Competere

DEFRA

DUE DILIGENCE CONSULTATION

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October 2020

DEFRA Due Diligence Consultation

C O N T E N T S

Consultation questions

Section A: About you

Question 1: What is your name? Shanker Singham

Question 2: What is your email address? ssingham@competere.co.uk

Question 3: What country are you based in? UK

Question 4: Would you like your response to be treated as confidential?
• No

Question 5: Are you responding:
• On behalf of an organisation

Section B: About your organisation

[Please note this section only applies if responding on behalf of an organisation]

Question 1: What type of organisation are you responding on behalf of?
• Small or micro business (Less than 50 employees)

Question 2: Please provide your organisation's name. Competere Ltd

Section C: About your business

[Please note this section is for business respondents only]

Question 1: Which sector best describes your business?
• Trade Consultancy

Question 2: Where is your business headquartered?
• In the UK

Question 3: If your business is headquartered in the UK, please tell us where.
• Greater London

Question 4: If your business is headquartered overseas, please tell us in which country.
N/A

Question 5: How many people does your business employ in the UK?
• 1 to 49

Question 6: How many people does your business employ globally?
• 1 to 49

Question 7: What is your business' annual turnover in the UK?
• 0 up to 10.2 million GBP

Question 8: What is your business' annual turnover globally? (assuming 1 USD = 0.7837 GBP)
• 0 up to 100 million GBP

Question 9: Which of the following forest risk commodities do you use in in production or trade in the UK? Please tick all that apply.
Our specific comments on the consultation are included below.

Question 10: Please list any other forest risk commodities you use in production or trade in the UK.
Competere Ltd is a trade consultancy

Question 11: Do you currently have a system in place to ensure that any of the following forest risk commodities have been produced legally? Please tick all that apply.
N/A

Question 12: Please list any other forest risk commodities where you have a system in place to ensure they have been produced legally.
N/A

Question 13: If you have a system in place to ensure that any forest risk commodity has been produced legally, please describe it.
N/A

Question 14: Please use this box to share any further information about the systems you use to better understand how forest risk commodities in your supply chains are produced.
N/A

Section D: About the proposal

Questions 1 – 8 are dealt within the specific comment we have included below.

Question 9: Do you have any further information or comments you would like us to be aware of?
Competere is a trade consultancy which produces research papers under research grants or of its own motion on topics of relevance to international trade, competition, and regulation. We have a well-developed academic and research capability which includes over 100 articles, book chapters and a book on the interface between international trade, competition and domestic regulation, as well as a regular stream of op-eds and media appearances.

As a trade and economic consultancy, Competere does not directly trade in any of the forestry products and agricultural commodities specifically raised in the consultation, but instead advises on the rules which underpin the international trading systems, and develops economic modelling to understand the impact of international trade, competition and regulatory issues on the global system including those rules that apply to these kinds of products.

Our specific comments are included below.

1. Ensuring the UK supports and strengthens international trade rules in products with environmental impacts

"We are re-emerging after decades of hibernation as a campaigner for global free trade.

And frankly it is not a moment too soon because the argument for this fundamental liberty is now not being made.

We in the global community are in danger of forgetting the key insight of those great Scottish thinkers, the invisible hand of Adam Smith, and of course David Ricardo's more subtle but indispensable principle of comparative advantage, which teaches that if countries learn to specialise and exchange then overall wealth will increase and productivity will increase, leading Cobden to conclude that free trade is God's diplomacy – the only certain way of uniting people in the bonds of peace since the more freely goods cross borders the less likely it is that troops will ever cross borders.

And since these notions were born here in this country, it has been free trade that has done more than any other single economic idea to raise billions out of poverty and incredibly fast.

In 1990 there were 37 percent of the world's population in absolute poverty - that is now down to less than ten per cent.

And yet my friends, I am here to warn you today that this beneficial magic is fading.

Free trade is being choked and that is no fault of the people, that's no fault of individual consumers, I am afraid it is the politicians who are failing to lead.

The mercantilists are everywhere, the protectionists are gaining ground.

From Brussels to China to Washington tariffs are being waved around like cudgels even in debates on foreign policy where frankly they have no place - and there is an ever growing proliferation of non-tariff barriers and the resulting tensions are letting the air out of the tyres of the world economy.

World trading volumes are lagging behind global growth.

Trade used to grow at roughly double global GDP – from 1987 to 2007.

Now it barely keeps pace and global growth is itself anaemic and the decline in global poverty is beginning to slow.

And in that context, we are starting to hear some bizarre autarkic rhetoric, when barriers are going up, and when there is a risk that new diseases such as coronavirus will trigger a panic and a desire for market segregation that go beyond what is medically rational to the point of doing real and unnecessary economic damage, then at that moment humanity needs some government somewhere that is willing at least to make the case powerfully for freedom of exchange, some country ready to take off its Clark Kent spectacles and leap into the phone booth and emerge with its cloak flowing as the supercharged champion, of the right of the populations of the earth to buy and sell freely among each other.

And here in Greenwich in the first week of February 2020, I can tell you in all humility that the UK is ready for that role."

Prime Minister, Boris Johnson, 3rd February 2020.

The question for the UK is whether the UK is in fact ready for that role as PM Boris Johnson exhorted, or whether it will prove unable to take off its Clark Kent spectacles, unable to play that role, or that it will act like a mini-EU on the global stage, leading the world into more market distortions, more regulatory protectionism that will ultimately help push the poor deeper into poverty, reversing the global gains over the last seventy years.

It is in this context that DEFRA has initiated a consultation regarding the UK's proposed approach to concerns about products that could lead to deforestation. It is important to understand the implications of such a policy on the UK's international trade commitments in the WTO and elsewhere, particularly at a time when the UK has embraced "Global Britain" and set out its stall to be a leader on free trade in the world, as suggested in the Boris Johnson speech quoted above. The purpose of this note is to examine the WTO permissible boundaries of rulemaking in this area. We understand the UK is proposing a regulation that would make it illegal for UK firms trading in forestry products that have been produced "illegally" depending on the "relevant law". We have looked at the major WTO agreements that could apply to this case, and have also looked at analogous issues which also implicate WTO provisions where the UK is known to have an interest by way of explaining the scope of WTO consistent structures.

2. Approach of trade agreements to labour and environmental issues

The inclusion of labour and environmental issues in trade agreements has been considered from the beginning of the GATT system, but substantive approaches are a relatively new introduction (given the seventy-year history of the GATT/WTO system). There was an aborted attempt in 1947 with the aim of introducing legally binding provisions in the International Trade Organisation. However, the ITO was still born, as the US Congress never approved the arrangements that included it. Instead the world was left only with a contract between Contracting Parties called the General Agreement on Tariffs and Trade (GATT). It took another fifty years before these issues were again introduced this time via side letters in trade agreements such as the NAFTA agreement. The reason they were in side letters and not in the agreement was because it was not clear at the time whether these were indeed trade-related issues and there was concern that their inclusion (while worthy objectives in and of themselves) would damage the goals of the trade agreement which was to increase import competition and thereby increase choice and lower price, leading to more efficient outcomes and ultimately more economic output. Chapters in FTAs followed in the case, for example of the US-Jordan agreement. Since then most trade agreements have included labour and environmental chapters, although without the same types of enforcement mechanisms that typically applied to violations of the trade rules on discrimination and national treatment.

Some complained that these provisions were not enforceable and so were merely hortatory in nature. The trade world has looked at ways of enforcing them but doing so in ways that did not undercut the purpose of the trade agreement. Most trade agreements now include sustainable development chapters which include labour and environmental issues, the US tends to have standalone chapters for these subjects and the EU tends to lump them together in an overall sustainability chapter approach. In neither case does full dispute resolution apply to these subjects.

By way of example, the CPTPP which the UK aspires to accede to contains a chapter on environmental issues. The CPTPP is worthy of study not just because it is an agreement which the UK aspires to accede to, so if the UK adopts a very different approach, this will be hard to reconcile with its potential CPTPP partners. It is also worthy of study because four of the CPTPP countries (Australia, Malaysia, Mexico and Peru) are in the 17 "mega diverse" countries supporting 70% of the world's biodiversity. The CPTPP countries also export and trade and

consume very high levels of natural resources. The CPTPP chapter does three things. First it ensures that the CPTPP members properly enforce their own laws in the environmental space (by allowing interested parties to request national level investigations and so forth). Second, it provides that CPTPP members will have high standards of transparency in their environmental laws, and consultation in respect of these laws. Third, it provides frameworks for CPTPP members to work together on a host of environmental challenges, such as protecting the ozone layer, protecting the marine environment from ship pollution, combatting illegal wildlife trade, and combatting over-fishing and illegal fishing.

3. How the WTO Analyses Technical Regulations

The UK is considering a law to ensure that supply chains using forestry products and agricultural commodities do not include products that violate the UK's deforestation goals. It is perfectly permissible for countries to enact technical regulation for prudential reasons, but there are some limitations which prevent them from discriminating against other WTO members in so doing. The major agreements that deals with these regulations are the Technical Barriers to Trade Agreement ("TBT Agreement") and, in the case of protection of animal, human or plant health, the Sanitary and Phyto-Sanitary Agreement (the "SPS Agreement"). The first question to ask is whether the agreement relates to the protection of human, animal or plant health in which case it will be analysed under the SPS Agreement. If it does not apply to these, it will be analysed under the TBT Agreement. If the rule does not constitute a "technical regulation" within the meaning of the TBT Agreement, it will be analysed under the GATT. The TBT and SPS agreements are mutually exclusive, the SPS agreement applying only to measures that are intended to protect plant, animal or human health (typically from food borne pathogens or pests). The TBT scope applies to both technical regulations and standards (which are not compulsory). The TBT Agreement allows members to have a greater flexibility than the SPS agreement on their technical regulation (which is subject only to a legitimate objective test).

We first review how the SPS Agreement applies to regulations designed to protect animal, human and plant health.

4. Approach of WTO trading system on SPS Issues and Mutual Recognition/Equivalence

The WTO trading system has looked at issues related to the protection of animal or plant health through the SPS Agreement. The SPS Agreement provides for a system of rules that allow countries to maintain these measures subject to some basic requirements. First, the measures must be proportionate relative to the regulatory goal they are seeking to achieve. Second, they must be based on sound science. Third they must be necessary for the particular goal, and they must not constitute an unnecessary burden on international trade.

The SPS Agreement encourages members to grant equivalence in respect of each other's SPS rules (underlying product regulation). Under the SPS Agreement, members should grant each other equivalence if their ultimate objectives remain the same, and the Parties' regulatory system objectively achieves those goals. The objective standard means that countries cannot simply self-certify that their regulatory frameworks satisfy particular health and safety goals but a reasonable observer would have to agree that they were. This importation of an objective standard is a high bar that allows countries to only declare equivalence where there is a sound basis for doing so.

Precisely what this objective standard is and how it applies is worthy of further discussion. The WTO Decision on the Implementation of Article 4 of the SPS Agreement (the "Equivalence Decision") provides that it specifically does not require "sameness" of measures but expressly

contemplates that measures may achieve goals in alternative ways. The overall thrust of the Equivalence Decision is that the policy is towards granting equivalence where possible. On request of the exporting member, the onus is on the importing member to explain what its goals are in terms of SPS protections, and clearly identify the risks that the regime is intended to address. The importing party shall respond to equivalence requests in a timely manner (within 6 months).

It is important that developing country requests for technical assistance are properly and expeditiously dealt with by developing countries. Members should also actively participate in equivalence work going on in the OIE, Codex and IPPC.

The Codex has developed these ideas more fully in its Guidelines on the Judgement of Equivalence (CAC/GL 53-2003). These Guidelines look at what is covered by food inspection and certification systems. These cover infrastructure, programme design and specific requirements.

The importing country is able to implement its ALOP (Appropriate Level of Protection), and the exporter needs to show that it can satisfy the importer's ALOP. This it can do by a mixture of documentary checks as well as on-site inspections and so forth.

The IPPC deals with equivalence in the case of plants. Most equivalence decisions in the plant sector are based on approach to pest control (which affect crops). The same principles as set forth above apply here also.

Since the purpose of this paper is to look specifically at UK government approaches to deforestation, we will not discuss equivalence regimes in food safety area in detail. But an understanding of how equivalence regimes work in these more well-developed areas is useful in exploring what is possible in newer areas.

5. Examples of Equivalence Arrangements

There have been a number of successful equivalence deals that have been agreed including those on underlying product regulation.

5.1 Australia-New Zealand CER

The Australia-NZ arrangements are probably the most advanced equivalence arrangements that exist around the world. Building on the Trans Tasman Mutual Recognition Agreement (1998), the principle that any good that may be legally sold in one market can be legally sold in the other is enshrined into the CER. The agreement also laid the groundwork for the Joint Australia New Zealand Food Standards Code (2002).

5.2 NZ-EU Veterinary Agreement

In the area of meat products, the EU and NZ have agreed to the equivalence of their SPS regimes. Because of this equivalence only 2% physical inspections are required for NZ meat exports to the EU.

5.3 CETA

The EU and Canada have agreed equivalence measures in the CETA which are to be taken forward by the SPS Joint Management Committee. In the area of food safety, this includes Canadian recognition of EU member state meat inspection systems, simplified certificates for the export of Canadian meat and meat products into the EU. In an area of interest to the UK, CETA has an animal welfare technical working group.

Countries historically have adopted specific rules that relate to food hygiene, food standards and the protection of crops.

It is also clear that where the level of protection in an importing country exceeds what is implied as its ALOP, then equivalence does not mean that the exporting country has to match the importing country's higher level of protection. It means that the exporting country must show that it meets the importers' ALOP. Clearly where an importing countries' regulations or standards are not necessary to protect animal or plant health (because, for example, they are not based on sound science), they cannot be said to be a legitimate ALOP. Particular emphasis will be paid in equivalence decision-making on ensuring that there is no discrimination between the products of WTO members.

6. Understanding International Trade Rules and their application: TBT Agreement

If the regulation does not cover animal, human or plant health, it could be analysed under the TBT Agreement. The TBT agreement consists of a specialised legal regime for a set of applicable technical regulations. First the regulation must be within the scope of the TBT agreement itself for the TBT to apply. These regulations apply to product characteristics or related processes or production methods and may be in a positive or negative form.

Where international standards exist, or where they are imminent, the technical regulation should be based on those standards. The TBT rules on standards are to be found in Annex 3 of the TBT Agreement.

6.1 Is it a Technical Regulation within the meaning of the TBT Agreement?

The first question to answer is whether a particular regulation is even a measure to which the TBT Agreement applies. This issue was considered in European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - AB-2014-1 - AB-2014-2 (the "Seals case").[1] The case considered the question of whether a ban on all products containing seal products was a technical regulation (to which the TBT Agreement applied). The test of whether a regulation is a technical regulation for the purposes of the TBT agreement turns on the precise meaning of Annex 1.1 of the TBT Agreement which states that the TBT applies to:

"*Document(s) which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method*."

In the Seals case the ban on seal products was subject to an exception for seal products on certain Inuit and traveller groups. At issue in the Seals case was whether the measure banning seal products bans certain objective characteristics from all products (like the ruling that the ban was on any product containing seal products, or was akin to the ban on products containing asbestos fibres as in EC-Asbestos.)[2] The fact that the set of regulations, which must be looked at holistically, contained permissive elements as well as prohibitions did not by itself prevent the regulation from being a technical regulation for the purpose of the TBT Agreement. In the Seals case, the AB concluded that the fact that there were exceptions to the ban for Inuit hunters and certain other groups which did not relate to product characteristics, meant that the measure did not have permissive and prohibitive provisions which related to product characteristics and therefore was not a technical regulation to which the TBT applied. Norway

[1] WT/DS400/AB/R and WT/DS401/AB/R

[2] European Communities - Measures Affecting Asbestos and Asbestos-Containing Products - AB-2000-11, WT/DS135/AB/R,

had further alleged in the Seals case that a technical regulation would also apply not only to one that covered product characteristics but also one that dealt with processes and production methods (PPMs). But the AB dismissed this argument stating that in order to be found a technical regulation, the regulation could either relate to product characteristics or it could relate to PPMs which are related to specific product characteristics.

Unlike GATT Article III.4 which requires equality of competitive opportunity between directly competitive or substitutable products, the TBT agreement does allow such changes in competitive opportunity for cases of legitimate regulatory distinctions. (see below).

Once a regulation is established as a technical regulation for the purposes of the TBT Agreement, we must then consider whether it violates the TBT Agreement by providing less favourable treatment for like products of the domestic producer or like products of other members, pursuant to Article 2.1 of the TBT Agreement. Article 2.1 of the TBT Agreement provides that:

"*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country*."

The first question that needs to be answered are whether the products are indeed "like products".

6.2 Like Products

The provisions in the TBT Agreement on non-discrimination apply to like domestic products and like products of other members. The US-Clove Cigarettes case (see post) examined what "like products" meant. The case was very clear that the concept of like products does not apply to distinctions between products which are based on the regulatory objectives of the measure itself. Such an interpretation would defeat the entire purpose of Article 2.1 of the TBT Agreement. When analysing the TBT Agreement, the AB disagreed with the Panel's narrow interpretation and relied on the directly competitive or substitutable test of GATT Article III.2, which it said informed the test in both Article III.4 and in article 2.1 of the TBT Agreement. This test is broader than a test that determines like products solely from physical characteristics, end uses, and consumer tastes and habits. In summary, likeness is determined by the competitive relationship between the products in question.

Box 1

Discriminating on the Basis of Production Methods

From a trade perspective, discriminating on the basis of production methods as opposed to the ultimate product itself has potentially very serious impacts on trade. This is why such discrimination has long violated international law principles, as particularly espoused by the WTO.

When countries promulgate laws that impede trade flows based on laws that relate to production methods, they go much further than is ordinarily acceptable in international trade. Generally, WTO law frowns on attempts to discriminate based on production methods for the very good reason that such provisions could become a protectionists' charter. It is too easy for an incumbent, protected interest to claim that a particular production method is unacceptable so that it does not have to compete against that particular product. This is a long-standing concern and dates back to the original ITO Charter in 1947. At that time one delegation stated that "Indirect protection is an undesirable and dangerous phenomenon. … Many times, the stipulations 'to protect animal or plant

life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection …".[3]

There are a very limited number of cases where discrimination on the basis of production methods has been found to be WTO consistent, but these are usually based on international standards.

One of the leading cases on the application of Article 2.1 of the TBT Agreement is the United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products ("Tuna II") case.[4]

In Tuna II, the US used a labelling scheme whereby only tuna caught in a prescribed manner would be allowed to be marketed in the US under its "Dolphin-safe" label. While product could be marketed in the US without this label, the US regulations set out that there could be no other way of satisfying the "Dolphin-safe" labelling requirement outside of the US proscribed mechanism. Mexico complained that it subscribed to a labelling standard for Dolphin safe products that was outside the US mechanism but it claimed that its dolphin safe standard was an international standard and that the US's rules violated the TBT agreement, or in default violated the GATT as it discriminated against Mexican products.

6.3 Article 2.1, TBT Agreement

In Tuna II, there was an enquiry as to what constituted a technical regulation (and whether a labelling requirement constituted a technical regulation which would then be subject to the labelling requirement of the TBT Agreement. The Appellate Body ("AB") also considered what constituted an Article 2.1 violation, specifically whether the technical regulation could lead to treatment no less favourable for imported products or like products from other countries. The AB noted that Article 2.1 did not mean that distinctions between product characteristics, or processes or production methods would automatically mean less favourable treatment under Article 2.1. As noted in US-Clove Cigarettes, Tuna II, and US-COOL, some regulatory distinctions were legitimate.[5] The TBT preamble provides important context and allows countries to enact regulations to protect animal or plant life or health at the levels it thinks appropriate provided that these measures are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."

The AB supported previous AB decisions that required the panel to:

> "*seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other countries*."

The AB pointed out that measures which were origin-neutral on their face could nevertheless be de facto inconsistent with Article 2.1. Simply because the measure on its face did not make a distinction based on origin did not mean that it could not alter the conditions of competition between like imported products and products of other

[3] 7EPCT/C.II/32 (Note of the Netherlands and the Belgo-Luxembourg Economic Union, 30 October 1946)
[4] United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - AB-2012-2, WT/DS381/AB/R
[5] United States - Measures Affecting the Production and Sale of Clove Cigarettes - AB-2012-1, WT/DS406/AB/R; United States - Certain Country of Origin Labelling (COOL) Requirements - AB-2012-3, WT/DS386/AB/R; See FN4 for Tuna II

countries. A major point that the AB considered was whether the technical regulation was "even-handed". The AB also considered that less favourable treatment could be inferred if the technical regulation was a way for one member to exert pressure on another to modify its practices. The AB found that even if consumers would have made different choices in the absence of the measure, the measure itself did distort the competitions of competition for Mexican products. In assessing whether this distortion had a detrimental impact on Mexican products, the AB approved the Panel's conclusion that the US had not shown that the detrimental impact on Mexican trade stems exclusively from a legitimate regulatory distinction. The AB said that the US had failed to demonstrate that it was even-handed in the relevant respects. The AB then reversed the Panel's decision and found the US labelling system was covered by the TBT Agreement and violated it, because it provided less favourable treatment to Mexican producers, and was inconsistent with Article 2.1 of the TBT Agreement.

The AB also examined the Panel's decision under Article 2.2 of the TBT Agreement (was the measure more restrictive than necessary to fulfil the legitimate objectives pursued by the US). Article 2.2 of the TBT Agreement provides that:

> "*Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products."*

The first test was whether the objective was legitimate. Here, the AB reviewed the Panel's conclusion that there was a legitimate objective. Mexico alleged to the AB that the US' objective could not be legitimate because it coerced another WTO member to change its practices to comply with a unilateral policy of the US. But the AB found that this was irrelevant to the issue of whether the objective was itself legitimate.

The Panel had said that it was possible to envisage risks to dolphins that were outside the US mechanism to control risks, and so the US measure was not able to contribute to the protection of dolphins in all cases. In analysing Article 2.2, the AB said that a panel should consider the following factors:

i. The degree of contribution made by the measure to the legitimate objective at issue;
ii. The trade restrictiveness of the measure;
iii. The nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure.

In most cases, a comparison of the challenged measure and the possible alternative measures should be undertaken. Any alternative measure should be considered in terms of whether it is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective (taking into account the risks non-fulfilment would create), and whether it is reasonably available. The AB found that allowing the Mexican labelling system to co-exist with the US labelling system would involve no reduction in the protection afforded to dolphins.

6.4 Reliance on Labelling Requirements

Rather than impose legal bans, some countries have investigated using labelling requirements which specific a "safe" product. Since this might also be considered by DEFRA in respect of deforestation initiatives, it is important to point out that any proposed labelling requirements must be analysed under the TBT Agreement also. A mandatory labelling requirement may be deemed to be a technical regulation under Annex 1 of the TBT Agreement.

> *"It [technical regulation] may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method*."

In the Tuna II case, the AB found that the US regulations set out a very specific labelling requirement to sell tuna with a "dolphin safe" label. Any other labelling features which did not comport with the US legislation on what specifically constituted how tuna were to be caught in a dolphin safe manner were prohibited. This was deemed by the AB to be a "single and legally mandated set of requirements for making any statement with respect to the broad category for "dolphin safety"".[6] No claim in respect of dolphin safety was allowed except for the one that was set out in US laws and regulations. The US measure also provided for specific enforcement mechanisms. In the Tuna case, the US maintained that a labelling requirement could only be a technical regulation if it was mandatory to use that label in order to place a product on the market. Since suppliers could place products on the market (albeit without any dolphin safety label, no matter what dolphin safety provisions they included). The AB rejected this view and said that this did not preclude a finding that a labelling requirement was a technical regulation.

6.5 The Role of International Standards

Under the TBT Agreement, parties can promulgate technical regulations that have a legitimate objective if they are based on international standards (or even international standards that are imminent). The issue is whether the standard is in fact an "international standard". In order to be an international standard, the Tuna II decision laid down some ground rules as to what constitutes an international standard.

Article 2.4 TBT Agreement sets out:

> "*Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems*."

Annex 1.2 of the TBT Agreement defines a standard as follows:

> *"Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."*

[6] Tuna II, WT/DS/381ABR at pp77 and 78.

In terms of Article 2.4, there is a three-stage analysis which needs to be undertaken as follows:

i. the existence or imminent completion of a relevant international standard;
ii. whether the international standard has been used as a basis for the technical regulation; and
iii. whether the international standard is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, taking into account fundamental climatic or geographical factors or fundamental technological problems

6.6 What is a Relevant International Standard?

The Tuna II case analysed this issue and found that the ISO/IEC Guide 2 that a standard is one "adopted by an international standardizing/standards organisation and made available to the public" was not the final word. It is envisaged that Annex 1 of the TBT Agreement goes beyond the ISO/IEC Guide 2. The relevant standard must emanate from a "body that is based on the membership of other bodies or individuals and has an established constitution and its own administration." Annex 1.2 refers to a "body" not an "organization", and therefore the AB in Tuna II found that in order to constitute an international standard, it must be adopted by an international standardizing body. The international body must have its membership open to at least all Members (Annex 1.5, TBT). The body must have recognized activities in standardization, which means that WTO members must be aware that the international body in question is engaged in standardization activities. They must also be open at all stages of the development of a standard to the relevant standardizing bodies of at least all WTO members. The determination of whether a body is a recognized standards setting body is determined, according to the AB in Tuna II by adherence to the six principles set out in the Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement".[7] The AB found compliance with the six TBT principles enunciated by the TBT Committee in 2000 were determinative of whether a body was a recognized standardization body.[8] The six principles relate to transparency, openness, impartiality and consensus, effectiveness and relevance, coherence and development. If a body does not comply with these six principles, that is evidence that the body is not "recognized" by other WTO members as a standardizing body.

The AB also said that an international standardizing body should not privilege any particular interests in the development of a standard. In Tuna II, the AB found that Mexico's standard setting body was not open to at least all WTO members and so could not be an international standard setting body consistent with the TBT Agreement.

7. Interconnection with GATT and its Article XX Exceptions

In the event that the TBT or SPS agreements do not apply to a particular measure at issue, it may still fall foul of WTO rules if it violates the GATT itself, especially its provisions on MFN (Article I) and National Treatment (Article III).

[7] Decision of the TBT Committee (2000)
[8] See for further analysis https://www.wto.org/english/tratop_e/tbt_e/tbt_six_principles_e.htm

Article XX contains a list of exceptions to the ordinary MFN and national treatment provisions of the GATT but makes these exceptions subject to its "chapeau".

Article XX exceptions are as follows (subject to the chapeau below):

"nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
*(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;**
(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960."

The chapeau of Article XX provides that:

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

The analysis requires us to first see if a particular measure falls into one of the Article XX exceptions. If it does, then the panel must determine if that exception is applied in such a way that conforms to the Article XX chapeau. Only if both are satisfied can the measure pass muster under WTO law. In the original Tuna case, the US-Restrictions on Tuna, (1991 Panel Report (unadopted), the Panel recalled that:

"previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.[9] Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked.[10]"

Article III.4 must be read differently therefore than the TBT Agreement, and the more general prescription of Article III.4 is balanced by the Article XX exceptions. The AB in the Seals case was clear that the concept of legitimate regulatory distinction ("LRD") does not apply to Article I or III, only to the TBT Agreement. As Canada argued in the Seals case, and the AB agreed, the LRD defence to a technical regulation that would otherwise violate Article 2.1 of the TBT agreement does not apply to Articles I and III of the GATT but that LRD should be read consistently with Article XX of the GATT, and not vice versa.

In the Shrimp-Turtle case[11], the Appellate Body considered the impact of an Article XI violating import ban for shrimp caught without turtle excluder devices. The case turned on whether such an import ban based on the product production method (PPM), not the characteristics of the final product (shrimp) was legal under one of the Article XX exceptions. The AB ultimately found it was not because the ban was applied in a manner that violated the chapeau of Article XX and discriminated between like fisherman in Malaysia, India and the Philippines (as opposed to fisherman in the Caribbean who received exceptions, implementation periods and technical assistance). The implication was that if such discrimination did not exist, the ban could have been legal. The AB also found that for the chapeau's test to be met, it was highly relevant to examine the manner in which the particular measures were applied, and the fundamental enquiry is whether they are being applied in a manner which suggests an abuse of the exception.

The Shrimp-Turtle case analysed the applicability of Article XX(g) which relates to "exhaustible natural resources." It found that these were not limited to minerals or non-living things as the appellants suggested, but also covered such items as sea turtles and endangered species. The next requirement of the Article XX(g) exception is that the measure must be even-handed (and apply equally to domestic production as well as imports). In then doing the analysis under the chapeau, it is clear that the policy goal of the measure cannot be relevant to the analysis of whether the measure constitutes an unjustified trade restriction in countries where the same conditions apply, otherwise the chapeau would be meaningless. The AB noted that the exceptions in Article XX were limited and conditional exceptions, and that the purpose of the exceptions and the chapeau was to enable members to be able to rely on an exception, while balancing this against the duty to preserve the rights of other party's under the GATT system itself. But the exceptions should not be regarded as members' rights in the way that other GATT provisions are. Tellingly, the AB reviewing the US regulations said:

"However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members."

[9] "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 385, para. 5.9

[10] "EEC - Regulation of Parts and Components", adopted on 16 May 1990, L/6657, 37S/132, para. 5.11

[11] United States — Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R

Another important element in discussing whether the application of the measure violated the chapeau's injunction against arbitrary or unjustifiable trade restrictions was to what extent the member seeking to rely on the exception had engaged other WTO members in negotiations related to the measure. In the Shrimp Turtle case, the US had not so engaged with other members and this counted against it. The AB cited approvingly Principle 12 of the Rio Declaration on Environment and Development which stated:

> *"Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus. (emphasis added)."*

In almost identical language, paragraph 2.22(i) of Agenda 21 provides:

> *"Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles:*

… (i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus. (emphasis added)."

Other environmental agreements also strongly push the idea of cooperation among nations to resolve global problems and seek to avoid unilateral actions. The CPTPP language cited to it at the beginning of this comment is designed to adopt a joint as opposed to a unilateral approach. Where parties engage in unilateral actions, WTO panels will enquire as to whether there was a reasonable alternative action that would have been more cooperative. The need for an alternative is greatest where there is an import prohibition which is deemed to be the "heaviest weapon" in a country's "armoury of trade measures".[12]

7.1 Reliance on the Public Morals Exemption

The UK has considered using GATT exemptions in order to support unilateral domestic policies in the areas of deforestation (the subject of this consultation) and animal welfare. It is therefore important to consider how the relevant GATT exemption (Article XX(a)) has been used in the past and how it can be used in the future. It is also important to understand the limitations on the GATT exemptions and the wider context in which they can be deployed.

Both in the case of animal welfare, and in the case of deforestation, an argument has been made that these could be based on the WTO's public morals exemption. The public morals exemption has been rarely tested.

The leading case on the public morals exception is the Seals case.[13] As noted above, the case related to the ban on importation of seal products in the EU, which was subject to certain exceptions for Inuit communities in Greenland, and travellers. Having found that the measure was not within the scope of the TBT Agreement as it was not a technical regulation, defence of the measure relied on citing to the Article XX(a) exemption in the GATT.

[12] Para 172, United States — Import prohibition of certain shrimp and shrimp products, WT/58/AB/R
[13] WT/DS/400/AB/R and WT/DS/401/AB/R

At issue in the case was the question of whether a public morals defence had to be the sole objective of the legislation, and what was the precise role of other objectives that might be inconsistent with the public morals objection (as was the case for Inuit and traveller exceptions which can hardly be consistent with the seal welfare argument). This is an important issue otherwise the public morals exemption could allow any regulatory barriers to trade as long as it could be said that there was some public morals aspect to the legislation or regulation. In the case, the AB agreed with the Panel that the EU had a single public morals objective which led to a regulation the effect of which it mitigated on certain communities who it also had an interest in. Article XX(a) also specifically says that the measure must be necessary to protect public morals (therefore must be proportionate). As we have noted, Article XX(a) requires a two-tier analysis where a measure is first reviewed to see if it was necessary and then a separate enquiry is made into whether the measure satisfies the chapeau of Article XX, i.e.

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

This will be relevant to any measure the UK might apply in this area – the rule cannot apply differentially as between trading partners where the same conditions prevail. There must be a sufficient nexus between the measure and the public morals being protected, and the particular measure must actually make a contribution to the public morals objective that is being claimed.

The debate about animal welfare and pathogen reduction treatments (PRTs) is instructive to any attempt to rely on GATT Article XX exemptions. In the case of animal welfare and PRTs, there is a question as to whether the purpose of PRTs is to protect human health or to allow animals to be mistreated (and then the resultant diseases to be eradicated by PRTs). It is highly relevant here that the US requires PRTs for any import of products for human health reasons, and that PRTs are demonstrably proved to be helpful in combatting campylobacter and other food-borne pathogens. In the animal welfare debate, there is a danger that food hygiene issues and animal welfare issues become conflated. Regarding food hygiene issues, given that incidence of food borne disease is much higher in the EU than it is in the US, it is likely that any barrier the US might erect to UK products based on the fact that they are *not* treated with PRTs would be based on the SPS agreement. There would then be two competing objectives that would have to be considered in the analysis, the food hygiene issues where PRTs protect human health, and the separate animal welfare issue.

As noted in a recent piece for CAPX:

> *"As for food-borne pathogens, incidents of Campylobacter and Salmonella are much higher in the EU than in the US despite the fact that the US consumer eats twice as much poultry as the average EU citizen per capita. Whereas 20 cases of campylobacter are diagnosed each year in the US per 100,000 people, 94.8 cases per 100,000 people are diagnosed in the UK. The reason why the US requires pathogen reduction treatments is not, as the conventional wisdom in the UK goes, because they want to mistreat animals, but rather because they want to keep people safe, and they do a much better job of it than the UK.*

In any event, these same chlorine rinses are already used in this country in salads, fish and our drinking water. The real reason it is not used for poultry has nothing to do with safety and everything to do with keeping out US imports. In any case, about 90% of American poultry is washed not in chlorine, but in peracetic acid (which is more like vinegar), which was certified by the European Food Safety Agency as safe more than five years ago. Nor is this brand of protectionism anything new – the poultry wars of the 1960s were a direct result of French and German protectionism against American chicken…"[14]

With respect to the quite separate animal welfare issue, the question would be whether the ban on PRTs actually contributes to the goal of protecting animal welfare, and whether the ban satisfies the Chapeau of Article XX. Even though the science on animal welfare is less "hard" than that developed regarding human health and food hygiene, there is still a requirement for some scientific basis for any proposed ban. The question is what is the animal welfare issue that must be considered. If it is concern about stocking density (chickens are kept in crowded conditions leading to disease), then then the actual stocking densities in different markets is important (see Box 2).

Box 2

The UK maximum packing density for chickens is **39 kg/square metre**.

US maximum densities depend on the size of the bird and range from 6.5 lbs (2.948 kg) per square foot for smaller birds to 9lbs (4.08kg) per square foot for larger birds, thus:

The US maximum packing density ranges between **31.7kg/square metre** to **43.9kg/square metre**.

US maximum densities are thus somewhat stricter than the UK (7kg below the UK limits) for younger birds and a little less than 5kg above the UK limits for larger birds.

https://www.nationalchickencouncil.org/about-ncc/overview/

The National Chicken Council (NCC) member companies include chicken producer/processors, poultry distributors, and allied industry firms, accounting for approximately 95 percent of the chickens produced in the United States.

https://www.nationalchickencouncil.org/wp-content/uploads/2017/07/NCC-Welfare-Guidelines-Broilers.pdf

NATIONAL CHICKEN COUNCIL ANIMAL WELFARE GUIDELINES AND AUDIT CHECKLIST FOR BROILERS

US Flock Husbandry Guidelines

i. Birds should have space to express normal behaviours such as dust bathing, preening, eating, drinking, etc. Upon entering a broiler house, most of the birds should be sitting and relatively quiet, with background chirping or clucking. Evaluated flock husbandry practices including, but not limited to, stocking density, lighting, and gait scoring are important to assess normal behaviour.

[14] https://capx.co/the-mail-on-sundays-campaign-against-us-food-imports-is-a-new-low/

ii Stocking density must allow all birds to access feeders and drinkers, and will depend on the target market weight, type of housing, ventilation system, feeder/drinker equipment, litter management, and husbandry. Stocking density is typically determined at the end of the flock based on target market weight, by adjusting the initial placement numbers with the average mortality and must not exceed the following:

Maximum Bird Weight Range	***Maximum Stocking Density***
Below 4.5lbs liveweight	6.5lbs per square foot
4.5 to 5.5lbs liveweight	7.5lbs per square foot
5.6 to 7lbs liveweight	8.5lbs per square foot
More than 7lbs liveweight	9lbs per square foot

No Broiler chickens are raised in cages: https://www.chickencheck.in/farm-to-table/are-broiler-chickens-raised-in-cages/

UK: https://www.gov.uk/government/publications/poultry-on-farm-welfare/broiler-meat-chickens-welfare-recommendations

Stocking density in UK

If you have 500 or more conventionally reared meat chickens on your holding you can stock birds at up to 33kg per square metre. You can increase this up to 39kg birds per square metre but there are extra requirements.
When stocking above 33kg per square metre you must keep documents in the housing with technical details and information on equipment, including:

- a plan that shows the dimensions of the surfaces the chickens occupy
- a ventilation plan and target air quality levels (including airflow, air speed and
- temperature) and details of cooling and heating systems and their location
- the location and nature of feeding and watering systems (eg automatic or manual, how many feeders, how each is operated)
- alarm and backup systems if any equipment essential for the chickens' health and wellbeing fails
- floor type and litter normally used
- records of technical inspections of the ventilation and alarm systems
- If you plan to stock above 33kg per square metre you must tell the Animal and Plant Health Agency (APHA) and state what your planned stocking density is.

You must give at least 15 working days' notice before changing the stocking density.

What other countries do will also be relevant. Here since the UK admits poultry from Poland and other EU member states which have higher stocking densities than the UK or US, (some times as high as 43Kg/m2), a ban on PRT treated product will be seen as not passing muster under the chapeau, as it is not even handed. For it to be satisfactory, it will be at least necessary to ban product coming from EU member states as well as from other countries. The UK would have to additionally prove that the ban actually contributed to the objective of improving animal welfare. The animal welfare/PRT issue highlights how difficult the complexities involved are when a WTO member seeks to rely on Article XX exemptions.

Another analogous measure to the one being contemplated by the UK government is the EU's Timber Regulation ("EUTR"). The EUTR requires timber importers, inter alia, to assess the risk that their imports contained illegally produced commodities. Conditioning entry into the UK market solely on whether products were produced and harvested legally, raises similar issues

under the WTO Agreement as discussed herein. One of the fundamental problems with such an approach is that it imposes penalties or barriers that are based on the legality of a method under which the commodities were produced, and has little to do with the 'environmental friendliness' of the production. So, the same commodity from two different countries could be produced in exactly the same way, but because their domestic laws are different, one might be considered legal for import, and the other illegal. Because such a law does not specify product characteristics, nor process and production methods, it will likely not be a technical regulation under the TBT Agreement. It could therefore be considered to result in arbitrary or unjustifiable discrimination between the like products from different countries. This could not be justified under the GATT Article I:1 or Article III, if the measure creates an advantage for products from some countries, unless it is saved by one of the Article XX exemptions we refer to. The EUTR has not been challenged by another WTO member yet. The European Union has been careful to consult with large timber exporting countries to mitigate this possibility. However, that does not mean that that a challenge would not be successful. [15]

In the Seals case, Canada sought to bring an argument that there had to be an identifiable risk to public morals that the measure was protecting (and was a proportionate response). Canada also claimed that the EU had to show that this public moral risk was consistent with the EU's risk appetite in similar cases (i.e. wildlife hunts and animal conditions in abattoirs etc). The argument was that the EU tolerated this risk in other areas. These arguments were rejected by the AB noting that it was up to members to determine how to develop measures to deal with specific public morals issues. The degree of trade restrictiveness of the measure is relevant to the consideration of whether it was necessary.

The AB cited to the Brazil-Retreaded Tyres case[16] and noted that:

> *"In Brazil – Retreaded Tyres, the Appellate Body identified certain principles in evaluating the contribution of a measure in the context of a necessity analysis under Article XX: The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyse the contribution of the measure at issue to the realization of the ends pursued."*

Canada had argued that it was important to assess the contribution of the measure to the satisfaction of the public morals objective. The AB in the Seals case did find that material contribution was one (but certainly not the only factor) which was relevant in a necessity analysis, but there was no specific standard of materiality which the panel had to apply.

In the Seals case, the AB did enquire into the evidence considered by the panel about whether the measure actually achieved the public morals objective stated (and did not take a position, since this was an issue of fact on which the Panel had decided based on the evidence before it).

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[15] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 Mitchell, Andrew D. and Ayres, Glyn, Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement (May 3, 2012). Environmental and Planning Law Journal, Vol. 29, 2012, U of Melbourne Legal Studies Research Paper No. 596, Available at SSRN: https://ssrn.com/abstract=2050665

[16] Brazil - Measures Affecting Imports of Retreaded Tyres - AB-2007-4, WT/DS332/AB/R

In assessing the measure, the Panel in the Seals case had also assessed whether a reasonable alternative method was available. Considering this the AB said that it is legitimate for panels to examine alternative measures presented by other parties, and to bear in mind that the contours of alternative measures were affected by the non-specific nature of the public morals concerns in the first place. In the Seals case, a certification system was considered, but the complexity of monitoring and compliance were found to be problematic. The AB concluded that the certification system would be beset by difficulties (whether it was stringent or more relaxed) and therefore could not be said to be a viable alternative.

The AB emphasised that the analysis of the Article XX exemptions is a two-stage analysis. The second stage is to apply the chapeau, specifically stating:

> *"The function of the chapeau of Article XX of the GATT 1994 is to prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of that Article.1497 In that way, the chapeau operates to preserve the balance between a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994. Achieving this equilibrium is called for "so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves". As the Appellate Body stated in US – Gasoline, the burden of demonstrating that a measure provisionally justified under one of the exceptions of Article XX does not constitute an abuse of such an exception under the chapeau rests with the party invoking the exception. The Appellate Body explained that this is "a heavier task than that involved in showing that an exception … encompasses the measure at issue."*

The chapeau specifically refers to ensuring that the exceptions are not used to ground arbitrary or unjustifiable restrictions on trade which must mean something more than the Article I and III provisions. The chapeau refers to whether the conditions in other countries also apply – in other words, if the standard applies to one country but not others where the same conditions apply there will be a problem. A relevant question would be is there a negative impact on the competitive opportunities between other members. In the case of an animal welfare rule that discriminated between the US and the EU, where stocking densities were found to be the same or similar would almost certainly violate these principles. The justification for such measures is handled very differently in the TBT agreement than in the chapeau of Article XX. In the TBT Agreement, the measure can be justified by legitimate regulatory distinctions (according to the AB in US-Tuna II). In the chapeau, the test is to balance a member's right to rely on these exceptions and the interests of other GATT members which should not be nullified or impaired by the reliance on the exception.

The AB concluded that the EU seal ban was covered by Article XX(a), but violated the chapeau of Article XX. This was because it discriminated between similar conditions which prevailed in Inuit communities in Canada and Greenland (the Inuits in Greenland benefiting from an exception to the rule, whereas the Inuits in Canada could not so benefit because the exception had been specifically written for the Greenland Inuits. This was similar (though not legally identical) to the finding in Tuna II.

8. <u>Economic Considerations of Equivalence and International Consensus Building</u>

There is another important element why an equivalence/recognition approach based on developing an international consensus which emerges as an international standard is preferable to a unilateral approach. There is a significant economic benefit to regulatory competition because it is through the give and take of managing regulatory competition (and different ideas that countries have about how to solve big emerging problems) that we are more likely to reach

the goals enshrined in Good Regulatory Practice (GRP). These are, broadly speaking to regulate in a way that is least restrictive of trade and least damaging to overall market competition, consistent with a legitimate, publicly stated regulatory goal. It is through this process, clunky and frustratingly slow as it may appear to some, that the legitimate expectations of all WTO members, including developing countries can be frustrated as little as possible. This is precisely why unilateral action is eschewed. The net result of such a cooperative approach is to maximise the overall potential for wealth creation across the whole of the global economy, ensuring that poverty can be alleviated in as comprehensive a manner as possible.

9. Specific application of international trade rules in the case of deforestation; potential trade-consistent approaches.

It is likely that any document which relates to production methods with which compliance is mandatory will count as a technical regulation to which the TBT agreement applies. The particular technical regulation must then pass muster under the TBT Agreement (see for example US-Tuna II case). If the labelling requirement is such that it can only be satisfied by adherence to UK legislation or regulation, then the labelling requirement will be a technical regulation to which the TBT agreement also applies.

9.1 TBT Analysis

Article 2.1 of the TBT Agreement provides that members must enact technical regulation that is no less favourable to the products of other WTO members and like domestic products, and like products from other countries (which means being placed at a disadvantage). All forestry products from all WTO members would have to be treated the same way even where there is no advantage being given to domestic producers as would be the case for the forestry regulation. The issue is that the regulation should not alter the conditions of competition of like products as between domestic producer and foreign producer as well as like products from other WTO members, and it would be difficult to craft a unilateral measure that achieves this given that the nature of production varies considerably around the world. A measure that is deemed to be an attempt by one member to force another to modify its practices would be especially vulnerable under Article 2.1 of the TBT Agreement. Under Article 2.2 of the TBT Agreement, the measure would have to have a legitimate objective as set out in Article 2.2. Protecting the environment is one such category (note that animal welfare often discussed in the UK context is not). The requirements for non-discrimination and even-handedness as well as a rigorous review of potential alternatives is also required under Article 2.2.

In the alternative, if the UK were to approach this issue by setting up a labelling mechanism to indicate where products were “Deforestation Safe” in an analogous manner to tuna products that were “Dolphin Safe”, this would not insulate the labelling mechanism from WTO challenge. As was noted in the Tuna II case, the UK would have to ensure that it was being even-handed in its regulatory approach and was not discriminating against a particular group of countries. Given the potentially unbalanced application of this labelling requirement to certain WTO members, for example forestry product producers in developing countries close to the equator, it would be difficult for the UK’s scheme to pass muster under the TBT Agreement.

The UK can also be bullet-proofed on the TBT Agreement if it is successful in pushing for an international standard to cover the issue. This is because once an international standard is imminent, then it is permissible for a party to pass a technical regulation

based on that standard. However, the caveat is that the standard must be truly international, in other words it must be set by a recognized body that is normally engaged in standard setting processes. So the UK could not invent or create a standard setting body as this would fall foul of the rules set out in Tuna II on what are appropriate international standards. Such a standard setting body must be truly open to at least all WTO members and must be recognized by them (which it cannot be unless it satisfies the six TBT Principles set out in the TBT Committee Decision (2000)).

9.2 GATT Analysis

The deforestation regulations under consideration could prima facie violate GATT Article I (MFN) and III (non-discrimination). The UK would have to rely on a GATT exception (if the applicable law is outside the scope of the TBT Agreement). There are two potentially applicable exceptions, Article XX(a) (public morals) and Article XX(g) (conservation of exhaustible natural resources). In both cases, any panel reviewing a challenge to this regulation would look to see whether the UK was relying on this in a limited and conditional manner, and whether the measure was truly necessary. In performing the necessity analysis, the panel would look at the methodology laid out in the Brazil-Retreaded Tyres case under which the following factors would be considered:

i. Nature of the risk
ii. Objective pursued
iii. Level of protection sought

The question of whether the measure actually contributed to the goal would be an important consideration, especially in the comparison of alternative measures. Here it is extremely relevant that unilateral action by the UK would not contribute to the goal of a reduction in deforestation if it was not followed by other countries, or worse, if other countries rejected the unilateral approach and this compromised more international, consensus based methods.

These exceptions would be subject to the chapeau of Article XX, and the UK would have to be able to show that it was acting in an even-handed manner, and the regulations were not being applied in a manner that was an arbitrary or unjustified restriction on trade. In satisfying the Chapeau obligations, the UK would have to show it had consulted with the WTO members affected by its ban (in a manner that the US had failed to do in the Shrimp-Turtle case) and sought to reach a negotiated solution. If the suggestion is a unilateral ban, then the UK would have to be guided by the language of the Appellate Body which stated:

> *"However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members."*

Given that an import ban is the most devastating in the armoury of trade restrictions, any future Panel would look at what alternative measures were available to the UK, either through negotiated agreement or international standards. They would also look at Principle 12 of the Rio Declaration which sets out that unilateral solutions to global environmental problems should be avoided.

9.3 Alternative Approaches on Deforestation

The better approach for the UK would be to seek to build an international consensus on standards in this area and avoid unilateral actions. The issue will be in which standard setting body, this international consensus can be achieved.

In order to ensure that the UK can base its technical regulations on that international standard, it would have to emanate from a standardizing body that would be recognised by other WTO members as a body that is in the standards setting business. In this respect, regional standard setting bodies (such as EU ones) would not be so recognised by non-EU WTO members. In order to be a recognised body, that body would have to satisfy the TBT Six Principles outlined above by being open, transparent, and allowing national bodies from at least all WTO members to participate at every stage of standard setting.

The WTO compliant process to follow would be for the UK to work within such a standards setting body to develop global standards in this area, and then to draft technical regulations based on those global standards. Such an approach would pass muster under the TBT Agreement and would allow these global standards to be adopted on an international basis thus making a bigger contribution to the overall global environmental goal of curbing deforestation.

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