

**AN ANALYSIS OF WTO RULINGS
WITH RESPECT TO LABOUR STANDARDS AND HEALTH**

September 2000

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AN ANALYSIS OF WTO RULINGS WITH RESPECT TO LABOUR STANDARDS AND HEALTH

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Hypothetical case study for labor standards For a better understanding of gatt art. I, III & XI

I. Hypothetical background

A, B and C are wto members. A imports shoes from B and C. B produces shoes by unfair labor standards; while A and C produce shoes by fair labor standards. For the purpose of protecting labor standards, A imposes some punitive measures on the imports of B's shoes.

II. Possible measures taken by A

A can take either one or several punitive measures as given in the following:

1. Forbid or restrict the quantity of imports of B's shoes
2. Impose a punitive tariff on B's shoes
3. Impose a punitive internal tax on B's shoes
4. Restrict government from buying B's shoes
5. Mandatory eco-label indicating the product is produced by unfair labor standards

III. Legal prospects of such measures

Responding to A's measures, B may choose to file a case against a with wto dsb. For each of A's measure, its legal prospect is analyzed in the following:

1. Forbid or restrict the quantity of imports of B's shoes

Gatt art. XI:1 provides "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party..."

B may claim that A's quantitative restrictions (border measures) violate art. XI:1. At the same time, as a treats B's shoes less favorably than it treats C's shoes, B may claim a violates **gatt art. I:1** (mfn).

According to the current practice of wto, A will loose the case.

2. Impose a punitive tariff on B's shoes

Gatt art. I:1 provides "...any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

B may claim that its shoes, notwithstanding the labor standards adopted in its production, and C's shoes are like products. A must treat B's shoes no less favorably than C's shoes, i.e. By imposing higher tariff on B's shoes than on C's shoes, a has violated the mfn provision.

According to the current practice of wto, A will lose the case.

3. Impose a punitive internal tax on B's shoes

Gatt art. III requires that a contracting party shall not treat foreign products less favorably than like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

B may claim that its shoes, notwithstanding the labor standards adopted in its production, and A's domestic shoes are like products. A must treat B's shoes no less favorably than its own shoes, i.e. By imposing the punitive internal tax on b's shoes, A has violated the national treatment provision.

According to the current practice of wto, A will lose the case.

4. Restrict government from buying B's shoes

Gatt art. III:8(a) provides an exception to national treatment, which reads "the provision of this article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

According to this provision, A's measures can arguably be justified. However, the scope and effect of this measure is quite limited.

5. Mandatory eco-label indicating the product is produced by unfair labor standards

In the gatt case, US restrictions on import of tuna (i), the panel ruled that the requirement of mandatory eco-lebelling did not violate GATT, so far as it was not applied in a discriminatory manner.

However, as this panel report was not adopted. It is hard to say whether eco-lebelling will be justified under gatt art. III.

IV. Analysis

- according to the existing wto/gatt juris prudence, most A's punitive measures are illegal.

- like product

Like product is a very important concept in wto agreement. It is the pre-condition for most-favored-nation treatment and national treatment. In order to justify the discriminatory treatments accorded to products produced by unfair labor standards, some countries have argued that products produced by unfair labor standards and those produced by fair labor standards are not like products.

- here comes the question: how to determine like products?

There are several possible methods:

1) physical characteristics

(shoes produced by fair labor standards and those by unfair labor standards are like products.)

2) physical characteristics + the production process (e.g. Process and production methods or "ppm")

(shoes produced by fair labor standards and those by unfair labor standards are not like product, because the labor standards involved in production are different.)

3) physical characteristics + regulatory purpose

(shoes produced by fair labor standards and those by unfair labor standards are not like products, because for its regulatory purpose of labor standards promotion, a government can define products produced by fair and unfair labor standards as different.)

4) physical attributes + dsb discretion (case by case, provision by provision)

(shoes produced by fair labor standards and those by unfair labor standards may be like products and may be not. It is subject to the discretionary interpretation of wto dsb on different wto provisions and in different cases.)

In the event that in determining like products, the manner in which the products are produced and/or regulatory purpose shall be taken into account, the wto regime then can be used to protect labor rights, because labor standard is arguably a kind of ppm, and "to protect labor rights" is also a kind of regulatory purpose.

Work Methodology on the Study of GATT/WTO Rulings

question:

how to establish the role of wto dispute settlement body and the way they directly and indirectly become a source of standard setting?

1. wto's attitude toward labor standards

in the singapore declaration, the wto expressed its basic pro-labor-standards stand, however it made it clear that to deal with labor standards was not its business, but rather ilo's. the wto and its dsb try to avoid the issue of labor standards and do not set labor standards directly.

2. wto's impact on labor standards

compared to other international organizations, the wto has a strong enforcement mechanism. in the event that labor standards are included in the wto, the literal standards will become real and enforceable standards.

wto is a two-edge sword. if it is not used for pro-labor-standards purpose, its free trade rationales will very possibly be used by free traders and become hurdles to international pro-labor-standards efforts (e.g. lowest common denominator, pre-cautionary).

there are few cases directly related to labor standards. however its jurisprudence still has an indirect impact on the linkage of labor standards and international trade.

3. relevant wto provisions

in the wto agreements, there are some articles related to labor standards. due to the de facto precedent effect of wto dsb rulings, the wto jurisprudence, i.e. the interpretations of these articles made by dsb (both panel and ab) in adopted decisions, is actually a law-making process.

1) gatt art. I (mfn) and art. III (national treatment): define "like products" and "directly competitive and substitutable products"

mfn requires equal treatment to "like products" of different foreign countries.

national treatment requires equal treatment between "like products" of domestic and foreign origins. it also requires that "directly competitive and substitutable products" of domestic and foreign origins shall be similarly taxed.

whether "like products" and "directly competitive and substitutable products" shall be determined solely on physical characteristics, or ppm and regulatory purpose shall be considered.

2) gatt art. XI (general elimination of quantitative measures)

art. XI provides that "no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party..."

available wto jurisprudence shows that prohibitions or restrictions on import of goods produced by low labor standards are defined as border measures and are forbidden.

3) gatt art. XX: general exceptions

gatt members can apply gatt inconsistent measures provided that such measures could be justified under one of the exceptions in gatt art. XX. the exceptions include, inter alia, public morals, human, animal or plant life or health, and prison labor. some internationally recognized core labor standards arguably fall in the category of public moral.

at the present time, art. XX (esp. its chapeau) is rigidly interpreted. however, we might see some change after the seattle conference, especially in the Hormone case.

4. study the dsb decisions in relevant cases

it is necessary to look at dsb's interpretations on gatt art. I, III, XI, and XX in various rulings. by doing so, we may see how they affect labor standards, how they are internally related, and what the trend is.

5. when applicable, win/loss analysis shall be made on these selected cases.

win/loss standards:

- 1) public interest vs. private claims
- 2) impact on different actors: free-traders, developing countries, anglo-american countries, social market countries, business firms, and civil society.

6. work process

step I:

- 1) read the summary of these cases (state of play) and relevant articles and news reports
- 2) determine which cases are interesting and compile a list of interesting ones
- 3) browse all interesting cases on the web site
- 4) determine the real interesting cases and print out the panel/ab reports
- 5) read the cases and take notes and fill in the tables of case analysis and case details

step II:

- 7) the win/loss analysis

step III:

8) discussion, feedback and improvement

WTO/GATT and Labor Standards/Health: Case Study

GATT Art. I & III: MFN and National Treatment to “like products” and “directly competitive and substitutable products”

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>Belgium – Family allowances (Allocations familiales)</p> <p>Panel report adopted on 7 Nov. 1952 (G/32-1S/59)</p>	<p>Belgium imposed an additional tax on products originating in countries without a system of family allowances if those products were produced by public bodies.</p> <p>Claimed by Norway and Denmark</p>	<p>GATT: Art. I (MFN), III (National Treatment)</p>	<p>Labor standards: Higher tax can not be levied on imports produced with lower labor standards (material entitlement).</p> <ul style="list-style-type: none"> • It is the first and the only case directly related to labor standards in the jurisprudence of GATT and WTO. • MFN is unconditional. Labor standards are irrelevant. • The panel found that the measure was a denial of MFN treatment to “like products” from Norway and Denmark. The Belgian measures not only violated Art. I (and perhaps Art. III), but also were “based on a concept which was difficult to reconcile with <u>the spirit of the General Agreement...</u>” • This case was cited by a WTO panel in the shrimp case. • The panel actually denied that in defining “like products”, different labor standards involved in producing the products shall be taken into account. 	<p>Step backward</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>US – Restrictions on Imports of Tuna</p> <p>Tuna I: Panel report issued in September 1991</p> <p>(report not adopted)</p>	<p>US banned the import of tuna with the reason that these tuna were produced in a manner resulting in high rates of dolphin mortality.</p> <p>Claimed by Mexico</p>	<p>GATT: Art. III (National Treatment), XI (General Elimination of Quantitative Measures)</p>	<p>Labor standards/health: definition of like products: “product” (physical characteristics, etc.) vs. “process”</p> <ul style="list-style-type: none"> • Key questions: 1) can one country tell another what its environmental regulations should be? and 2) do trade rules permit action to be taken against the method used to produce goods rather than the quality, content and physical characteristics of the goods themselves? • In this case, the Panel’s answer to both questions was “no”. • The panel ruled that even when connected to a scheme that prevented sale of US tuna produced in a like manner, the US ban could not be considered a domestic regulation or requirement under Article III, but rather would be a border prohibition, illegal under GATT Art. XI. Had Art. III applied, then the only issue would have been whether imported tuna produced in a dolphin-unfriendly manner was given a worse treatment than domestically produced dolphin-unfriendly tuna. • Within the meaning of Art. III, like products apply only to the quality, content and physical characteristics of products. <u>The manner in which the products are produced</u> – e.g., Process and Production Methods (PPMs) is irrelevant. • As labor standards can be defined as a kind of PPM or an element of the production process, this ruling is of important value to the study of labor standards and WTO. • Eco-labelling is WTO consistent if it is not applied in a discriminatory manner. 	<p>Step backward</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>US - Measures affecting alcoholic and malt beverages</p> <p>Panel reported adopted on 19 Jun. 1992 (DS23/R-39S/206)</p>	<p>Canada complained that US federal excise tax measures introduced in 1991 in section 11201 of the Omnibus Budget Reconciliation Act of 1990, as well as a wide range of state tax measures, distribution barriers, licensing fees, transportation requirements, alcohol content regulations, and listing/delisting policies, operated to create significant discrimination against Canadian beer, wine and cider in the United States market.</p>	<p>GATT Art. III:2 (National Treatment)</p>	<p>Labor standards/health: in defining like products, regulatory purpose also needs to be taken into account.</p> <ul style="list-style-type: none"> • In this case regulatory purpose was taken as an important standard in defining like products. • Thus, the regulatory purpose of “protection of labor rights” arguably can be used to define products produced by different labor standards as “different”, and so that products produced by unfair labor standards can be treated less favorably than products produced by fair labor standards. Thus, the purpose of labor rights protection in WTO regime can be reached. 	<p>Major step forward</p>
<p>US – Restrictions on Imports of Tuna</p> <p>Tuna II: Panel report issued in mid 1994</p>	<p>US banned the import of tuna with the reason that these tuna were produced in a manner resulting in high rates of dolphin mortality.</p> <p>Claimed by EC</p>	<p>GATT: Art. III (National Treatment), XI (General Elimination of Quantitative Measures)</p>	<p>It is basically a repetition of Tuna I</p>	<p>Step backward</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>Japan – Taxes on alcoholic beverages</p> <p>AB report issued on Oct. 4, 1996 WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R</p>	<p>Spirits exported to Japan were discriminated against under the Japanese liquor tax system which levied a substantially lower tax on “shochu” than on whisky, cognac and white spirits, which were defined as not “like products”.</p> <p>Claimed by EC, Canada and US</p>	<p>GATT Art. III:2, 4 (National Treatment)</p>	<p>Labor standards/health: like products shall be decided case by case and provision by provision; instead of regulatory purpose, effect shall be used as the standard to determine the meaning of “like products”.</p> <ul style="list-style-type: none"> • The AB rejected that regulatory purpose should be used in determining the meaning of “similar products”. Instead the AB ruled that effects should be used as an overarching or exclusive approach to the meaning of “similar products”. • The AB suggested: no one approach to exercising judgement will be appropriate for all cases... the concept of “likeness” (or similarity) must be decided case by case and provision by provision. • It suggests that the approach to the meaning of “like products” in Art. III:4 which deals with regulations, may well be different from the approach in Art. III:2, which addresses internal taxes. • This gives enormous discretionary power to DSB, which can be used in individual cases either for or against the inclusion of labor standards in the WTO regime. • As this ruling was made just before the Singapore Ministerial Conference, where labor standards were a contentious issue, this might indicate that DSB tried to change the rather liberal and risky “regulatory purpose” approach. 	<p>Major step backward</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
Canada – certain measures concerning periodicals AB report issued on June 30, 1997 WT/DS31/AB/R	The US claims that measures prohibiting or restricting the importation into Canada of periodicals are in contravention of GATT Art. XI, and the tax treatment of so-called “split-run” periodicals and the application of favourable postage rates to certain Canadian periodicals are inconsistent with GATT Art. III.	GATT Art. III, XI	Labour standards/health: Social concerns related to cultural protection are not considered. - Notwithstanding their culture-related contentious nature, imported split-run and domestic non-split-run periodicals are defined as directly competitive or substitutable products in so far as they are part of the same segment of the Canadian market for periodicals - Analysis was made purely from a commercial view.	Step backward
Korea – taxes on alcoholic beverages AB report issued on Jan. 18, 1999 WT/DS75/AB/R WT/DS84/AB/R	At issue were the internal taxes imposed by Korea on certain alcoholic beverage pursuant to liquor Tax Law and Education Tax Law.	GATT Art. III:2	Labour standards/health: GATT Art. III is again interpreted in favor of free traders. - A further liberalized interpretation of Article III in favor of free traders.	Slight step backward

Detailed Case Study: GATT Article I & III

Case Name	Quotes from Panel/AB Decision	Notes
Belgian Family Allowances (Allocations Familiales)	<ul style="list-style-type: none"> - The case is “regarding the application of the Belgian law on the levy of a charge on foreign goods purchased by public bodies when these goods originated in a country whose system of family allowances did not meet specific requirements”. - In applying MFN rationale, the panel concluded “[t]he consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be <u>irrelevant</u> in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption <u>dependent on certain conditions</u>”. - As to the <u>exemptions</u> of Art. III, “[t]he Panel did not feel the provisions of <u>paragraph 8 (a) of Article III</u> were applicable in this case as the text of the paragraph referred only to laws, regulations and requirements and not to internal taxes or charges”. - “[I]t was the opinion that the Belgian legislation on family allowances was not only inconsistent with the provisions of Article I (and <u>possibly with those of Article III, paragraph 2</u>), but was based on a concept which was difficult to reconcile with the <u>spirit of the General Agreement</u>...” 	<ul style="list-style-type: none"> - MFN treatment is unconditional. Labor standards are irrelevant. - Application of GATT Art. III:8(a): although internal tax measure is not allowed, it seems that <u>laws, regulations or requirements governing government procurement</u> for non-commercial purpose can be used to discriminate between products produced by fair and unfair labor standards. - “Directly competitive or substitutable products” are not mentioned.

Case Name	Quotes from Panel/AB Decision	Notes
<p>US –Restrictions on Import of Tuna (I)</p> <p>As the panel reports were not adopted, the original texts were not posted on the WTO web site. The quotes are made from the “WTO Case Study: the tuna-dolphin dispute” on WTO’s official web site.</p>	<ul style="list-style-type: none"> - that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported.) This has become known as a “product” versus “process” issue. - that GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country – even to protect animal health or exhaustible natural resources. The term used here is “extra-territoriality”. - What was the reasoning behind this ruling? If the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally — and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system - to achieve predictability through trade rules. - The panel’s task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct or not. <u>It suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse.</u> - <u>The panel was also asked to judge the US policy of requiring tuna products to be labelled “dolphin-safe” (leaving to consumers the choice of whether or not to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.</u> 	<ul style="list-style-type: none"> - Like products: product vs. process - the GATT rules do not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country, including labor and health standards. - the proposal made by the panel also fits in the case of labor and health: WTO member parties’ policy can be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specifically for the issue of labor and health. That way, the members can negotiate the specific issues, and can set limits that will prevent protectionist abuse. - The ruling about indiscriminatory use of eco-lebelling suggests that eco-lebelling can be used for labor and health protection.

Case Name	Quotes from Panel/AB Decision	Notes
US - Measures affecting alcoholic and malt beverages	<ul style="list-style-type: none"> - The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III has to be taken into account in interpreting the term “like products” in this Article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is made “so as to afford protection to domestic production”. While the analysis of “like products” in terms of Articles III:2 must take into consideration this objective of Article III, the Panel wished to emphasize that such an analysis would be without prejudice to the “like products” concepts in other provisions of the General Agreement, which might have different objectives and which might therefore also require different interpretations. - Once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, become inconsistent with Article III even if the regulation is not “applied ... so as afford protection to domestic production”. In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. - The Panel recognized that on the basis of their physical characteristics, low alcohol beer and high alcohol beer are similar. It then proceeded to examine whether, in the context of Article III, this differentiation in treatment of low alcohol beer and high alcohol beer is such “as to afford protection to domestic production. - The Panel then turned to a consideration of the policy goals and legislative background of the laws regulating the alcohol content of beer. ... Irrespective of whether the policy background to the laws distinguishing alcohol content of beer was the protection of human health and public morals or the promotion of a new source of government revenue, both the statements of the parties and the legislative history suggest that the alcohol content of beer has not been singled out as means of favouring domestic producers over foreign producers. - Having found that the two varieties of beer need not be considered as like 	<ul style="list-style-type: none"> - In the case, regulatory purpose was taken as an important standard in determining “like products”. - In this case, the GATT Panel interpreted GATT Art. III in a very special way. - In this case, the Panel ruled that differentiation among beers with different alcohol contents could be justified under Art. III. Compared to rulings in other alcohol-related disputes, this ruling is a very weird one. - According to the interpretation hereof, it seems that a WTO member party may differentiate between products produced by fair and unfair labor standards for the regulatory purpose of labor rights protection, so long as it can demonstrate that such a differentiation has not been applied to afford protection to domestic production. - The analysis in this case would be without prejudice to the “like products” concepts in other provisions of the General Agreement, which might have different objectives and which might therefore also require different interpretations.

	<p>products in terms of Article III:4 and the specific legislative contexts in the above-mentioned states, and that these laws and regulations affecting the alcohol content of beer are not applied to imported or domestic products so as to afford protection to domestic production in terms of Article III:1, the Panel considered that it need not examine the additional arguments of the parties in respect of the above-mentioned state requirements based on the alcohol content of beer.</p>	
<p>US –Restrictions on Import of Tuna (II)</p> <p>The quotes are made from the “WTO Case Study: the tuna-dolphin dispute” on WTO’s official web site.</p>	<ul style="list-style-type: none"> - that neither the primary nor the intermediary nation embargo were covered under Article III, that both were contrary to Article XI:1 and not covered by exceptions in Article XX(b), (g) or (d) of the GATT. 	<ul style="list-style-type: none"> - The ruling in Tuna I was further affirmed.
<p>Japan – Taxes on Alcoholic Beverages</p>	<ul style="list-style-type: none"> - Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO agreements. <p>GATT Article III:2, First Sentence:</p> <ul style="list-style-type: none"> - [T]he words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported an domestic products are “like” and, second, whether the taxes applied to the imported products are “in excess of” those applied to the like domestic products. - [T]he definition of “<u>like products</u>” in Article III:2, first sentence, should be construed narrowly. ... How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are “like” on a case-by-case basis. The report of the Working Party on Border Tax Adjustments, ..., set out the basic approach for interpreting “like or similar products” generally in the various provisions of the GATT 1947: ... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” product. <u>Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature</u> 	<ul style="list-style-type: none"> - When understanding GATT Art. III:2, second sentence, we must take into account the Ad Article. - The concepts of “like products” differ in different WTO agreements and provisions. - <u>U Turn of Standards</u>: the standard applied by the AB seems very much different from that applied by the panel of US - Measures affecting alcoholic and malt beverages. In this case Shochu and vodka are defined as like products. However, in the other case, beers with different alcohol contents are defined as unlike products. Instead of “regulatory purpose”, “effect test” is actually used as the sole approach to the meaning of “like products” and “directly competitive and substitutable products”. - In GATT Art. III:2, the big category of “similar products” is further divided into “like products” & “directly competitive

	<p><u>and quality</u>. ... Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of “like products” in Article III:2, first sentence is meant to be as opposed to the range of “like” products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the WTO Agreement. ...</p> <ul style="list-style-type: none"> - The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. ... Tariff classification has been used as a criterion for determining “like products” in several previous adopted panel reports. <p>GATT Article III:2, Second Sentence:</p> <ul style="list-style-type: none"> - Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether: (1) the imported products and the domestic products are “<u>directly competitive or substitutable products</u>” which are in competition with each other; (2) the directly competitive or substitutable imported and domestic products are “not similarly taxed”; and (3) the dissimilar taxation of the directly competitive or substitutable imported products is “applied ... so as to afford protection to domestic production”. - As with “like products” under the first sentence, the determination of the appropriate range of “directly competitive or substitutable products” under the second sentence must be made on a case-by-case basis. - <u>In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the “market place”</u>. This seems appropriate. - The phrase “not similarly taxed” in the Ad Article to the second sentence must therefore mean something else (different from “in excess of the tax on domestic like products”). It requires a different standard. - [T]here may be an amount of excess taxation that may well be more of a burden on imported products than on domestic “directly competitive or substitutable products” but may nevertheless not be enough to justify a conclusion that such products are “not similarly taxed” for the purposes of Article III:2, second sentence. We agree with the panel that this amount of differential taxation must be more than de minimis to be deemed “not similarly taxed” in any given case. And, 	<p>and substitutable products”</p> <ul style="list-style-type: none"> - <u>Standards for determining “like products” and “directly competitive and substitutable products”</u> under GATT III:2 include the product’s end-uses in a given market; consumers’ tastes and habits; the product’s properties, nature and quality (physical characteristics); tariff classifications; and the market place. - It can be expected that when eco-lebelling on labor standards becomes very popular, consumers’ choice of products produced by fair and unfair labor standards as a new kind of “taste and habit” may be developed. This may be used to justify defining products produced by fair and unfair labor standards as unlike products. - Except for the Belgium Family Allowance case, all “like products” disputes are about GATT Art. III. This indicates that (1) most cases are about the conflicts between domestic and foreign standards; and (2) countries tend to define some products as unlike so as to afford protection to domestic production.
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	<p>like the Panel, we believe that whether any particular differential amount of taxation is de minimis or is not de minimis must, here too, be determined on a case-by-case basis. Thus, to be “not similarly taxed”, the tax burden on imported products must be heavier than on “directly competitive or substitutable” domestic products, and that burden must be more than de minimis in any given case.</p> <ul style="list-style-type: none"> - <u>This is not any issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulator who imposed the measure.</u> 	
<p>Canada – Certain Measures Concerning Periodicals</p>	<ul style="list-style-type: none"> - A case of perfect substitutability would fall within Article III:2, first sentence, while we are examining the broader prohibition of the second sentence. - We, therefore, conclude that imported split-run and domestic non-split-run periodicals are directly competitive or substitutable products in so far as they are part of the same segment of the Canadian market for periodicals. 	<ul style="list-style-type: none"> - Not much new. Basically this case is an application of the methodology given out in Japan – Taxes on Alcoholic Beverages. - It needs to be noted that in its analysis, the AB did not consider the contentious culture-related nature of the case, while analyzed from a pure commercial view.

Case Name	Quotes from Panel/AB Decision	Notes
US – Import Prohibitions of Certain Shrimp and Shrimp Products	<ul style="list-style-type: none"> - Panel: [W]hen considering a measure under Article XX, we must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the <u>security and predictability</u> of the multilateral trading system...if an interpretation of the chapeau of Article XX...would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies...other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. ... Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system. (<u>overturned by the AB</u>) - US – Gasoline: the purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [Article XX]’. - What is appropriately characterizable as “arbitrary discrimination” or “unjustifiable discrimination”, or as a “disguised restriction on international trade” in respect of one category of measures, need not be so with respect to another group of type of measures. The standard of “arbitrary discrimination”, for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labor. - There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. - US – Gasoline: The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rule of the General Agreement. (<u>equilibrium between right and obligations</u>) - Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. - [T]he application of a measure may be characterized as amounting to an abuse of an exception of Article XX not only when the detailed operating provisions of the measures prescribe the arbitrary or unjustifiable activity, but also where a 	<ul style="list-style-type: none"> - Although the quoted analysis of the Panel was overturned by the AB because it was “over-broad”, it represents many people’s concern about a loose interpretation of Art. XX and the inclusion of labor standards into the WTO. - Important words in the text of Art. XX: “arbitrary”, “unjustifiable”, “disguised”, and “necessary”. - Anything applied unilaterally seems to be arbitrary. It entails the necessity of internationally recognized labor standards? - By providing that cases need to be decided on a case-by-case and provision-by-provision base, the AB retains enormous discretionary power on Art. XX. - <u>Unjustifiable discrimination</u>: in designing any measure, a nation must consider the situation of other countries; before unilateral actions, necessary across-the-boarder negotiations must be exhausted so as to look for a least trade-restrictive measure. - <u>Arbitrary discrimination</u>: rigidity and inflexibility in designing and implementing measures constitute arbitrary discrimination, procedures against the requirements of GATT Art. X (requirement of due process and transparency, etc.) - <u>Disguised restriction</u>: not examined. It is a hard and sensitive issue.

	<p>measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirement.</p> <ul style="list-style-type: none"> - Although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. 	
Korea –Taxes on Alcoholic Beverages	<ul style="list-style-type: none"> - The word “directly” which, in Korea’s view, is at the heart of the term at issue. At some level all products are competitive, in that they compete for the consumer’s limited budget, and it is therefore “directly” which gives meaning to the legal text and prevents Article III:2 from becoming an “unbridled instrument of tax harmonization and deregulation”. - We, therefore, conclude that the term “directly competitive or substitutable” does not prevent a panel from taking account of evidence of latent consumer demand as one of a range of factors to be considered when assessing the competitive relationship between imported and domestic products under Article III:2, second sentence, of the GATT 1994. In this case, the Panel committed no error of law in buttressing its finding of “present direct competition” by referring to a “strong potentially direct competitive relationship”. 	<ul style="list-style-type: none"> - A further liberalized interpretation of Article III in favor of free traders.

GATT Articles I & III Jurisprudence and Labor Rights Protection

I Introduction

In the Singapore Declaration, the WTO expressed its basic pro-labor-standards stand, however it made it clear that to deal with labor standards was not its business, but rather ILO's. Consequently, the WTO and its Dispute Settlement Body try to avoid the issue of labor standards and do not set labor standards directly.

Compared to other international organizations, the WTO has a strong enforcement mechanism. In the event that labor standards are included in the WTO, it can be expected that the enforceability of the standards will be greatly improved. WTO is a two-edge sword. If it is not used for pro-labor-standards purpose, its free trade rationales will very possibly be used by free traders and undermine the efforts of labor advocates for labor rights protection.

II Case Study

In the history of GATT/WTO jurisprudence, there are few cases directly related to labor standards. However, its jurisprudence still has an indirect impact on the protection of labor standards under the WTO regime. In the WTO agreements, there are some articles directly and indirectly related to labor standards, i.e. GATT Articles I and III. Due to the de facto precedent effect of GATT/WTO rulings, the GATT/WTO jurisprudence, i.e. the interpretations of these articles in adopted decisions, is actually a law-making process.

1 Belgium – Family Allowances (Allocations Familiales) (1952)

The case was regarding the application of the Belgian law on the levy of a charge on foreign goods purchased by public bodies when these goods originated in a country whose system of family allowance did not meet specific requirements. Family allowance actually is a kind of material entitlement that falls in the general category of labor standards.

The Panel found that the measure was a denial of MFN treatment to “like products” from Norway and Denmark. In applying the MFN rationale, the GATT Panel concluded that the consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions. The Panel also ruled that the exemptions provided by GATT Article III: (8) were not applicable in this case as the text of the paragraph referred only to laws, regulations and requirements and not to international taxes or charges. Importantly, the Panel pointed out that the Belgian legislation on family allowances was not only inconsistent with the provisions of Article I (and possibly with those of Article III, Paragraph 2), but was based on a concept which was difficult to reconcile with the spirit of the General Agreement ...

In the GATT/WTO jurisprudence, this case is the first and the only one directly related to labor standards. It was concluded by the Panel that MFN treatment was unconditional, and family allowances, which were a kind of labor standards, were irrelevant. The panel expressed its basic attitude that measures based on social concerns

were difficult to reconcile with the GATT's pro-trade spirit. This case was cited by a WTO Panel in the case: US – Import Prohibition of Certain Shrimp and Shrimp Products.

2 US – Restrictions on Imports of Tuna (Tuna I) (1991)

The case was about the US ban on the import of tuna from Mexico with the reason that these tuna were produced in a manner resulting in high rates of dolphin mortality. As a result of the US objection, the Panel report was not adopted. However, this case has become known as a “product” versus “process” issue, which has caused the attention of many social advocates, including labor advocates.

In this case, two key questions were raised:

- Can one Member Party tell another what its environmental regulations should be?
- Do trade rules permit action to be taken against the method used to produce goods rather than the quality, content and physical characteristics of the goods themselves?

The Panel concluded that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country. The Panel pointed out that if the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally – and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This

would conflict with the main purpose of the multilateral trading system - to achieve predictability through trade rules. The Panel also pointed out that its task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct or not. Interestingly, it suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse. The panel was also asked to judge the US policy of requiring tuna products to be labeled “dolphin-safe” (leaving to consumers the choice of whether or not to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.

In terms of labor standards, this case is extremely interesting. Whether within the meaning of GATT Article III, like products apply only to the quality, content and physical characteristics of the goods, or we need to also take into account the manner in which the products are produced, e.g. the process and production methods (PPMs). As labor standards can be defined as a kind of PPMs or an element of the production process, this ruling is of important value to studying the relationship between labor standards and international trade. It needs to be pointed out that if not applied in a discriminatory manner, eco-lebelling is GATT/WTO consistent and can be used for the purpose of protecting labor rights.

3 US – Measures Affecting Alcoholic and Malt Beverages (1992)

In this case, Canada complained that US federal excise tax measures, as well as a wide range of state tax measures, distribution barriers, licensing fees, transportation requirements, alcohol content regulations, and listing/delisting policies, operated to create significant discrimination against Canadian beer, wine and cider in the US market.

In those parts of the Panel report related to “like products”, the Panel ruled that the purpose of Article III was not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Article III was not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. The Panel considered that the limited purpose of Article III had to be taken into account in interpreting the term “like products” in this Article. Consequently, in determining whether two products subject to different treatment were like products, it was necessary to consider whether such product differentiation was made “so as to afford protection to domestic production”. While the analysis of “like products” in terms of Article III:2 must take into consideration this objective of Article III, the Panel emphasized that such an analysis would be without prejudice to the “like products” concepts in other provisions of the General Agreement, which might have different objectives and which might therefore also require different interpretations.

The Panel further stated that once products were designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, became inconsistent with Article III even if the regulation is not “applied ... so as afford protection to domestic production”. In the view of the Panel, therefore, it was imperative that the like product determination in the context of Article III be made in such a way that

it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties.

Taking into consideration the policy goals and legislative background of the laws regulating the alcohol content of beer, which indicated that the alcohol content of beer had not been singled out as means of favouring domestic producers over foreign producers, the Panel was of the view that beers with high and low alcohol contents needed not be considered like products in terms of GATT Article III:4.

In this case, compared to its normal practice, the Panel interpreted GATT Article III in a very special way. Regulatory purpose was taken as an important standard in determining “like products”. According to the interpretation hereof, a GATT/WTO member party may differentiate between products produced by fair and unfair labor standards for the regulatory purpose of labor rights protection, so long as it can demonstrate that such a differentiation has not been applied to afford protection to domestic production.

4 US – Restrictions on Imports of Tuna (Tuna II) (1994)

In this case, EC raised the claims against the same measures of the US as claimed by the Mexico in Tuna I. A similar ruling against the US measures was made by the Panel. However due to the objection of the US, the Panel report was not adopted.

The Panel basically followed the ruling of the Tuna I. In the ruling, it further pointed out that neither the primary nor the intermediary nation embargo were covered under Article III, that both were contrary to Article XI:1 and not covered by exceptions in Article XX(b), (g) or (d) of the GATT.

5 Japan – Taxes on Alcoholic Beverages (1996)

EC, Canada and US claimed that spirits exported to Japan were discriminated against under the Japanese liquor tax system which levied a substantially lower tax on “Shochu” than on whisky, cognac and white spirits, which were defined as not “like products”.

In its ruling, the Appellate Body (AB) first confirmed that Members of the WTO were free to pursue their own domestic goals through internal taxation or regulation so long as they did not do so in a way that violated Article III or any of the other commitments they had made in the WTO agreements.

The AB then moved on to make detailed analysis of GATT Article III:2 and its Ad Article. In its analysis, Article III:2 was divided into two parts, i.e. first sentence about “like products”, and second sentence about “directly competitive or substitutable products”.

The AB ruled that the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are “like” and, second, whether the taxes applied to the imported products are “in excess of” those applied to the like domestic products. The AB was of the view that the definition of “like products” in Article III:2, first sentence, should be construed narrowly on a case-by-case basis. Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits; the product’s properties, nature and quality.

The AB further stated that three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether: (1) the imported products and the domestic products are “directly competitive or substitutable products” which are in competition with each other; (2) the directly competitive or substitutable imported and domestic products are “not similarly taxed”; and (3) the dissimilar taxation of the directly competitive or substitutable imported products is “applied ... so as to afford protection to domestic production”.

As with “like products” under the first sentence, the AB ruled that the determination of the appropriate range of “directly competitive or substitutable products” under the second sentence must be made on a case-by-case basis. In this case, the AB emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the “market place”.

The AB stated that the phrase “not similarly taxed” in the Ad Article to the second sentence must mean something different from “in excess of the tax on domestic like products” in the first sentence. It ruled that this amount of differential taxation must be more than de minimis to be deemed “not similarly taxed” in any given case.

Unlike the Panel of US - Measures Affecting Alcoholic and Malt Beverages, the Panel rejected that regulatory purpose should be used in determining the meaning of “similar products”. Instead the AB ruled that effect should be used as an overarching or exclusive approach. It stated that it was not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the

measure was applied to imported or domestic products so as to afford protection to domestic production, then it did not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulator who imposed the measure.

As this ruling was made just before the Singapore Ministerial Conference, where labor standards were raised as a contentious issue, this might indicate that DSB tried to change the rather liberal (in terms of social concerns) and risky “regulatory purpose” approach.

6 Canada – Certain Measures Concerning Periodicals (1997)

The US claimed that measures prohibiting or restricting the importation into Canada of periodicals were in contravention of GATT Art. XI, and the tax treatment of so-called “split-run” periodicals and the application of favourable postage rates to certain Canadian periodicals were inconsistent with GATT Article III.

Based on the interpretation contained in Japan – Taxes on Alcoholic Beverages, the AB concluded that imported split-run and domestic non-split-run periodicals were directly competitive or substitutable products in so far as they were part of the same segment of the Canadian market for periodicals. Canada was required to change its discriminatory rules.

It needs to be noted that in this case, the AB did not consider the contentious culture-related nature of the case, but rather analyzed from a pure commercial view.

7 Korea – Taxes on Alcoholic Beverages (1999)

At issue were the internal taxes imposed by Korea on certain alcoholic beverage pursuant to liquor Tax Law and Education Tax Law.

In Korea's view, the word "directly" was at the heart of the term at issue. Korea argued that at some level all products were competitive, in that they competed for the consumer's limited budget, and it was therefore "directly" which gave meaning to the legal text and prevented Article III:2 from becoming an "unbridled instrument of tax harmonization and deregulation".

The AB concluded that the term "directly competitive or substitutable" did not prevent a panel from taking account of evidence of latent consumer demand as one of a range of factors to be considered when assessing the competitive relationship between imported and domestic products under GATT Article III:2, second sentence. The AB confirmed the Panel's view in buttressing its finding of "present direct competition" by referring to a "strong potentially direct competitive relationship".

This case has developed some further interpretations of GATT Article III in favor of free traders.

III Summary & Conclusion

The GATT/WTO jurisprudence related to GATT Article I and III, i.e. the interpretation of “like products” and “directly competitive or substitutable products”, is summarized as follows:

1952	Belgian Family Allowances	MFN treatment to like products is unconditional and labor standards are irrelevant to the meaning of like products.
1991	US – Restrictions on Import of Tuna	Within in the meaning of GATT Article III, like products apply only to the quality, content and physical characteristics of the goods, but not to the manner in which the products are produced.
1992	US – Measures Affecting Alcoholic and Malt Beverages	In defining like products, regulatory purpose also needs to be taken into account.
1996	Japan – Taxes on Alcoholic Beverage	Like products shall be decided on a case by case and provision by provision basis. Instead of regulatory purpose, effect shall be used as the standard to defining like products.
1997	Canada – Certain Measures Concerning Periodicals	GATT Article III is again interpreted in favor of free trade and social concerns related to cultural protection are not considered.
1999	Korea – Taxes on Alcoholic Beverages (1999)	GATT Article III is again interpreted in favor of free trade.

Some labor advocates and scholars propose that one route to make the protection of labor rights under WTO possible is to have labor standards included in WTO agreements via the development of WTO jurisprudence. The above study of GATT/WTO jurisprudence related to GATT Article I and III, i.e. the interpretation of “like products” and “directly competitive or substitutable products”, has shown that this route is a very hard one. Except for in the case of US – Measures Affecting Alcoholic and Malt

Beverages, interpretations have all been made in favor of free trade. For the inclusion of labor standards, future WTO jurisprudence must develop new interpretations of "like products" and "directly competitive or substitutable products" which will make substantial amendment on top of the existing ones.

As a result of these pro-trade interpretations, the possibility of developing a practice that labor standards, either as an element of production process or a kind of regulatory purpose, shall be taken into account in defining like products has become smaller and smaller. It is therefore not possible for WTO member parties to define products produced by fair and unfair labor standards as not "like products" and treat them differently.

Additionally, by repeatedly emphasizing that the meaning of like products must be interpreted on a case by case and provision by provision basis, the GATT Panel and WTO Dispute Settlement Body has given itself enormous discretionary power, which has made the case more complex. This also indicates that a general rule providing the relationship between labor standards and free trade is yet to be developed.

Except for the Belgium Family Allowance case, all "like products" disputes are about GATT Art. III. This indicates that (1) most cases are about the conflicts between domestic and foreign standards; and (2) countries tend to define some products as unlike so as to afford protection to domestic production.

WTO/GATT and Labor Standards/Health: Case Study

GATT Art. XX: General Exceptions

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>US – Import Prohibition of Certain Shrimp and Shrimp Products</p> <p>AB report issued on Oct. 12, 1998 WT/DS58/AB/R</p>	<p>At issue were US measures banning the import of shrimp that had been fished in a manner that threatened sea turtles, an endangered species.</p> <p>Claimed by India, Malaysia, Pakistan and Thailand</p>	<p>GATT: Art. XX (General Exceptions)</p>	<p>Labor standards/health: the least trade-restrictive principle is interpreted rigidly.</p> <ul style="list-style-type: none"> • The AB found that the scheme itself could be justified in principle under the “conservation of natural resources” exception in Art. XX, however its manner of application did not meet certain criteria in the “chapeau”, or general preambular provision, of Art. XX. • The AB held that nothing in the basic structure of GATT would prevent the imposition of otherwise GATT – inconsistent trade measures directed at other countries’ policies, provided that such measures could be justified under one of the exceptions in GATT Art. XX. The exceptions include, inter alia, “public morals,” “human, animal or plant life or health”, and “prison labor”. • Internationally recognized core labor standards can arguably be taken as a kind of public moral. • To some extent, it can be said that whether labor standards can be included into WTO regime depends on how rigidly Art. XX is interpreted. 	<p>Step backward</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>Asbestos</p> <p>Panel report could be issued in August 2000. Notes have been taken based on news reports.</p>	<p>A WTO arbitration panel will reject Canada's claim that the French ban on asbestos for health reasons is unfair barrier to trade.</p> <p>Final panel ruling to be made in 08/00 (report possibly can be made public in mid-August), and the case very probably will be appealed by Canada.</p>	<p>GATT: Art. III, XI, XX, Agreement on Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade</p>	<p>For the 1st time the WTO has upheld a member nation's trade restriction to protect human health by invoking Art. XX (b)</p> <ul style="list-style-type: none"> • Environmentalists and labor rights advocates say it indicates WTO may be growing more sensitive to their concerns • The ruling could set a profound precedent by allowing health concerns to overrule open trade provisions – and it could also change the way the WTO is seen by many outsiders who claim the WTO is only interested in open markets. • The panel found that France acted within its WTO rights to take measures seen as necessary to protect the life and health of humans, animals or plants (GATT Art. XX (b)). It is the 1st time in 202 WTO panels that trade-restricted measures have been upheld under this provision. • Canada claims chrysotile asbestos is safe if used properly. (this is important to the standard setting of “necessity test” in GATT Art. XX) This argument is not accepted by the Panel. 	<p>Major step forward</p>

Detailed Case Study: GATT Article XX

Case Name	Quotes from Panel/AB Decision	Notes
<p>US – Import Prohibitions of Certain Shrimp and Shrimp Products</p>	<ul style="list-style-type: none"> - Panel: [W]hen considering a measure under Article XX, we must determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the <u>security and predictability</u> of the multilateral trading system...if an interpretation of the chapeau of Article XX...would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies...other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. ... Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system. (<u>overturned by the AB</u>) - US – Gasoline: the purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [Article XX]’. - What is appropriately characterizable as “arbitrary discrimination” or “unjustifiable discrimination”, or as a “disguised restriction on international trade” in respect of one category of measures, need not be so with respect to another group of type of measures. The standard of “arbitrary discrimination”, for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labor. - There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. - US – Gasoline: The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rule of the General Agreement. (<u>equilibrium between right and obligations</u>) - Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. - [T]he application of a measure may be characterized as amounting to an abuse of an exception of Article XX not only when the detailed operating provisions of the 	<ul style="list-style-type: none"> - Although the quoted analysis of the Panel was overturned by the AB because it was “over-broad”, it represents many people’s concern about a loose interpretation of Art. XX and the inclusion of labor standards into the WTO. - Important words in the text of Art. XX: “arbitrary”, “unjustifiable”, “disguised”, and “necessary”. - Anything applied unilaterally seems to be arbitrary. It entails the necessity of internationally recognized labor standards? - By providing that cases need to be decided on a case-by-case and provision-by-provision base, the AB retains enormous discretionary power on Art. XX. - <u>Unjustifiable discrimination</u>: in designing any measure, a nation must consider the situation of other countries; before unilateral actions, necessary across-the-boarder negotiations must be exhausted so as to look for a least trade-restrictive measure. - <u>Arbitrary discrimination</u>: rigidity and inflexibility in designing and implementing measures constitute arbitrary discrimination, procedures against the requirements of GATT Art. X (requirement of due process and transparency, etc.) - <u>Disguised restriction</u>: not examined. It is a hard and sensitive issue.

	<p>measures prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirement.</p> <ul style="list-style-type: none"> - Although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. 	
Asbestos	<ul style="list-style-type: none"> - Not available 	

Win/Loss of Groups Affected For Labour Standards Related Cases

Case	Public Interest vs. Private Claims	Free Traders	Developing Countries	Anglo-American Countries	Social Market Countries	Multinational Corporations	Civil Society
Belgium- family allowance	Private Win/Public Loss: international trade and market access no longer contingent on social policy at site of production	Win: National Treatment and Most Favoured Nation Status prevail over meeting social needs	Win: sets a precedent for separating market access from domestic social policy in international trade	Win: sets a precedent for separating market access from domestic social policy in international trade	Loss: unable to encourage other countries to take measures against market infringement; loss of ability to decide who receives preferential market access	Win: government social policy at site of production declared irrelevant for market access	Loss: Public domain unable to take proactive measures against market infringement inside and outside of the domestic realm; potential loss of material entitlement

<p>US-Import Prohibitions of Certain Shrimp and Shrimp Products</p>	<p>Private Win/Public Loss: ability of states to utilize regulatory mechanisms to meet social needs curtailed</p>	<p>Win: regulatory exemptions to Article XX severely limited leaving guarantees of market access stronger</p>	<p>Win: regulatory exemptions to Article XX weakened allowing for more predictable and secured market access to developed countries by developing countries, as developed countries are more often adopting higher standards which may be potential target of exemption under Art. XX.</p>	<p>Ambiguous: ability to use regulatory measures in order to discriminate against products and production methods considered illegitimate severely curtailed; market access more predictable</p>	<p>Loss: ability to use regulatory measures in order to discriminate against products and production methods considered illegitimate severely curtailed; ability to meet social needs and exercise better judgement jeopardized</p>	<p>Win: unilateral declarations prohibiting market access based on regulatory impulses limited; guarantee of more predictable and secured market access</p>	<p>Loss: the ability of governments to enact regulatory policies to meet social needs hampered; unable to discriminate against products and production methods considered illegitimate</p>
<p>US-Import Restrictions on the Import of Tuna</p>	<p>Private Win/Public Loss: states unable to place restrictions on products produced under lower standards</p>	<p>Win: market access unchained from adherence to standards</p>	<p>Win: market access unchained from adherence to standards, the potential risk of abusing standards by developed countries for protectionist purpose limited</p>	<p>Ambiguous: unable to encourage standards-friendly practices in other jurisdictions; use of social labelling upheld; market access unchained from adherence to standards</p>	<p>Ambiguous: unable to encourage standards-friendly practices in other jurisdictions; use of social labelling upheld</p>	<p>Win: market access unchained from adherence to standards, unable to push government to influence on other countries' standards</p>	<p>Ambiguous: unable to encourage standards-friendly practices in other jurisdictions; use of social labelling upheld (can this be utilized to promote international labour standards?)</p>

<p>US-Measures affecting alcoholic and malt beverages</p>	<p>Public Win/Private Loss: regulatory purpose can be used to define “like products” thereby allowing products which may threaten social protections to be treated differently</p>	<p>Loss: the regulatory concerns of states can interfere with market access, lessen the predictability and security in international trade</p>	<p>Loss: the regulatory concerns of states can interfere with market access, the risk of possible abuse by developed countries increases</p>	<p>Ambiguous: regulatory purpose trumps national treatment of like products; regulatory concerns of states can interfere with market access</p>	<p>Win: regulatory purpose trumps national treatment of like products, lessen the predictability and security in international trade</p>	<p>Loss: the regulatory concerns of states can interfere with market access</p>	<p>Win: regulatory purpose trumps national treatment of like products</p>
<p>Japan-Taxes on alcoholic beverages</p>	<p>Private Win/Public Loss: regulatory aims and effects rejected as the exclusive approach to determining like products</p>	<p>Win: regulatory purpose no longer used as a standard to determine like products; regulatory barriers to markets likely to be removed</p>	<p>Win: regulatory barriers to markets can be challenged and are likely to be removed, lessen the risk of abuse by developed countries for protectionist purpose</p>	<p>Ambiguous: regulatory barriers to markets can be challenged and are likely to be removed</p>	<p>Loss: regulatory purpose can no longer be used for social protection against market infringement, a strong weapon for standards promotion lost</p>	<p>Win: regulatory barriers to markets can be challenged and are likely to be removed</p>	<p>Loss: market infringement can no longer be automatically impeded by regulations designed to provide social protection and meet social needs</p>

Canada-certain measures concerning periodicals	Private Win/Public Loss: social concerns not considered by the panel as legitimate to the case	Win: trade cannot be restricted by a country's attempt to address social concerns	Ambiguous: trade cannot be restricted by a country's attempt to address social concerns; Welcome to "McWorld" as cultural imperialism cannot be circumvented by trade measures	Win: market access cannot be restricted by a country's attempt to address social concerns	Loss: meeting social needs and addressing social concerns is now divorced from legitimate state trading policy	Win: social concerns no longer trump market access for goods and services	Loss: even if a state wants to, many social needs will not be met if they conflict with the principle of free trade as set out in WTO agreements
Korea-taxes on alcoholic beverages	same as the Japan-Taxes on alcoholic beverages						
France-Asbestos	Public Win/Private Loss: market access can be denied if a product poses a legitimate health risk	Loss: market access can be denied if a product poses a legitimate health risk	Loss: market access can be denied if a product poses a legitimate health risk; influence of standards increased	Ambiguous: market access no longer automatic; standards can be used for social protection	Win: standards can be used for social protection without penalty allowing for the state to address social needs	Loss: market access can be denied if a product poses a legitimate health risk; standards influence market access	Win: products which may be harmful can be prevented from gaining market access; social protection and social needs may be guaranteed through the use of recognized standards

Work Methodology on the Study of GATT/WTO Rulings and Health

The methodology for the study of health and the WTO is identical to that for labour standards and the WTO. The only difference is that health has been incorporated into the WTO Agreements, which means that relevant cases relate directly, rather than indirectly, to those Agreements. These cases have been read and analysed, and the win/loss for groups affected has also been prepared. This work has been set out below.

WTO/GATT and Labor Standards/Health: Case Study
Agreement on Sanitary & Phytosanitary Measures
Agreement on Trade-Related Aspects of Intellectual Property Rights

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>EC – Measures Affecting Meat and Meat Products (Hormones)</p> <p>AB report adopted Feb 13, 1998.</p>	<p>EC prohibited imports of meat & meat products derived from cattle to which either the natural hormones: oestradiol-17B, progesterone or testosterone, or the synthetic hormones: trenbolone acetate, zeranol or melengestrol acetate (MGA) had been administered for growth promotion purposes.</p> <p>Claimed by:</p> <ol style="list-style-type: none"> 1. Canada 2. US. <p>Third Parties:</p> <ol style="list-style-type: none"> 1. Australia 2. NZ 3. Norway 	<p>SPS: 2, 3, 5 GATT: Art. III (National Treatment), XI (General Elimination of Quantitative Measures) Agreement on Agriculture: 4 TBT: 2</p>	<p>Health: Measures must only have a “rational relationship” to risk assessment to satisfy SPS 5.1.</p> <ul style="list-style-type: none"> • Panel held that there was a “minimum procedural requirement” contained in 5.1 to show that “the Member imposing a sanitary measure... actually <i>took into account</i> a risk assessment when it enacted or maintained its sanitary measure in order for that measure to be considered as <i>based on</i> a risk assessment”. • AB rejected this, looking instead for a rational relationship between the risk assessment and the measure (note that they found no risk assessment, so EC measure inconsistent with 5.1, and consequently, 3.3). • This is a more lenient test, but since the same result is reached here, it is yet to be seen if the new test will result in a new standard in actuality. <p>No “deference to the findings of the national authorities” in SPS, even when situation involves complex facts (e.g., assessment of risks to human health arising from toxins & contaminants).</p> <ul style="list-style-type: none"> • AB sticks to “objective assessment of the facts” • Compare to deference required in Anti-Dumping Agreement – means wto defers to national judgments of economic, but not health, interest <p>Must satisfy ALL 3 elements of SPS 5.5 in order to be inconsistent with that provision.</p> <ul style="list-style-type: none"> • Although different levels of protection existed (element 1), and the difference between them were unjustifiable (element 2), that difference did not “result in discrimination or a disguised restriction on international trade” (element 3), so measure not inconsistent with 5.5. 	<p>Small step forward.</p> <p>Step backward</p> <p>Major step forward (Overall – ambiguous, both sides claim victory.)</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/health advocates
<p>Japan – Measures Affecting Agricultural Products</p> <p>AB report adopted Mar 19, 1999.</p>	<p>Japan required that every variety of a product went through quarantine treatment until the quarantine treatment had been tested for that particular variety, even if the treatment was effective for other varieties of the same product.</p> <p>Claimed by US (they say this is import prohibition contrary to wto obligations).</p> <p>Third Parties: 1. Brazil 2. EC</p>	<p>SPS 2, 5, 8 GATT: XI (General Elimination of Quantitative Measures) Agreement on Agriculture: 4</p>	<p>Health: Identified 4 cumulative requirements for measure to be consistent w/ 5.7, & added that “a reasonable period of time” in 4th element to be decided on a case by case basis.</p> <ul style="list-style-type: none"> • Cumulative nature of requirements makes it more difficult to be consistent w/ 5.7. • Case-by-case basis on “reasonable period of time” gives deciding body much discretion – can find violation of 5.7 on that basis alone. <p>Scope of publication requirement in Annex B para 1 (and therefore Article 7) is expanded as AB rules that “such as” is exemplary, not exhaustive.</p> <ul style="list-style-type: none"> • This means that more measures are subject to the Article 7 publication requirement than those listed, and therefore more measures have the potential to be found inconsistent w/ 7. • In this case, Japan’s measure, although not explicitly listed, was found to be implicitly subject to Article 7 scrutiny, and was therefore inconsistent w/ 7. 	<p>Step backward.</p> <p>Step backward.</p> <p>(Overall: setback – measure SPS inconsistent)</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</p> <p>AB report adopted Jan 16, 1998.</p>	<p>India’s alleged absence of patent protection for pharmaceutical and agricultural chemical products, and the absence of formal systems that permit the filing of patent applications of and provide exclusive marketing rights for such products.</p> <p>Compliant by US. Third Party: EC</p>	<p>TRIPS 63, 70.8 & 70.9</p>	<p>Health: “A means” in 70.8(a) must be a legal mechanism for filing of mailbox applications that provides a sound legal basis to preserve both the novelty and the priority of inventions.</p> <ul style="list-style-type: none"> Although the AB added that this mechanism did not have to eliminate doubts as to whether eventual patents would be invalidated, India’s “administrative instructions” were not a sufficient means, so violation of 70.8(a) <p>AB decided that, like 70.8(a), obligations under 70.9 were in place since Jan 1, 1995 & were not allowed “transitional arrangements”</p> <ul style="list-style-type: none"> This interpretation meant that India was in violation of 70.9, as they had made no attempts to satisfy their obligations under 70.9 	<p>Whether these India decisions are a step forward or backward for health advocates depends on your opinion of whether or not a country’s having mechanisms for filing</p>
<p>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</p> <p>Panel report adopted Sep 2, 1998.</p>	<p>India’s alleged absence of patent protection for pharmaceutical and agricultural chemical products, and the absence of formal systems that permit the filing of patent applications of and provide exclusive marketing rights for such products.</p> <p>Compliant by EC. Third Party: US</p>	<p>TRIPS 70.8 & 70.9</p>	<p>Health: Subsequent claim by previous 3rd party is permissible.</p> <ul style="list-style-type: none"> In this case, that finding basically resulted in a sure win for the claimant (EC). <p>AB said that they are NOT BOUND by previous decision, but should refer to “original panel” wherever possible.</p> <ul style="list-style-type: none"> Although in theory not bound, in practice AB came to same decisions that India was in violation of 70.8(a) & 70.9 for basically same reasons. 	<p>patent applications and granting exclusive marketing rights is health-beneficial.</p> <p>If it is, then these decisions are steps forward.</p>

Case	Case Summary	Relevant WTO Agreements & Articles	Analysis Related to Labor Standards/Health	What this means for labour standards/ health advocates
<p>Canada – Patent Protection of Pharmaceutical Products</p> <p>Panel report issued Mar 17, 2000.</p>	<p>Canada allowed pharmaceutical competitors to get patent approval & stockpile products before the term of the competing patent had ended.</p> <p>Complaint by EC.</p> <p>Third Parties: Australia, Brazil, Colombia, Cuba, India, Israel, Japan, Poland, Switzerland, Thailand, US.</p>	<p>TRIPS 27.1 & 28.1</p>	<p>Health: Panel delineates 3 cumulative requirements of a “limited exception” under Article 30 (exception to 28.1 claimed by Canada). Specifically, narrow reading of “limited” (element 1), “normal exploitation” includes period after patent expires, but not for pharmaceuticals (element 2), and “legitimate interests” are related to public policies/ social norms (element 3).</p> <ul style="list-style-type: none"> • Cumulative nature of elements makes it more difficult to qualify as an exception. • Canada’s regulatory review exception qualified as a limited exception, so not contrary to 28.1. Canada’s stockpiling exception did not satisfy element 1, so contrary to 28.1. <p>“Discrimination” for the purposes of 27.1 measured by effect & objective of measure.</p> <ul style="list-style-type: none"> • Canada’s regulatory review exception was not discriminatory. 	<p>Partial step forward.</p> <p>Step forward. (Overall: this is a good decision for health advocates.)</p>

**Detailed Case Study: Agreement on Sanitary & Phytosanitary Measures,
Agreement on Trade-Related Aspects of Intellectual Property Rights**

Case Name	Quotes from Panel/AB Decision	Notes
<p>EC – Measures Affecting Meat and Meat Products (Hormones)</p>	<ul style="list-style-type: none"> - (189) The term “based on”, when applied as a “minimum procedural requirement” by the Panel, may be seen to refer to a human action, such as particular human individuals “taking into account” a document described as a risk assessment. Thus, “take into account” is apparently used by the Panel to refer to some subjectivity which, at some time, may be present in particular individuals but that, in the end, may be totally rejected by those individuals. We believe that “based on” is appropriately taken to refer to a certain <i>objective relationship</i> between two elements, that is to say, an <i>objective situation</i> that persists and is observable between an SPS measure and a risk assessment. Such a reference is certainly embraced in the ordinary meaning of the words “based on” and, when considered in context and in the light of the object and purpose of Article 5.1 of the <i>SPS Agreement</i>, may be seen to be more appropriate than “taking into account”. We do not share the Panel’s interpretive construction and believe it is unnecessary and an error of law as well. - (117) So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither <i>de novo</i> review as such, nor “total deference”, but rather the <u>“objective assessment of the facts”</u>. - (215) We consider the above three elements of Article 5.5 to be cumulative in nature; all of them must be demonstrated to be present if violation of Article 5.5 is to be found. In particular, <u>both the second and third elements must be found</u>. The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in a discrimination or a disguised restriction on international trade. - (175) Article 3.3 is evidently not a model of clarity in drafting and communication. 	<ul style="list-style-type: none"> - The AB has very convenient rationale regarding standard of review. They refuse to incorporate Anti-Dumping’s contextual article 17.6, because they do not want to use a DIFFERENT AGREEMENT for purposes of interpretation. However, that is exactly what it does when incorporating DSU Article 11. - EC seems to be asking for this deference in ALL HIGHLY COMPLEX FACTUAL SITUATIONS, deviating from their pleas of special treatment because of human health, this is a larger category & could probably apply to every situation, so a poor argument - For Article 5.5’s, Canada said No reason to limit the ordinary meaning (of “different situations”) when in regards to human health, and that because the nature of this health case strongly affects trade, it should be held to trade standards, BUT Cda bends over backwards to appease a health-concerned public (e.g., Walkerton). - Should we have different standards for different WTO cases concerning human health (i.e. the greater it affects trade, the more trade standards will be used)?

<p>Australia – Measures Affecting Importation of Salmon</p>	<ul style="list-style-type: none"> - (110) Canada’s request for the establishment of a panel did not include a claim of violation of Article 6 of the <i>SPS Agreement</i>. <u>The Panel’s terms of reference are determined by Canada’s request for the establishment of a panel.</u> We, therefore, agree with Australia that Article 6 of the <i>SPS Agreement</i> is not within the terms of reference of the Panel. ... - (123) ... we maintain that for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, <u>it is not sufficient that a risk assessment conclude that there is a possibility of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the “likelihood”, i.e. the “probability”, of entry, establishment or spread of diseases and associated biological and economic consequences as well as the “likelihood”, i.e. “probability”, of entry, establishment or spread of diseased according to the SPS measures which might be applied.</u> - (125) ... As stated in our Report in <i>European Communities – Hormones</i>, the “risk” evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is “not the kind of risk which, under Article 5.1, is to be assessed.” <u>This does not mean, however, that a Member cannot determine its own appropriate level of protection to be “zero risk”.</u> - (146) (re: element 1 of 5.5) ... for “different” situations to be comparable under Article 5.5, there is no need for both the disease <i>and</i> the biological and economic consequences to be the same or similar. ... the Panel was correct in stating that <u>situations can be compared under Article 5.5 if these situations involve either a risk of entry, establishment or spread of the same or a similar disease, or a risk of the same or similar” associated potential biological and economic consequences”.</u> - (206) We thus believe that <u>the SPS Agreement contains an implicit obligation to determine the appropriate level of protection.</u> We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the <i>SPS Agreement</i>, such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the <i>SPS Agreement</i> in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement. 	<ul style="list-style-type: none"> - This quote exemplifies the nature of the WTO DSB as a court rather than the police. Not only does the wto not seek out fresh violations of the agreements, but even when a claim has been made, the DSB is prohibited from extending their analysis of violations to any provisions other than those that have been claimed. - Probability rather than possibility is a hard rule for health advocates - Members can establish zero-risk levels of protection, just not theoretically uncertain levels of protection. This is good for health advocates. - Either/or rather than and is an interpretation which makes it easier to compare levels of protection of different situations which may be found to be violations of 5.5 – again, hard rule for health advocates - Obligation adds an additional step that must be taken for Members constructing SPS measures
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<p>Japan – Measures Affecting Agricultural Products</p>	<ul style="list-style-type: none"> - (79) ... In our opinion, there is “<u>scientific justification</u>” for an SPS measure, within the meaning of Article 3.3 [and therefore 2.2], if there is a <u>rational relationship between the SPS measure at issue and the available scientific information</u>. - (84) In light of the above considerations based on the text and context of Article 2.2 of the <i>SPS Agreement</i>, we agree with the Panel that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence. <u>Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including characteristics of the measure at issue and the quality and quantity of the scientific evidence.</u> - (93) The second part of the second sentence of Article 5.7 stipulates that the Member adopting a provisional SPS measure shall “review the ... measure accordingly within a reasonable period of time.” In our view, <u>what constitutes a “reasonable period of time” has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure.</u> In the present case, the Panel found that collecting the necessary additional information would be relatively easy. Although the obligation “to review” the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement “within a reasonable period of time.” - (105) We consider that the list of instruments contained in the footnote to paragraph 1 of Annex B is, as indicated by the words “such as”, not exhaustive in nature. <u>The scope of application of the publication requirement is not limited to “laws, decrees or ordinances”, but also includes, in our opinion, other instruments which are applicable generally and are similar in character to the instruments explicitly referred to in the illustrative list of the footnote to paragraph 1 of Annex B.</u> - (126) Pursuant to the rules on burden of proof set out above, we consider that <u>it was for the United States to establish a prima facie case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a prima facie case of inconsistency with Article 5.6.</u> Since the United States did not even claim before the Panel that the “determination of sorption levels” is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a <i>prima facie</i> case that the “determination of sorption levels” is an alternative measure within the meaning of Article 5.6. 	<ul style="list-style-type: none"> - rational relationship is the definition of scientific justification - case-by-case determination could be good or bad for health advocates – in this case it was bad. This would not be a “healthy” trend. - Same comment. - Extends the obligation of SPS measure publication – yet another step when Member constructs an SPS measure. - AB clarifies rules on burden of proof & this time in favour of the Member imposing the measure in question.
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<p>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (complaint by US)</p>	<ul style="list-style-type: none"> - (78) ... India maintains that the Panel’s interpretation of Article 70.9 has the consequence that the transitional arrangements in Article 65 allow developing country Members to postpone legislative changes in all fields of technology except the most “sensitive” ones, pharmaceutical and agricultural chemical products. India claims that the Panel turned an obligation to take action in the future into an obligation to take action immediately. - (82) By its terms, Article 70.9 applies only in situations where a product patent application is filed under 70.8(a). Like Article 70.8(a), Article 70.9 applies “notwithstanding the provisions of Part VI”. Article 70.9 specifically refers to Article 70.8(a), and they operate in tandem to provide a package of rights and obligations that apply <i>during</i> the transitional periods contemplated in Article 65. It is obvious, therefore, that both Article 70.8(a) <i>and</i> Article 70.9 are intended to apply as from the date of entry into force of the <i>WTO Agreement</i>. - (90) With respect to Article 63, the convenient phrase “including but not necessarily limited to”, is simply not adequate to “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly” as required by Article 6.2 of the DSU. If this phrase incorporates Article 63, what article of the <i>TRIPS Agreement</i> does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel. 	<ul style="list-style-type: none"> - Interesting that India views pharmaceutical & agricultural chemical products as the most sensitive area. This may/ may not affect interpretation of whether this is a health-friendly decision. - Hard line taken with respect to these 2 provisions due to notwithstanding clause. Members must oblige immediately. - AB defines terms of reference, stopping US from “sneaking one in”
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<p>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (complaint by EC)</p>	<ul style="list-style-type: none"> - (7.30) It can thus be concluded that <u>panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same</u>. In examining dispute WT/DS79 we are not legally bound by the conclusions of the Panel in dispute WT/DS50 [India – Patent Protection, claim by US] as modified by the Appellate Body report. However, in the course of “normal dispute settlement procedures” required under Article 10.4 of the DSU, we will <u>take into account the conclusions and reasoning</u> in the Panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the DSU, which stresses the <u>role of the WTO dispute settlement system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings</u> (which concern has been referred to by both parties). In our view, these considerations form the basis of the requirement of the <u>referral to the “original panel” wherever possible</u> under Article 10.4 of the DSU. - (7.58) We note the point made by India that the present system ensures the retention of the necessary facts to determine novelty and priority for the purposes of decisions on the future grant of patent rights pursuant to Article 70.8(b) and (c). Even if we were persuaded that this was the case despite the unpublished nature of the system, we do not believe that this would alter our concerns regarding the soundness of the legal basis for the system under the law as it presently stands. - (7.70) Moreover, the range of products affected, i.e. pharmaceuticals and agricultural chemicals, is large and differing marketing approval regimes will apply according to the products in question. For these reasons, we are not convinced that India can establish any specific date later than 1 January 1995 as the date by which it should have in place the legal means necessary to give effect to the exclusive marketing rights provisions of Article 70.9. - (9.1) On the basis of the findings set out above, the Panel concludes that India has not complied with its obligations under Article 70.8(a) because it has failed to establish a sound legal basis for adequately preserving novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional period to which it is entitled under Article 65 of the TRIPS Agreement; and that India has not complied with its obligations under Article 70.9 of the TRIPS Agreement because it has failed to establish a system for the grant of exclusive marketing rights. 	<ul style="list-style-type: none"> - Statement regarding binding nature of precedent – fairly wishy-washy. - This seems to add the obligation of publication. - AB seems to use the “large & differing” nature of pharmaceutical & agricultural chemical products to justify the obligation of immediate compliance with 70.9.
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<p>Canada – Patent Protection of Pharmaceutical Products</p>	<ul style="list-style-type: none"> - (7.3) <u>After a pharmaceutical patent expires, it is common for other producers to enter the market supplying copies of the patented product at lower prices.</u> These lower-priced copies, <u>known as “generic” pharmaceuticals,</u> often constitute a large part of the supply of pharmaceuticals in national markets. Generic pharmaceuticals must also comply with the government approval process. According to Canada’s information, for generic producers the process of developing their version of the drug and obtaining regulatory approval takes approximately three to six-and-a-half years, with development taking some two to four years and the regulatory process itself one to two-and-a-half years. <u>If none of the development process could be performed during the term of the patent, generic producers could be forced to wait the full three to six-and-a-half years after the patent expires before being able to enter the market</u> in competition with the patent owner. - (7.55 – 7.57) <u>The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent’s grant of market exclusivity.</u> ... [Market exclusivity for a brief period after the expiry of a patent is normal (while others catch up, produce product, etc.), but] <u>market exclusivity created by using patent rights to preclude submissions for regulatory authorization should not be considered “normal”.</u> ... [It] is not a natural or normal consequence of enforcing patent rights. It is an unintended consequence of the conjunction of the patent laws with product regulatory laws. - (7.92) ... it is not true that Article 27 requires all Article 30 exceptions to be applied to all products. Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain products areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible, as the EC argued, that TRIPS would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers.(7.92) 	<ul style="list-style-type: none"> - This quote illustrates the relevance of this case to health, and an opinion regarding where patent laws stand in the minds of health advocates. - Panel is basically setting a standard, then making an exception for pharmaceuticals. - The Panel rejects Canadian argument regarding the interpretation of discrimination in 27.1, but still ends up finding Canadian measure non-discriminatory.
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SPS & TRIPS Jurisprudence and Health Protection

I Introduction

Unlike in the case of labor standards, the WTO has made the decision that to deal with health standards was its business and it has therefore incorporated health into its agreements. Specifically, the Sanitary and Phytosanitary (SPS) Agreement is devoted entirely to food safety and animal and plant health regulations. Also, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) reflects on health indirectly in the context of pharmaceuticals as intellectual property in need of protection, and finally, subparagraph (b) of Article XX of the General Agreement on Tariffs and Trade 1994 (GATT) is the health-justified exception to GATT obligations.

Because health standards have been explicitly incorporated into the WTO regime, rather than pressure for inclusion (which has already occurred), health advocates pressure the WTO to interpret the existing agreements in a manner that is favorable to domestic health regulation. The danger in this, however, lies in the potential for governments to use health rationales in an effort to undermine free trade. The WTO has kept health regulation in check, though, and trade values still reign.

II Case Study

Since the inception of the WTO, there have been three completed cases for each of SPS and TRIPS in which the WTO dispute settlement body (DSB) has ruled on health regulation. These six cases, and their repercussions on health, have been dealt with below. With respect to GATT Article XX(b), one case is pending (the asbestos case), and an analysis of its health repercussions is anticipated in the near future as the Panel decision should be released by the end of August, 2000. This case has been looked at in a preliminary stage under the GATT XX section of this report (above).

SPS Cases

1 European Communities – Measures Affecting Meat and Meat Products (Hormones) (1998)

In this case, Canada and United States claimed that an EC prohibition of imported meat and meat products derived from cattle to which any of six hormones had been administered for growth promotion purposes was in violation of WTO Agreements.

This is an interesting case in that both sides claimed victory. This is due to the fact that certain decisions by the Appellate Body (AB) were pro-claimant, and others were pro-respondent. In favor of the claimants, the AB held that EC was in violation of SPS 5.1 which requires countries base their SPS measures on a risk assessment. The AB determined that “based on” a risk assessment meant that there had to be a “rational relationship” between the measure and the risk assessment, rejecting the Panel’s “minimum procedural requirement”. Also, they held that there was no need for a risk assessment to establish a minimum quantifiable magnitude of risk. Although this new test made it easier to show that a measure was based on a risk assessment, the EC

measure was still found inconsistent with Article 5.1 because the AB could see no risk assessment at all.

In favor of the respondent, the AB held that EC was not in violation of SPS 5.5, which prohibits arbitrary or unjustifiable distinctions in SPS protection levels which result in discrimination or a disguised trade restriction. The AB set out three cumulative elements necessary for the violation of 5.5. The cumulative nature made this a more difficult violation to prove, as all three elements must be found if the measure is to be struck down. The third element (discrimination or disguised trade restriction) was not met and the EC measures was therefore held to be consistent with Article 5.5.

This was the first WTO case that dealt with the SPS Agreement and it set out the basic interpretation techniques for that Agreement. These interpretations are recognized and reflected in subsequent cases. It is difficult to say whether this ambiguous decision resulted in a victory for health regulation or not. However, due to the opposite nature of trade versus social concerns, many health advocates would see stagnancy in pro-health decision-making as a step backward.

2 Australia – Measures Affecting Importation of Salmon (1998)

This case was about the Australian prohibition of salmon imports from Canada based on a quarantine regulation. Canada claimed that the prohibition was contrary to Australia's obligations under WTO Agreements, especially SPS. Overall, this result was a setback for health regulation.

The AB the definition of a "risk assessment" very clearly, and upheld the EC Hormone decision that there is no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk. The AB also added that "likelihood" in

the second and third elements of the risk assessment definition meant “probability” rather than “possibility”, making it more difficult for a Member maintaining an SPS measure to show that their risk assessment is a valid one. The Australian measure was found inconsistent with Article 5.1 because their risk assessment was not valid on the second and third elements, based on this new definition.

Similarly, with respect to Article 5.5, the EC Hormones definition was followed and the AB added that “different situations” in the first element of the definition could be either risk of entry or risk of consequences, rather than both, making it easier to satisfy the first element, and find a violation. The Australian measure was, consequently, found inconsistent with Article 5.5 and, by implication, also inconsistent with Article 2.3 (arbitrary or unjustifiable discrimination between Members where identical or similar conditions prevail or there is a disguised trade restriction).

Finally, the AB dealt with the Canadian claim that the Australian measure was inconsistent with yet another provision of the SPS Agreement, Article 5.6, which says that measures must not be more trade restrictive than necessary (i.e. an alternative measure should be substituted if feasible). The AB set out three cumulative elements necessary for violation of Article 5.6. Again, the fact that these elements are cumulative should make it more difficult to prove a violation of the provision. The AB reversed the Panel’s finding of inconsistency with Article 5.6, concluding that there was not enough evidence to determine the second element of the definition they set out, and therefore, also not enough evidence to make a ruling on the provision.

3 Japan – Measures Affecting Agricultural Products (1999)

This case dealt with the Japanese requirement that every variety of a product went through quarantine treatment until the quarantine treatment had been tested for that particular variety, even if the treatment was effective for other varieties of the same product. The United States claimed that this import prohibition was contrary to WTO obligations. The AB came down hard on the Japanese measure, representing another setback for health advocates.

For SPS Article 5.6, the AB followed the Australia Salmon interpretation and, like in that case, the measure was not found inconsistent (for testing by product) because there was not enough evidence to make a conclusion on the second element of the test.

The prohibition was found inconsistent with SPS Article 5.7 (if not sufficient evidence available (in 2.2), can adopt SPS measures based on certain other information and get the necessary sufficient evidence within a reasonable period of time). The AB identified four cumulative requirements for consistency with this provision, making it difficult to prove consistency. The AB also added that, for the purposes of the fourth element, “a reasonable period of time” would be decided on a case-by-case basis. This gives both present and future deciding bodies much discretion, as they can find a violation of 5.7 on that basis alone.

The AB also expanded the scope of the publication requirement in paragraph 1 of Annex B (and therefore Article 7) of the SPS Agreement, by ruling that “such as” is an illustrative, rather than exhaustive, list starter. This means that more measures are subject to the Article 7 publication requirement than those listed, and therefore more measures have the potential to be found inconsistent with Article 7. Here, Japan’s measure,

although not explicitly listed, was found to be implicitly subject to Article 7 scrutiny, and was therefore inconsistent with Article 7.

TRIPS Cases

4 India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (1998)

The United States claimed that India’s absence of formal systems permitting the filing of patent applications and providing exclusive marketing rights for pharmaceutical and agricultural chemical products resulted in an inexcusable absence of patent protection for such products contrary to the TRIPS Agreement. Note that the EC reserved its third party rights in this case.

In its ruling, the AB defined “a means” in TRIPS Article 70.8(a) (which requires a means for filing patent applications) as a legal mechanism for filing mailbox applications that provides a sound legal basis to preserve both the novelty and the priority of inventions. Although the AB added that this mechanism did not have to eliminate doubts as to whether eventual patents would be invalidated, India’s “administrative instructions” were not a sufficient means, and were deemed inconsistent with Article 70.8(a).

The AB decided that, like under TRIPS Article 70.8(a), obligations under Article 70.9 (which requires a system for granting exclusive marketing rights for products) were in place since January 1, 1995 and were not allowed “transitional arrangements” (i.e. were not allowed additional time for implementation). This interpretation meant that India was in violation of 70.9, as it had made no attempts to satisfy its obligations under 70.9 at that the time of the decision.

5 India – Patent Protection for Pharmaceutical and Agricultural Chemical Products

(1998)

In this case, EC raised the claims against the same Indian measures as claimed by the United States in the previous case. What this case turned on was the permissibility of the claim, as EC had been a third party in the earlier case. India argued that the complaints should have been raised simultaneously in the interests of fairness and efficiency. The AB held that a subsequent claim by a third party is permissible, a finding which basically resulted in a sure win for the claimant (EC).

The AB pointed out that although it is not bound by the previous decision, the “original panel” should be referred to wherever possible. Again, the AB was not sensitive to the request for “transitional arrangements”, seeing the “large and differing” nature of pharmaceutical and agricultural chemical products as reason for immediate compliance with these TRIPS obligations. The AB’s theoretical freedom to make a new decision resulted, in practice, in a following of both the reasoning and the conclusion in the previous case that India was in violation of Articles 70.8(a) and 70.9 of the TRIPS Agreement.

6 Canada – Patent Protection of Pharmaceutical Products (2000)

Canada allowed pharmaceutical competitors to get patent approval and stockpile products before the term of the competing patent was ended. The European Communities complained that this was contrary to sections 27.1 and 28.1 of the TRIPS Agreement. Canada, however, claimed that this fell under the exception in TRIPS Article 30.

The Panel delineated three cumulative requirements of a “limited exception” under Article 30. Specifically, the Panel narrowly interpreted the term “limited” in the first element, said that the term “normal exploitation” in the second element includes the period after a patent expires, but not for pharmaceuticals, and “legitimate interests” in the third element are related to public policies or social norms. Following this definition, the Panel concluded that Canada’s regulatory review exception qualified as a limited exception, so it was not contrary to 28.1, but that Canada’s stockpiling exception did not satisfy the first element, so it was contrary to 28.1. It can be argued that this decision was a good one for health advocates. Although it does not allow stockpiling before the completion of a patent term, it does allow generic producers of drugs to complete necessary paperwork so that they can begin buying (or making) and selling generic drugs to the public as soon as possible after the patent term ends. This catalysed availability of generic drugs translates to cheaper (and therefore more accessible) pharmaceuticals for those who need them and, perhaps, can’t afford the more expensive version. This opinion may be reflected in the Panel’s decision that “normal exploitation” of a patent by market exclusion in the period after the patent has ended should not apply to pharmaceuticals.

The Panel also examined EC’s claim that Canada’s regulatory review exception was discriminatory, contrary to TRIPS 27.1. After defining “discrimination”, for the purpose of 27.1, as measured by the objective and effect of the measure, the Panel decided that the exception in question was not discriminatory. Again, this was overall a good decision for health advocates, given the public health benefits of generic drug availability.

III Summary & Conclusion

The WTO jurisprudence in relation to health, and specifically, the SPS and TRIPS Agreements, is summarized as follows:

SPS Cases

1998	EC – Measures Affecting Meat and Meat Products	SPS 5.1 inconsistent measure because no valid “risk assessment”. SPS 5.5 consistent because third element of definition not met.
1998	Australia – Measures Affecting Importation of Salmon	SPS 5.1 inconsistent measure because no valid “risk assessment”. SPS 5.5 inconsistent because AB made definition easier to satisfy, and definition was met. Not enough evidence to rule on SPS 5.6.
1999	Japan – Measures Affecting Agricultural Products	SPS 5.1 inconsistent measure because no valid “risk assessment”. Not enough evidence to rule on SPS 5.6.

TRIPS Cases

1998	India – Patent Protection for Pharmaceutical and Agricultural Chemical Products	TRIPS 70.8(a) inconsistent because present “means” not satisfactory and no time extension allowed. TRIPS 70.9 inconsistent because present means nonexistent and no time extension allowed.
1998	India – Patent Protection for Pharmaceutical and Agricultural Chemical Products	TRIPS 70.8(a) and 70.9 inconsistent because claim by third party in previous case permissible, and basically nothing has changed since that ruling.
2000	Canada – Patent Protection of Pharmaceutical Products	Regulatory review exception consistent with 28.1, but stockpiling exception inconsistent with 28.1.

Given that health standards are explicitly protected under the WTO regime, the issue is whether or not this protection has been successful.

Success of SPS in Health Protection: Needs Some Ironing Out

SPS measures have been found inconsistent with Article 5.1 because nobody can make an adequate risk assessment within the definition set out in the Appellate Body decisions. Therefore these measures are not seen as based on a risk assessment. This

means that either the present definition of a “risk assessment” is too strict or Members are simply not carrying out adequate risk assessments on which to base their SPS measures. It is likely that the former is true as “probability” rather than “possibility” is a difficult threshold to establish and Members are often under pressure from their citizens to take measures to protect human health at the first “possibility” of risk, not giving them enough time to establish that the risk is “probable”. On the other hand, if the threshold was lowered to “possibility”, that would make production of an adequate risk assessment overly easy, and it is likely that health reasons could be used as a guise for international barriers to trade.

The Panel decision of inconsistency with SPS Article 5.5 which almost undercut health regulation in the EC Hormones case, but was reversed by the Appellate Body, was carried through in the Australia Salmon case. Therefore, the EC Hormones interpretation of this provision is not as health-friendly in practice as originally thought.

The developing trend in relation to SPS Article 5.6 is that measures are found neither consistent, nor inconsistent with this provision because there is not enough evidence to determine the second element necessary to deem a measure inconsistent (whether an alternative SPS measure achieves the appropriate level of sanitary protection). This is a glitch that is working in favor of members maintaining SPS measures, for the time being.

In conclusion, the SPS Agreement’s ability to protect health is fairly muddled. Some Articles are working against health protection in the WTO jurisprudence (5.1 and 5.5), whereas another (5.6) is working for health protection, but only as a fluke in favour of domestic health regulation.

Success of TRIPS in Health Protection: Good

TRIPS Articles 70.8(a) and 70.9 are consistently being enforced by the Appellate Body. Specifically, the transitional arrangements which are allowed for other articles are not allowed in the provision of a means for filing patent applications and granting exclusive marketing rights. This means that, as of January 1, 1995, all WTO Members should have satisfied both of these obligations, or they may come under attack by another Member through the WTO dispute settlement system. This is basically a good decision for health advocates due to the immediacy of pharmaceutical needs. Having a vehicle to protect the profit of one's chemical inventions is more of an incentive to invent than not having such a vehicle. Although this decision may not directly benefit health, it may block the hinderance of advancement in pharmaceutical health treatment.

WTO Jurisprudence has determined that generic drug producers qualify for the TRIPS Article 30 exception to TRIPS Article 28.1 for regulatory review, but not stockpiling. This will help generic producers expedite their preparation somewhat for entrance into the market. This, in turn, may result in sooner availability of affordable pharmaceuticals. Therefore, this is another TRIPS decision which is successful in health protection.

Win/Loss of Groups Affected for Health Related Cases

Case	Public Interest vs. Private Claims	Free Traders	Developing Countries	Anglo-American Countries	Social Market Countries	Business Firms	Civil Society
EC-Measures Affecting Meat and Meat Products	Private Win/Public Loss: market access trumps social protection unless based on “an objective assessment of the facts” in the eyes of the dispute panel; social sovereignty severely infringed	Win: right of access to markets strengthened; social barriers to trade reduced	Win: market access can no longer be denied for the purposes of social protection unless stringent, uncontroversial, and universally accepted criteria are met	Ambiguous: although a win for market access of own goods, prevention of access for social protection of foreign goods severely hampered	Loss: national social sovereignty reduced; social policy trumped by requirement of free market access; social needs more difficult to meet	Win: social barriers to trade weakened; “objective” guidelines replace “subjective” protectionism	Loss: ability to press for social needs superceded by WTO requirement of maintenance of full market access irregardless of potential social consequences
Australis-Measures Affecting the Importation of Salmon	Private Win/Public Loss: ability to harness social protection to prevent market access even more restricted; social sovereignty further weakened	Win: right of market access strengthened; social barriers to trade further reduced	Win: criteria for objective social protection made even more difficult to prove; right of market access strengthened	Ambiguous: right of market access strengthened; ability to harness social protection in order to restrict access for foreign goods weakened	Ambiguous: although a win for market access of own goods, ability to prevent market access to foreign goods even weaker; social sovereignty infringed upon by the market	Win: criteria for objective social protection even more difficult to prove; access to markets made even more predictable	Loss: social sovereignty dangerously undermined; ability to enact social protections in order to meet social needs crippled; market trumps societal needs

Japan-Measures Affecting Agricultural Products	Ambiguous: although decision favoured private interests, established SPS disputes to be settled on a case by case basis	Ambiguous	Ambiguous	Ambiguous	Ambiguous	Ambiguous	Loss: opportunity for social protection to trump market access by first principles lost
India-Patent Protection for Pharmaceutical and Agricultural Chemical Products	Private Win/Public Loss: intellectual property rights supercede social need; social sovereignty further eroded	Win: intellectual property rights strengthened even in cases where IP conflicts with social needs	Loss: option of meeting social needs through low cost generic drugs restricted	Win: intellectual property rights triumph over the right of other states to meet social needs in the realm of health	Loss: option of meeting social needs through low cost generic drugs restricted	Win: intellectual property rights made more enforceable and stable	Loss: global governance of issues such as AIDS made more difficult as intellectual property deemed more important than human health
Canada-Patent Protection of Pharmaceutical Products	Public Win/Private Loss: intellectual property rights slightly curbed	Loss: length of intellectual property rights and resulting market exclusivity not extended	Win: length of time to put generic drugs on the market reduced after IP rights expire	Loss: length of market exclusivity after the end of patents not guaranteed	Win: length of time to put generic drugs on the market reduced after IP rights expire	Loss: market exclusivity after the end of patents not guaranteed	Ambiguous: although ability to quickly put generic drugs out post-patent increased, decision did not reduce legal duration of IP rights

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