

IMPLICIT APPROACHES TO ADDRESS  
ENVIRONMENTAL CONCERNS IN THE WTO:  
FROM THE PERSPECTIVE OF APPELLATE  
BODY JURISPRUDENCE

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I. INTRODUCTION

Environmental protection is closely connected with economic development, and is clearly implicated in many World Trade Organization (WTO) agreements, such as the General Agreement on Trade (GATT), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>1</sup> Apart from that, through the WTO process of dispute settlement, the WTO panel and Appellate Body (AB) provide interpretation and application of provisions regarding environmental issues,<sup>2</sup> which, as this comment indicates, represent other implicit approaches to environmental problems. This comment will discuss two cases that address the concerns of environmentalism in implicit ways.

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC—Asbestos)*, the AB suggested that, when deciding whether two products are “like products,” consumers’ attitudes toward environmentally unfriendly products should be part of the evaluation.<sup>3</sup> In defining “relevant market” in *Canada—Certain Measures Affecting the Renewable Energy Generation Sector (Canada—Renewable Energy)*, the AB

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1. Agreement on the Application of Sanitary and Phytosanitary Measures art. V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 5, 1867 U.N.T.S. 493; Agreement on Technical Barriers to Trade arts. II, V, Apr. 12, 1979, 31 U.S.T. 405, 1186 U.N.T.S. 276; General Agreement on Tariffs and Trade arts. I, III, XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

2. *The Environment: A Specific Concern*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm) (last visited Jan. 26, 2020).

3. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 110–11, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter AB Report, *EC—Asbestos*].

brought governmental interests into consideration by viewing both the demand-side and the supply-side.<sup>4</sup> After analyzing the above cases, this comment will briefly explore the general effectiveness of implicit approaches in dealing with environmental concerns.

## II. EC—ASBESTOS

Chrysotile asbestos is generally considered a highly toxic material, exposure to which poses significant threats to human health, such as asbestosis, lung cancer, and mesothelioma.<sup>5</sup> However, due to certain qualities—such as resistance to very high temperature—chrysotile asbestos is also widely used in various industrial sectors.<sup>6</sup> To control the health risks associated with asbestos, the French government, which had previously been an importer of large quantities of chrysotile asbestos, imposed a ban on the substance and on products that contain it.<sup>7</sup> On behalf of France, the European Communities (EC) justified this prohibition on the grounds of human health protection, arguing that asbestos was hazardous not only to the health of construction workers subject to prolonged exposure, but also to the health of a portion of the population subject to occasional exposure.<sup>8</sup> As the second largest producer of asbestos world-wide,<sup>9</sup> Canada contested the prohibition in the WTO.

Canada claimed that the ban violated GATT Articles III and XI and Article 2 of the TBT Agreement, and also “nullified or impaired” benefits under GATT Article XXIII:1(b).<sup>10</sup> The EC argued that the TBT Agreement did not cover the ban, and, with regard to GATT 1994, requested that the WTO panel confirm the ban was either compatible with Article III:4

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4. Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶¶ 5.178, 5.199, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013) [hereinafter AB Report, *Canada—Renewable Energy*].

5. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 5.28, WTO Doc. WT/DS135/R (adopted Apr. 5, 2001).

6. *Id.* ¶ 3.48.

7. *Id.* ¶ 3.8.

8. *Id.* ¶ 8.194.

9. *Id.* ¶ 3.20.

10. *Id.* ¶ 1.2.

or “necessary . . . to protect human health” within the meaning of Article XX(b).<sup>11</sup>

Despite finding a violation of Article III, the panel found that the ban could be justified under Article XX(b).<sup>12</sup> It also met the conditions of the chapeau of Article XX.<sup>13</sup> It therefore ruled in favor of the EC, though did not enter a ruling specifically regarding TBT Agreement.<sup>14</sup> On appeal, the WTO AB upheld the panel’s ruling in favor of the EC, while modifying its reasoning on a number of issues. One such issue was the meaning of the word *like*. By what standard should *likeness* be defined? Following the instruction of Articles 31 and 32 of Vienna Convention on the Law of Treaties (VCLT),<sup>15</sup> the AB initially turned to the “ordinary meaning” of “like” according to various dictionaries, which helped little in resolving the issue of interpretation.<sup>16</sup> Then, the AB turned to the relevant context of GATT Article III:4, concluding that “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products,”<sup>17</sup> indicating that the AB adopted a market access standard in analyzing the meaning of likeness. The AB adopted the four criteria established in the “Report of the Working Party on *Border Tax Adjustments*” in analyzing likeness, including “(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits—more comprehensively termed consumers’ perceptions and behavior—in respect of the products; and (iv) the tariff classification of the products.”<sup>18</sup> Having adopted this approach, the AB resolved to assess all evidence related to each of those four criteria in making an overall determination of whether the products at issue could be consid-

11. *Id.* ¶¶ 3.4–3.7.

12. *Id.* ¶¶ 8.159, 8.193.

13. *Id.* ¶ 8.240.

14. *Id.* ¶ 9.1.

15. Vienna Convention on the Law of Treaties arts. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

16. AB Report, *EC—Asbestos*, *supra* note 3, ¶¶ 90–92.

17. *Id.* ¶ 99.

18. *Id.* ¶ 101 (citing Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 21 & n.46, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.8, WTO Doc. WT/DS2/R (adopted May 20, 1996)).

ered similar or substitutive in aspects of physical properties, end uses, customers' altitudes, and tariff classifications.

The AB evaluated evidence relating to asbestos health risks under the existing criteria of physical properties and consumer tastes and habits.<sup>19</sup> In doing so, the AB introduced public policy concerns—especially concerns regarding human health and environment protection—into the analysis of likeness while eschewing the “aim and effect” test,<sup>20</sup> which the WTO panel had previously rejected in *Japan—Alcoholic Beverages II*, noting that the aim “sometimes can be indiscernible.”<sup>21</sup> Thus, the difficulties of analyzing states' motivation makes the aim and effect test unstable and unclear. The AB criticized the panel for relying on end uses in the examination of physical properties.<sup>22</sup> Ironically, when introducing public policy concerns into the scrutiny of physical properties, the AB adopted the same approach for which it had criticized the panel. Indeed, it seems improper for the AB to take any other factor into account in the examination of physical properties if the AB believes that each aspect of the products involved, although interrelated, should be examined separately.<sup>23</sup> However, including public policy issues under the criterion of customers' tastes and habits seems reasonable and justifiable since this criterion, by its nature, encompasses the element of public interests and concerns. In such a context, the scope of consumers includes not only intermediate consumers (i.e., companies and manufacturers), but also “ultimate” consumers (i.e., individuals),<sup>24</sup> because both have interests that fall under

19. *Id.* ¶ 113.

20. “A measure could be said to have the *aim* of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal. A measure could be said to have the *effect* of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products.” Panel Report, *United States—Taxes on Automobiles*, ¶ 5.10, WTO Doc. WT/DS31/R (circulated Oct. 11, 1994).

21. Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.16, WTO Doc. WT/DS8/R (adopted Nov. 1, 1996).

22. AB Report, *EC—Asbestos*, *supra* note 3, ¶ 111.

23. *Id.* ¶¶ 102, 111.

24. *Id.* ¶ 122.

the rubric of human health and environmental protection. In this case, the AB intended to broaden the content of GATT Article III to better explain the definition of a *like* product by taking policy issues into consideration. However, this approach roused the initial panel's anxiety of less frequent invocation of Article XX(b), which allows members to adopt measure necessary to protect human, animal, or plant life or health, even if such measure is inconsistent with the GATT.<sup>25</sup> At the time, the panel was worried about which article should be applied in certain situations, but the AB dismissed the panel's concerns on this matter, noting that different inquiries occurred under these two very different articles.<sup>26</sup> Under Article III, evidence relating to health risks might be relevant in assessing the competitive relationship in the marketplace between allegedly like products.<sup>27</sup> According to the AB, "[t]he same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health."<sup>28</sup>

### III. CANADA—RENEWABLE ENERGY

In 2009, the provincial government of Ontario, Canada, enacted a law to incentivize the production of electricity from wind or solar generators, which also included a scheme to source a minimum level of the component parts and services from producers within Ontario.<sup>29</sup> Ontario's electricity system is "a partially liberalized 'hybrid'" wherein both public and private entities engage in generation, transmission, and distribution.<sup>30</sup> The Ontario government's involvement in the province's electricity market has been extensive; seeking to replace the capacity lost by the coal phase-out with cleaner options, the Ontario government has sought to incentivize greater production of wind and solar energy, choosing the widely used instrument of a "feed-in tariff" (FIT) program, which is a "pro-

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25. *Id.* ¶ 115.

26. *Id.*

27. *Id.*

28. *Id.*

29. Panel Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ VII.6, WTO Doc. WT/DS412/R (adopted May 24, 2013) [hereinafter Panel Report, *Canada—Renewable Energy*].

30. *Id.* ¶ VII.25.

gram for procurement, providing standard program rules, standard contracts and standard pricing.”<sup>31</sup> Under this program, the Ontario Power Authority—the body responsible for the “overall long-term system planning” of Ontario’s electricity sector—is required to procure energy through “a 20-year power purchase agreement in respect of all renewable fuels other than waterpower.”<sup>32</sup> Ontario also linked eligibility for its generous FIT to a local content requirement aiming to promote green industries; specifically, the applicable regulations require that, by 2012, the minimum required domestic content be fifty percent for large wind installations, and sixty percent for solar photovoltaic (PV).<sup>33</sup> The WTO panel would later find that the requirements were sufficiently high such that they could not be met absent some Ontario-sourced manufactured goods.<sup>34</sup>

The action that Japan and the European Union brought against Canada in the WTO was premised on attacking the discrimination inherent in the minimum required domestic content level.<sup>35</sup> To this end, they invoked three WTO provisions.<sup>36</sup> The first of the three, though, is most relevant to this comment: Japan and the European Union claimed violation of Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which forbids “subsidies that are contingent upon the use of domestic over imported goods.”<sup>37</sup> In fact, the issue of the existence of the subsidy was the most important part of the case, and so required examination of the two prerequisites—a financial contribution and a benefit—in the WTO definition of a subsidy.<sup>38</sup> Although both the panel and AB found the FIT contracts to be a financial contribution, neither body was able to issue an affirmative finding that there was a benefit to the recipient.<sup>39</sup>

Article 1 of the SCM Agreement establishes that a subsidy exists if “there is a financial contribution by a government or

31. *Id.* ¶¶ VII.195, VII.216.

32. *Id.* ¶¶ VII.24, VII.195.

33. *Id.* ¶ VII.158 tbl.1.

34. *Id.* ¶¶ VII.161–VII.162.

35. *Id.* ¶¶ III.1–III.5.

36. *Id.* ¶¶ III.1, III.4.

37. *Id.*

38. *Id.* ¶ VII.168.

39. *Id.* ¶¶ VII.222, VII.327.

any public body within the territory of a Member,” that confers a benefit to companies and individuals.<sup>40</sup> Both the panel and AB recognized the first part of the definition—the existence of financial contribution from the government—but the AB disagreed with the panel on the second step of the test, which requires that the financial contribution “confer a benefit” to the recipient.<sup>41</sup> For the identification of a benefit, the panel considered the market for electricity generated from all sources of energy to be the relevant market, since electricity generated from all sources share the same physical properties<sup>42</sup> and consumers do not distinguish between them.<sup>43</sup> However, the AB had, in a previous opinion, held that both demand-side and supply-side should be taken into account in defining the relevant market.<sup>44</sup> Although the fact that all types of electricity are physically identical suggests “high demand-side substitutability between electricity generated through different technologies,” there are “additional factors that may be used to differentiate [them] on the demand-side, . . . such as the type of contract, the size of the customer, and the type of electricity generated (base-load *versus* peak-load).”<sup>45</sup> In addition, from the perspective of the supply-side, under the Ontario scheme, the government purchased electricity “at the wholesale level and then resold [it] to consumers at the retail level.”<sup>46</sup> As an intermediate buyer, the Ontario government’s purchase decisions are shaped by its definition of the energy supply-mix, which requires it to purchase electricity generated through different technologies.<sup>47</sup> In the AB’s view, creating a market by defining the energy supply-mix “cannot *in and of itself* be considered as conferring a benefit” under Article I of the SCM Agreement.<sup>48</sup> In this sense, the AB’s interpretation of

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40. Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

41. AB Report, *Canada—Renewable Energy*, *supra* note 4, ¶¶ 5.130, 5.220.

42. Panel Report, *Canada—Renewable Energy*, *supra* note 29, ¶ VII.318.

43. *Id.*

44. Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 1121, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011).

45. AB Report, *Canada—Renewable Energy*, *supra* note 4, ¶ 5.170.

46. *Id.* ¶ 5.176.

47. *Id.* ¶ 5.175.

48. *Id.* ¶ 5.227.

a benefit distinguishes between two kinds of policies for subsidies: the creation of a brand-new market and the distortion of the existing market.<sup>49</sup> The former does not necessarily constitute a benefit under the SCM Agreement, creating a safe harbor for governmental subsidies in the guise of creating a new market.

In this way, the AB reached the conclusion that the relevant market should be the market for electricity produced from wind power or solar PV technology,<sup>50</sup> where the significance of government intervention is evident. The AB thus took a government policy of promoting clean energy into the definition of relevant market and addressed the non-trade value of environmental protection.

#### IV. PROS AND CONS OF IMPLICIT APPROACHES TO ENVIRONMENTAL CONCERNS

Sometimes, trade liberalism and non-trade values are in tension under the WTO system. Domestic regulations might conflict with state obligations stipulated in international trade treaties. In this case, WTO bodies first examine state behavior to determine whether it is consistent with other GATT articles before invoking GATT Article XX, which expressly lays emphasis on environmental concerns. In both examined cases, the AB tried to introduce environmental concerns in the first step without resorting to the general exceptions. By doing this, the AB insisted on the market approach and still found the opportunity to consider public policies in trade dispute settlements. By attaching more importance to the market, the AB deals with trade issues and thus has more freedom in making decisions, since trade issues fall within the AB's duty and it can avoid direct conflicts with members' regulation power.

Another important aspect of the implicit approach is that it can correct market distortions and supplement market incapacities. On the one hand, if the market itself cannot provide the efficient outcome, government intervention proves necessary. The AB, then, must refer to negative externalities as a legitimate reason to protect non-trade values. On the other hand, advancements in technology, the development of soci-

49. Panel Report, *Canada—Renewable Energy*, *supra* note 29, ¶¶ IX.12, IX.19.

50. *Id.* ¶¶ VII.277, VII.318.

ety, and the difficulties in compromising between countries gravely complicate the process of treaty interpretation and negotiation, making treaties incomplete and outdated. By explaining provisions actively and creatively, the AB runs the risk of judicial activism; yet, in this way, it keeps abreast of trends in development. Moreover, active and creative explanation is expedient due to instability and uncertainty. In the long run, states should take more time and energy to negotiate with each other in order to promote the diffusion and ratification of proper treaties to govern specific issues in changing situations. In this way, disputes can be resolved under color of international law, while judicial activism could be avoided. By turning the implicit approach into explicit international rules, states could promote the stability and certainty of the dispute settlement process.

