure may be in principle be justified under Article XX.<sup>120</sup>

This particular prong of the product-process doctrine is difficult to reconcile with international environmental law (in particular Principle 12 of the Rio Declaration, which was arguably adopted under the impression of the first *Tuna* ruling merely nine months after its adoption<sup>121</sup>, and para 2.20 of Agenda 21), which has an undeniable bearing on the

<sup>114</sup> This is arguably overlooked by Puth, *WTO und Umwelt. Die Produkt-Prozess-Doktrin*, 2003, pp. 251 ff.

<sup>115</sup> This is also underlined by Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, *Columbia Journal of Environmental Law* 27 (2002), p. 491, at p. 516, who argues that the *Tuna/Dolphin* reports, ‘although unadopted, ... embody a perspective almost universally held by the trade-insider network’. See also Palmeter, *Environment and Trade: Much Ado About Little?*, *JWT* 27 (1993) 3, p. 55, at p. 66, and Mavroidis, *Trade and Environment after the Shrimps – Turtles Litigation*, *JWT* 34 (2000), p. 73, at p. 74, who speaks of a ‘long-standing erroneous interpretation’. For a more elaborate analysis of the issues discussed in this and the following subsection cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 256 ff, 3277 and 342 ff.

<sup>116</sup> The term ‘extrajurisdictional’ is used in the GATT Panel Report, *United States – Restrictions on Imports of Tuna* (Tuna I), DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155, paras. 5.28 and 5.30 ff.

<sup>117</sup> Cf. the GATT Panel Report, *United States – Restrictions on Imports of Tuna* (Tuna I), DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155, para. 5.27.

<sup>118</sup> Cf. the GATT Panel Report, *United States – Restrictions on Imports of Tuna* (Tuna II), DS29/R, 16 June 1994, unadopted, paras. 5.25.

<sup>119</sup> This unadopted ruling has been reported to have received the unanimous support of all thirty-nine GATT contracting parties that expressed an opinion, cf. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in: Bronckers/Quick, (eds.), *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, 2000, pp. 187 ff, at p. 189.

<sup>120</sup> Cf. the panel report, *United States - Taxes on Automobiles* (‘Gas Guzzler’), DS31/R, 11 October 1994 (unadopted); see also Charnovitz, *The law of environmental ‘PPMs’ in the WTO: debunking the myth of illegality*, *Yale Journal of International Law* 27 (2002) 1, p. 59, at p. 94.

<sup>121</sup> Cf. Sands, ‘Unilateralism’, *Values and International Law*, *EJIL* 11 (2000), p. 291, at pp. 294 ff.

interpretation of Article XX.<sup>122</sup> These principles do not distinguish between product-related and process-based regulations. Moreover, unilateral trade measures concerned with transboundary and global concerns are not regarded as unjustifiable pursuant to these principles. Rather, such measures are ‘merely’ subjected to specific qualifications, in particular that they should be subordinated ‘as far as possible’ to cooperative efforts.

Although the Rio Declaration is not binding, its ‘evidential value’ regarding state intentions<sup>123</sup> is obvious, given that it has been adopted by 176 states,<sup>124</sup> and is considered as expressing world-wide consensus<sup>125</sup> and as constituting ‘at present the most significant universally endorsed statement of general rights and obligations of states affecting the environment’ which partly restates customary law and partly endorses new and developing principles of law.<sup>126</sup> The guidelines, which are derivable from the Rio Declaration and Agenda 21, are to a considerable extent mirrored in both *US – Shrimp* rulings of the Appellate Body, which has pointed out that PPM requirements are not a priori excluded from the scope of Article XX. Rather, in its words, ‘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’.<sup>127</sup> In the subsequent 2001 *Shrimp* proceedings under Article 21.5 of the DSU, the Appellate Body re-affirmed that its ruling on the conditional justifiability of process-based measures constitutes a statement of principle.<sup>128</sup>

## 2. *Justification of NPR PPM-based Measures, and the EU Ecolabelling Scheme in Particular*

### *a) Justification under the GATT*

There are three reasons why it seems appropriate to examine whether eventually discriminatory effects of a voluntary NPR PPM-based labelling regime like the EU Ecolabelling Scheme can be justified under the GATT. First, as has been mentioned, the GATT applies beside the TBT Agreement to the extent that no conflict arises;<sup>129</sup> and it has

<sup>122</sup> Cf. in the following text.

<sup>123</sup> Cf. Birnie/Boyle, *International Law and the Environment*, 2<sup>nd</sup> edn, 2002, pp. 82-84.

<sup>124</sup> Cf. also Puth, *WTO und Umwelt. Die Produkt-Prozess-Doktrin*, 2003, p. 125.

<sup>125</sup> Cf. Petersmann, *International Trade Law and International Environmental Law. Prevention and Settlement of International Environmental Disputes in GATT*, JWT (1993), p. 43, at pp. 49-50.

<sup>126</sup> Cf. Birnie/Boyle, *International Law and the Environment*, 2<sup>nd</sup> edn, 2002, pp. 82-84; for further arguments regarding the relevance of these principles for the interpretation of WTO law, cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 329 ff with further references.

<sup>127</sup> Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, para. 121.

<sup>128</sup> Appellate Body report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted on 21 November 2001 (US – Shrimp II), para. 138; this is also pointed out by Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, *Columbia Journal of Environmental Law* 27 (2002), p. 491, at pp. 500-501.

<sup>129</sup> Regarding the relationship between the GATT and the TBT Agreement, there are two clear interpretative starting points. First, technical regulations are measures that are prone to affect trade in goods. To the extent this is the case, a technical regulation has to be regarded as a measure that falls under the scope of the GATT, in principle. Second, the existence of the general conflict clause in the General Interpretative Note to Annex 1A and the failure to address the question of the relationship between the GATT and the TBT Agreement more specifically in either agreement clearly points to the conclusion that both are meant to apply in parallel to the extent possible. To the extent of conflict, however, the provisions of the TBT Agreement do prevail (cf the General Interpretative Note to Annex 1A). It follows that the respective scopes of application of the TBT Agreement and the GATT are not mutually exclusive, but overlap. This also corresponds to WTO jurisprudence,

been shown above that the GATT in principle applies to voluntary NPR PPM-based labelling regimes like the EU scheme, in so far as it can be attributed to the EU and its Member States. Second, as indicated above, it is contested by some WTO Members and several authors that the TBT Agreement applies to NPR PPM-based labelling scheme at all. Although the present contribution does not share this view, a WTO panel might do so; it would then have to scrutinize a labelling scheme like the EU regime under the GATT. Therefore, the following considerations on the eventual justifiability of such labelling mechanisms arguably also have practical value, beside their doctrinal import. Third, there is the problem that the TBT Agreement and its Code of Good Practice do not comprise a general exception clause modelled after Article XX of the GATT. As will be argued below, one way of overcoming this problem consists in regarding Article XX of the GATT as an overarching exception clause that may become relevant, as a fall-back clause, also under the TBT Agreement. This third reason explains why it seems useful to examine the possibility of justifying NPR PPM-based labelling schemes under the GATT *before* turning to the analogous issue under the TBT Agreement.

Under the GATT, Articles XX(b) and XX(g) are primarily relevant. Under Article XX(b), it has to be shown that a given measure is necessary to protect human, animal or plant life or health. It must also be shown, under the introductory clause ('chapeau') of Article XX, that the measure is not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. For reasons of space constraint, and given that the relevance of Article XX(g) and the chapeau standards for NPR PPM-based measures have already been treated elsewhere,<sup>130</sup> the following the considerations concentrate on Article XX(b).

In view of the international efforts to combat climate change and the fact that e.g. the United Framework Convention on Climate Change has quasi-universal membership,<sup>131</sup> it seems safe to assume that WTO panels would regard climate protection as a legitimate goal also within the terms of Article XX(b). However, the means adopted – in casu: the EU Ecolabelling Scheme – must also be 'necessary' to protect this aim. This necessity test essentially inquires into whether there is an alternative measure, which is less trade restrictive than the regulatory measure actually adopted, and whether the WTO Member in question could reasonably be expected to apply this alternative.<sup>132</sup> With the inception of the WTO, the WTO Appellate Body seems to have relaxed the necessity test when the values pursued are

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which has concluded more generally that the GATT is not entirely superseded by other Annex 1A agreements, but only to the extent these agreements are inconsistent with the GATT (Cf the Appellate Body report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted on 20 March 1997, p. 14 ('The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the SCM Agreement, supersede the GATT 1994...')). For further details cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 299 ff.

<sup>130</sup> Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 327 ff with further references.

<sup>131</sup> United Nations Framework Convention on Climate Change (1992) 31 ILM 848.

<sup>132</sup> This test, which had originally been developed in WTO case law under Article XX(d) of the GATT, has been transposed also to Article XX(b), cf. the panel report, *Thailand – Cigarettes*, paras. 74 ff, and the panel report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted on 20 May 1996 (*US – Gasoline*), paras. 6.24 ff; for a detailed analysis of this test cf. e.g. Neumann/Türk, *Necessity revisited: Proportionality in World Trade Organisation law after Korea - Beef, EC - Asbestos and EC – Sardines*, JWT 37 (2003), p. 199, at pp. 207 ff; Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 268 ff.

vital or particularly important.<sup>133</sup> Given that the protection of life and health, which is pursued through a means like an ecolabelling scheme that also aims at the protection of the international climate, undoubtedly is a vital interest, the necessity threshold should in principle be lower in such a case.

However, the necessity test, as applied in WTO jurisprudence, also seems to contain considerations of suitability and effectiveness.<sup>134</sup> It is worth noting, therefore, that official EU documents state that the EU scheme (at least in its 1992 and 2000 versions) does not appear effective,<sup>135</sup> or, put differently, that it is questionable whether it is suitable for reaching its goal. Moreover, it has been held, on a more general level, that eco-labels are *typically* unsuitable means for environmental policy-making.<sup>136</sup>

In this respect, it must be stressed, however, that one can argue that the assessment of the suitability of a means adopted in pursuance of a legitimate goal should as a general rule employ a very low threshold for legal grounds and for interrelated reasons of decision-making theory,<sup>137</sup> and that this low degree of scrutiny is reflected also in WTO dispute settlement practice: thus, a measure is regarded, in standing Appellate Body jurisprudence, as suitable, unless it ‘cannot in any possible situation have any positive effect on conservation goals’.<sup>138</sup> Additionally, one must take into account that the effectiveness of labels may increase over time,<sup>139</sup> particularly when they are combined with further types of measures such as label-related tax incentives and the promotion of the labelling scheme,<sup>140</sup> as has been quite clearly demonstrated by national experiences with the implementation of the EU’s labelling scheme for cars<sup>141</sup> as well as by the EU-wide experience with the considerably more successful EU energy-efficiency labelling scheme.<sup>142</sup>

#### ***b) Justification under the TBT Agreement***

<sup>133</sup> Cf. the Appellate Body report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, adopted on 17 February 1999, para. 162: ‘The more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument’.

<sup>134</sup> Cf. e.g. Notaro, *The New Generation Case Law on Trade and Environment*, *European Law Review* 25 (2000), p. 467, at p. 486 with further references.

<sup>135</sup> EU Commission, Proposal for a Regulation of the European Parliament and of the Council on a Community Ecolabel scheme, COM(2008) 401 final, p. 4.

<sup>136</sup> Trüeb, *Umweltrecht in der WTO*, 2001, pp. 457 ff, 459, and 460.

<sup>137</sup> Cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 148-149 with further references.

<sup>138</sup> Appellate Body report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996 (*US – Gasoline*), p 21.

<sup>139</sup> ADAC, *Study on the effectiveness of Directive 1999/94 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars. Final report*, 2005, pp. 61, 99 and 99 ff.

<sup>140</sup> EC Commission, Proposal for a Council Directive on passenger car related taxes, 5 July 2005, COM(2005) 261 final, at 6; cf. also ADAC, *Study on the effectiveness of Directive 1999/94 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars. Final report*, 2005, pp. 99 ff.

<sup>141</sup> Cf. the study by ADAC, *Study on the effectiveness of Directive 1999/94 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars. Final report*, 2005, pp. 54 and 104, which concludes that ‘[t]he fact that fiscal measures which are directly linked to the fuel consumption or CO<sub>2</sub> emissions of passenger cars may have a great impact on consumers’ vehicle purchase decisions is clearly proven by the example of the Dutch BPM (registration tax) refund in 2002. From 01 January 2002, a fiscal incentive was introduced for environmental-friendly passenger cars of class A and B as a reduction from the registration tax (BPM). Buyers of passenger cars labelled ‘A’ received an incentive of € 1,000, buyers of passenger cars labelled ‘B’ € 500. In this year, the percentage of class A increased disproportionately from 0.3 % in 2001 to 3.2 %, class B from 9.5 % in 2001 to 16.1 %.’

<sup>142</sup> Directive 92/75/EC (on this scheme cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 375 ff); cf. also ADAC, *Study on the effectiveness of Directive 1999/94 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars. Final report*, 2005, pp. 56 ff for a comparative assessment.

When one takes the (contested) view that NPR PPM-based labelling schemes come within the scope of the TBT Agreement,<sup>143</sup> then, as noted above, the EU labelling scheme, being a *voluntary* regime, would have to be scrutinized under the TBT Agreement's Code of Good Practice (Annex 3 of the TBT Agreement). Like the TBT Agreement in Articles 2.1 and 2.2, the Code of Good Practice contains two self-standing disciplines that are primarily relevant for an EU-type labelling mechanism: pursuant to Article D, such a mechanism must not be discriminatory; pursuant to Article E, even non-discriminatory measures must not create unnecessary obstacles to international trade.

Turning first to Article D, and assuming that the EU Ecolabelling Scheme were to give rise to *de facto* discriminatory effects, the problem arises that the Code, and the TBT Agreement more generally, do not contain an explicit exception clause (modelled after Article XX of the GATT) that relates to Article D. An analogous problem exists under the TBT Agreement, as the architecture of Articles D and E of the Code has a structural counterpart in the similar architecture of Articles 2.1 and 2.2 of the TBT Agreement.<sup>144</sup> Some writers have doubted therefore, whether it is possible at all to justify discriminatory measures under the TBT Agreement.<sup>145</sup> However, the preamble of the TBT Agreement underlines that justification of discriminatory measures must be possible also under this agreement, provided in particular that such measures are *necessary* and 'not applied in a manner that would constitute a means of *arbitrary or unjustifiable* discrimination...or a disguised restriction on international trade'. Moreover, there are several arguments that support the view that justification of measures found to violate Article D of the Code may be possible under principles similar to the GATT. First, it could be argued that all WTO provisions being cumulative in principle, Article XX of the GATT should, as an overarching provision, also be regarded as being applicable in respect of the TBT Agreement.<sup>146</sup> Second, one could argue that the possibility of justification provided in *Article E* is also applicable to infringements of Article D. Third, one could submit that the notion of discrimination under Article D is different from that of Articles I and III of the GATT: whereas, under the GATT, a measure which is found to be 'discriminatory' under Articles I or III can still be justified under Article XX, one could submit that a measure should only be regarded as 'discriminatory' for purposes of Article D, if it amounts to unjustifiable discrimination.<sup>147</sup>

As mentioned before, Article E of the Code (just as Article 2.2 of the TBT Agreement) also constitutes a self-standing discipline that requires that even *non-discriminatory* measures do not represent unnecessary obstacles to international trade. Hence, even if labelling

<sup>143</sup> Cf. above, ##.

<sup>144</sup> On this cf. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law and Legal Theory*, 2009, pp. 305 ff with further references.

<sup>145</sup> Schick, *Das Abkommen über technische Handelshemmnisse im Recht der WTO*, 2004, pp. 44 ff; Marceau/Trachtman, GATT, TBT and SPS: A Map of Domestic Regulation of Goods, in: Ortino/Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003*, 2004, p. 275, at pp. 285 and 336-337; Tietje, *Das Übereinkommen über technische Handelshemmnisse*, in: Prieß/Berrisch (eds.), *WTO-Handbuch*, 2003, p. 273, at paras. 63-65. These writers focus on the structurally analogous architecture in Articles 2.1 and 2.2 of the TBT Agreement.

<sup>146</sup> Cf. Marceau/Trachtman, GATT, TBT and SPS: A Map of Domestic Regulation of Goods, in: Ortino/Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003*, 2004, p. 275, at pp. 336-337.

<sup>147</sup> On the possibility of such terminology cf. also Kewenig, *Der Grundsatz der Nicht-Diskriminierung im Völkerrecht der internationalen Handelsbeziehungen. Band 1: Der Begriff der Diskriminierung*, 1972; Epiney, *Umgekehrte Diskriminierungen. Zulässigkeit und Grenzen der discrimination à rebours nach europäischem Gemeinschaftsrecht und nationalem Verfassungsrecht*, 1995, pp. 19-20; cf. also Schick, *Das Abkommen über technische Handelshemmnisse im Recht der WTO*, 2004, pp. 52-53 for a similar consideration under Article 2.1; however, Schick does not advocate the applicability of the principles of justification under Article 2.1, but concludes that Article 2.1 only applies to measures that pursue protectionist intentions. If the scope of application of Article 2.1 is reduced in this way, *de facto* discriminatory measures are rendered permissible under this permission, which shows that this restriction is inadequate.

measures, adopted within the EU Ecolabelling Scheme for given product groups, were not to incur *de facto* discriminatory effects, they would have to be scrutinized under Article E as to their necessity. Moreover, the Code requires Members to ensure that their standardizing bodies base their measures on appropriate and effective international standards,<sup>148</sup> and sets out transparency requirements similar to that relating to technical regulations under the TBT Agreement.<sup>149</sup> A complete assessment of the EU labelling scheme as to its consistency with these provisions would however require an examination of the large series of EU measures, in which individual labelling criteria for specific product groups have already been defined<sup>150</sup> or will be defined in future, and of the processes in which they are adopted. Nonetheless, it should be noted on a general level that labelling is commonly seen as a suitable and comparatively rather non-restrictive means for pursuing environmental goals;<sup>151</sup> that the EU scheme mandates public and private bodies involved in criteria-setting to take account of relevant international standards;<sup>152</sup> and that it aims to provide openness and transparency in the criteria-shaping process and in conformity assessment procedures.<sup>153</sup>

Mention should also be made of the view that the TBT Agreement's necessity test may require Members to forgo state-administered voluntary labelling in favour of privately sponsored schemes.<sup>154</sup> However, this contention cannot stand unqualified, given that legitimate concerns may designate state-run schemes as more effective in the sense of the necessity test: thus, verification of compliance with labelling criteria may turn out to be more reliable in concrete cases, which may in turn lead to broader consumer acceptance and increased effectiveness of the label. Additionally, government involvement may be necessary to establish uniform labelling mechanisms that help avoid the consumer disorientation<sup>155</sup> which risks being incurred by an overly wide array of competing privately sponsored labels.

Finally, as respects the justification of EU-type discriminatory and non-discriminatory NPR PPM-based labelling schemes under the TBT Agreement, regard must also be had to Agenda 21, whose legal import on the interpretation of WTO law has already been referred to,<sup>156</sup> and the Implementation Plan of the 2002 World Summit on Sustainable Development (WSSD). While both emphasize the importance of ecolabelling as an instrument of environmental protection,<sup>157</sup> the WSSD Implementation Plan goes even further and explicitly

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<sup>148</sup> Article F of the Code of Good Practice.

<sup>149</sup> Articles H and J ff of the Code of Good Practice.

<sup>150</sup> Cf. above, subsection a.

<sup>151</sup> Cf. e.g. Green, *Climate Change, Regulatory Policy and the WTO. How Constraining are Trade Rules?*, JIEL 8 (2005), p. 143, at p. 186 with further references; Buck/Verheyen, *International Trade Law and Climate Change – a Positive Way Forward*, 2001 (available at [library.fes.de/pdf-files/stabsabteilung/01052.pdf](http://library.fes.de/pdf-files/stabsabteilung/01052.pdf), last visited on 19 February 2010), p. 15.

<sup>152</sup> Cf. Article 4(4) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>153</sup> Cf. Article 4(2) and Annex V(4)(b) of the EU Ecolabel Regulation (Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27/1, 30 January 2010).

<sup>154</sup> Cf. Canada, *Labelling and Requirements of the TBT Agreement*, WTO Doc WT/CTE/W/229, 23 June 2003, para. 9.

<sup>155</sup> On consumer confusion effects of multiple labels cf. WTO Secretariat, *Information Relevant to the Consideration of the Market Access Effects of Eco-Labeling Schemes*, WTO Doc WT/CTE/W/150, 29 June 2000, 2-3 with further references; the avoidance of confusion of consumers was also a reason for the EU to introduce a mandatory EU-wide labelling scheme providing information on the consumption of energy by household appliances, cf. the preamble of Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, [1992] OJ L 297, 13 October 1992, p 16.

<sup>156</sup> Cf. above, ##.

<sup>157</sup> Cf. e.g. paras. 4.21, 4.22, 9.12, 14.75, 19.4, 19.24, 19.26, 19.27, 19.28, 19.29, 19.44, and 19.49 of Agenda 21.



endorses that countries should adopt NPR PPM-based labelling schemes that do not act as disguised trade barriers.<sup>158</sup>

#### D. SUMMARY OF CONCLUSIONS

This contribution has examined the new 2010 ecolabelling programme of the EU as a model test case, under WTO law, for voluntary government-administered labelling schemes that rely on NPR PPM-based criteria. With respect to this highly contested type of labelling scheme, this contribution has arrived at the following main conclusions:

- The EU Ecolabelling Scheme and similar voluntary NPR PPM-based labelling schemes are not exempted from the scope of the TBT Agreement, and must fully comply with the TBT Agreement and its Code of Good Practice in particular.
- This type of scheme is not per se prohibited under the TBT Agreement solely due to its reliance on NPR PPM-based criteria.
- The EU Ecolabelling Scheme can be attributed, in terms of GATT law, to public authorities. It is neither exempted from, nor a priori prohibited under the GATT solely due to its process-based approach.
- The term ‘like products’ should primarily be understood to mean products that are in a close competitive relationship, a determination that has to be made primarily from the perspective of consumers.
- This approach to the determination of likeness is in line with GATT/WTO dispute settlement practice. In the determination of likeness, this practice has traditionally relied on the criteria developed by the Working Party on Border Tax Adjustment: these criteria can be regarded as indicators of a close competitive relation. The Appellate Body has recently confirmed this focus on competitive relationship and the inherently intertwined perspective of consumers.
- It follows from the fact that the likeness determination is inherently influenced by consumer perception that divergent NPR PPMs can theoretically affect the likeness judgment, rendering otherwise similar products unlike in terms of WTO law.
- Under labelling schemes, there is a clear risk that products, which are not included in a product group that is awarded a label, may have to be considered, under WTO law, to be ‘like’ the products that are entitled to such a label.
- Although this incurs a risk of (*de facto*) discrimination under labelling programmes such as the EU scheme, there is no per se violation of relevant non-discrimination disciplines in the GATT or the TBT Agreement.
- Put differently, non-discriminatory NPR PPM-based regulations in general and NPR PPM-based labelling schemes in particular should be regarded as being in conformity with relevant WTO non-discrimination disciplines, if they do not incur disparate impacts between foreign and domestic like products.
- In its rulings, which reflect relevant international environmental law, the Appellate Body has confirmed that NPR PPM-based regulations are not per se incapable of justification under Article XX of the GATT.
- NPR PPM-based labelling programmes of the EU-type are likewise capable of justification under Article XX of the GATT and under the TBT Agreement and its

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<sup>158</sup> Cf. para. 15(e) of the Implementation Plan of the 2002 World Summit on Sustainable Development (WSSD), available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm), last visited on 26 July 2006.

Code of Good Practice. WTO jurisprudence has recently applied a deferential standard of review when inquiring into the suitability and necessity of regulatory measures, whenever vital interests such as human life and health are at stake. This approach is clearly relevant also when assessing climate-related measures such as the EU Ecolabelling Scheme.