DEVELOPMENT OF THE WORLD TRADE ORGANISATION'S 'LIKE PRODUCTS' AND 'NO LESS FAVOURABLE TREATMENT' JURISPRUDENCE

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INTERNATIONAL COMMERCIAL LAW—WORLD TRADE ORGANISATION JURISPRUDENCE—TECHNICAL BARRIER TO TRADE AGREEMENT—GENERAL AGREEMENT ON TARRIFS AND TRADE—LIKE PRODUCTS—NO LESS FAVOURABLE TREATMENT—PROCESS AND PRODUCTION METHODS—ARBITRARY OR UNJUSTIFIED DISCRIMINATION BETWEEN MEMBER STATES

ABSTRACT

Both art 2.1 of the Technical Barrier to Trade Agreement and art III:4 of the General Agreement on Tariffs and Trade specifically refer to the terms 'like products' and 'no less favourable treatment'. Through the development of World Trade Organisation case law, the meaning of these terms has expanded significantly, resulting in a shift towards a broader interpretation. The effect of this expansion has meant that Member States are more likely to be able to engage in conduct that provides less favourable treatment between Member States, provided non-discrimination is present. Although affording a stark contrast between a traditional free-trade approach, it allows for an appropriate balance for the possibility of Member States to pursue legitimate

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objectives, including, inter alia, the protection of the environment and human health.

I INTRODUCTION

As the paramount international forum that deals with global rules of trade, one of the World Trade Organisation's ('WTO's) primary functions is to promote a liberal trading system.[1] A foundational principle of the WTO in its promotion of liberal trade is the non-discrimination principle, which seeks to ensure fair trade conditions amongst its Members.[2] Discrimination in trade has been described as having the potential to 'breed resentment' through 'poisoning political relations and distorting the market',[3] highlighting the necessity for the non-discrimination principle. The non-discrimination principle encompasses two sub-principles which seek to ensure non-discrimination, being 'national treatment' and 'most favoured nation'. The national treatment obligation prohibits countries from favouring domestic products over imported products, while the most favoured nation obligation proscribes discrimination between different countries.[4] Provisions in both the Technical Barrier to Trade Agreement ('TBT Agreement')[5] and the General Agreement on Tariffs and Trade ('GATT') [6] encompass this non-discrimination principle by requiring 'no less favourable treatment' to be afforded to 'like products'.[7] However, interpretation of 'no less favourable

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1 'What is the WTO?', *World Trade Organization* (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm>; 'The Case for Open Trade', *World Trade Organization* (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm>.

2 The non-discrimination principle is contained within several WTO agreements. See for example *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') art III:1 ('*GATT 1994*'); *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*').

3 Peter Van den Bossche and Werner Zduoc, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 4th ed, 2018) 305.

4 Ibid ch 4–5.

5 TBT Agreement (n 2).

6 *GATT 1994* (n 2).

7 Ibid art 2.1; *TBT Agreement* (n 2) art III:4.

treatment' and 'like products' has proven difficult throughout WTO history, as a result of these terms not being expressly or clearly defined.[8]

Recent WTO case law has provided some clarity by suggesting that the original interpretation of 'likeness' has expanded. The case law dictates that determining 'likeness' now allows for the consideration of process and production methods (being the inputs and process technologies utilised in the production of a product), which has significantly expanded its meaning.[9] Furthermore, although affording less favourable treatment between Members may be justified where there is a legitimate objective present (such as the protection of the environment or human health),[10] developments in WTO jurisprudence suggest that such measures cannot be inconsistent with the over-arching non-discrimination principle. This is because such measures may have the effect of restricting trade, creating a tension between the protection of free-trade and legitimate objectives.[11] The desire to attempt a balance between these two competing ideals has long been acknowledged, with this objective being cited in the first preamble of the *Agreement Establishing the WTO*.[12] Although the WTO and GATT Panels have previously favoured the traditional orthodox free trade view,[13] there has been a positive shift in recent WTO decisions that allows for broader circumstances

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8 Dukgeun Ahn, 'Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case' (1999) 20(4) *Michigan Journal of International Law* 819; Christopher Tran, 'Just Another Fish in the Sea? The WTO Panel Decision in US-Tuna III' (2012) 29(1) *Environmental and Planning Law Journal* 45.

9 Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc WT/DS58/AB/R (12 October 1998) ('*US—Shrimp*'); Appellate Body Report, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) ('*EC—Seal*'); Appellate Body Report, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico, WTO Doc WT/DS381/AB/RW (14 December 2018) ('*US—Tuna II (Mexico)*'); Bruce Neuling, 'The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate' (1999) 22(1) *Loyola of Los Angeles International and Comparative Law Review* 1, 13.

10 *GATT 1994* (n 2) art XX; *TBT Agreement* (n 2) art 2.2.

11 Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (4 April 2012) [173]–[182] ('*US—Clove Cigarettes*'); Klaus Liebig, 'The WTO and the Trade-Environment Conflict' (1999) 24(1) *Intereconomics* 83, 89; T Alana Deere, 'Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble' (1998) 10(1) *International Legal Perspectives* 1, 24.

12 *GATT 1994* (n 2) preamble.

13 GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) ('*US—Tuna I (Mexico)*'); GATT Panel Report, *United States —Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) ('*US—Tuna (EEC)*').

where Members can provide less favourable treatment to pursue legitimate objectives.[14] Analysing this shift is necessary, as this change in approach ultimately provides the contemporary foundation for Member States who engage in trading activities.

This article argues that interpretations of 'likeness' and 'less favourable treatment' under the GATT and the TBT Agreement (and by extension, the interpretation of the non-discrimination principle as a whole), have broadened through the development of WTO jurisprudence, which has in turn allowed for a greater balance between the competing concerns of free trade protection and the pursuit of legitimate objectives. Thus, it follows that Members can in fact provide less favourable treatment between 'like products', provided that non-discrimination is present. The article begins by discussing the traditional interpretation of 'like products' under both the TBT Agreement and the GATT, as previously, there has been a reluctance in WTO jurisprudence to consider process and production methods as a legitimate basis for distinguishing products. This historical approach will then be contrasted with more recent WTO jurisprudence, where determining 'like products' has been approached more broadly. This article will then similarly contrast the traditional and contemporary meaning of 'no less favourable treatment' under both Agreements and consider in what circumstances less favourable treatment may be justified today. In doing so, this article confirms the contemporary approach for engaging in trade.

II BACKGROUND OF THE TBT AGREEMENT AND THE GATT

[14] Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9); Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9); Nicolas DiMascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds apart or Two Sides of the Same Coin' (2008) 102 *American Journal of International Law* 48, 58-9; 'WTO Rules and Environmental Policies: Key GATT Disciplines', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm>.

A brief background on the sub-principles that exist in the TBT Agreement and the GATT is necessary to fully appreciate the 'expansion' of interpretation on which this article is based. The TBT Agreement is an international treaty that binds all WTO Members and aims to ensure that technical regulations, *inter alia*, are non-discriminatory and do not create unnecessary trade barriers.[15] A technical regulation is a document that lays down product characteristics or related process and production methods to which compliance is mandatory.[16] These may be in the form of regulations, standards, testing and certification procedures otherwise known as measures.[17] Article 2.1 of the TBT Agreement provides:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.[18]

Evidently, art 2.1 contains both a most favoured nation obligation and a national treatment obligation.[19]

The GATT is a legal agreement that aims to promote international trade by reducing or eliminating trade obstacles, such as tariffs or quotas.[20] Article III of the GATT provides for a national treatment obligation by seeking to ensure that internal measures (such as laws, rules, regulations, procedures and decisions)[21] are not applied to protect domestic production.[22] Article III:4 of the GATT provides:

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15 *TBT Agreement* (n 2); 'Technical Barriers to Trade', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm>; Jonathan Carlone, 'An Added Exception to the TBT Agreement After Clove, Tuna II, and Cool' (2014) 37(1) *Boston College Law School* 103, 105.

16 *TBT Agreement* (n 2) annex 1 art 1.

17 'Technical Barriers to Trade', *Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/trade/organisations/wto/Pages/technical-barriers-to-trade-tbt>.

18 *TBT Agreement* (n 2) art 2.1.

19 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) [87].

20 *GATT 1994* (n 2).

21 Ibid art XXVII(a).

22 Ibid art III:1.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to 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 …[23]

The GATT has a relatively general application in relation to technical regulations.[24] However, the TBT Agreement is tailored specifically to technical regulations, and thus, technical regulations will first be examined pursuant to this instrument.[25] Nevertheless, both agreements have a similar scope, and both contain non-discrimination obligations.[26] Additionally, both art III:4 of the GATT and art 2.1 of the TBT Agreement are similar in the sense that both agreements require Members to give 'no less favourable treatment' over 'like products'.[27] Although the development of WTO case law has demonstrated some key differences in interpreting 'likeness' under the GATT compared to the TBT Agreement, more recent WTO case law suggests the meaning of 'likeness' has expanded, allowing for a more consistent approach between both Agreements.[28] This shift also allows for a broader understanding of when products will be deemed alike and when an action will be considered 'less favourable'.

III LIKENESS

The term 'likeness' was originally afforded a narrow interpretation in WTO jurisprudence, though its interpretation has expanded significantly over time. The notion of 'like products' is not defined in either the GATT or the TBT

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23 Ibid art III:4.

24 Henry Hailong Jia, 'Entangled Relationship Between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions' (2013) 12(4) *Chinese Journal of International Law* 723, 759.

25 Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc WT/DS135/AB/R (12 March 2001) [80] ('*EC—Asbestos*').

26 *GATT 1994* (n 2) art III; *TBT Agreement* (n 2) art 2.

27 *GATT 1994* (n 2) art III:4; *TBT Agreement* (n 2) art 2.1.

28 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9); Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9); Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9); Neuling (n 9) 13.

Agreement. Rather, the meaning of 'like products' is derived from WTO case law, which has served as a cause for controversy in the development of WTO jurisprudence.[29] Determining the 'likeness' of products is critical; if products are not considered like, it is permissible for less favourable treatment to be applied to those products under art III:4 of the GATT and art 2.1 of the TBT Agreement, which is inconsistent with the non-discrimination principle.[30]

The term 'likeness' has been compared to an 'accordion' in that it can 'stretch' from a narrow to wide scope depending on which WTO provision it falls under.[31] In this context, the determination of 'likeness' focuses on whether products are in a competitive relationship with one another.[32] A collection of non-exhaustive factors have been developed throughout the case law to assist in determining whether two products are alike in the context of art III:4 of the GATT.[33] These factors have been held to include consideration of the product's physical properties, the extent to which the products are capable of serving the same or similar end-use, consumers taste and habits, and international tariff classification.[34] However, the Appellate Body in *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* ('*EC—Asbestos*') emphasised that 'likeness' should nevertheless be determined on a case-by-case basis.[35]

The traditional criteria determining likeness, as established in WTO case law concerning art III:4 of the GATT, is also applicable to an analysis of the term 'likeness' under art 2.1 of the TBT Agreement.[36] The core

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29 Joel P Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58(2) *Harvard International Law Journal* 273, 290.

30 Markus Krajewski, '"Like Products" in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence by Won-Mog Choi' (2015) 15(1) *King's Law Journal* 198; *GATT 1994* (n 2) art III:4; *TBT Agreement* (n 2) art 2.1; World Trade Organization and United Nations Environment Programme, *Trade and Climate Change: WTO-UNEP Report* (Final Report, 2009) 106.

31 Appellate Body Report, *Japan — Alcoholic Beverages II*, WTO Doc, WT/DS8/AB/R (1996) 21 ('*Alcoholic Beverages*').

32 Appellate Body Report, *EC—Asbestos*, WTO Doc WT/DS135/AB/R (n 25) 99.

33 Ibid 101.

34 Ibid.

35 Ibid 102; Appellate Body Report, *Alcoholic Beverages*, WTO Doc, WT/DS8/AB/R (n 31) 21.

36 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) 108–13.

controversy under determining 'likeness' is whether process and production methods can be used as a legitimate factor to distinguish products, and thus, to discriminate between otherwise 'like products'.[37] Members often attempt to restrict trade based on the process and production methods used on a product, raising the question as to whether process and production methods can be legitimately used to distinguish products.[38] In considering the legitimacy of using process and production methods to determine likeness, it is necessary to differentiate between product-related process and production methods and non-product-related process and production methods. The essential difference between these two terms is that in the latter, process and production methods have no impact on the final product—making the position even more unclear.[39] Although a GATT interpretation and TBT Agreement interpretation of 'likeness' still both possess key differences, both interpretations are arguably shifting towards a consistent broader approach.

A *The Traditional vs Contemporary Take on Process and Production Methods*

Traditionally, decision makers of WTO jurisprudence have been reluctant to consider process and production methods in the assessment of 'likeness', resulting in an inability for Members to defend differential treatment of products based on its process production methods. This is the case even where different process and production methods create environmental or other harms.[40] However, more recent authority suggests that it is a legitimate factor to distinguish products.

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37 Krajewski (n 30).

38 Konrad von Moltke, 'Reassessing Like Products' (1998) 29(1) *Trade, Investment and the Environment* 4, 5.

39 World Trade Organization and United Nations Environment Programme (n 30) 107; Robert Cunningham and Susanah Vindedzis, 'Four Legs Good, Two Legs Bad? Animal Welfare vs the World Trade Organization (Featuring Article XX of the General Agreement on Tariffs and Trade and Article 2 of the Technical Barrier to Trade' (2017) 38 *Adelaide Law Review* 311, 318.

40 Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27(1) *The European Journal of International Law* 9, 37; GATT Panel Report, *US—Tuna I (Mexico)*, GATT

1 *Process and Production Methods in Determining Likeness under the GATT*

United States — Restrictions on Imports of Tuna ('*US—Tuna I (Mexico)*') is an example of the consideration of process and production methods in the context of likeness.[41] In *US—Tuna I (Mexico)*, the United States of America ('US') placed an embargo on tuna imports that were caught using purse-seine fishing, a method of fishing that indirectly caught and killed dolphins.[42] One of the states that predominantly used the purse-seine fishing method was Mexico, meaning that it was significantly affected by the US' embargo on purse-seine tuna imports. Mexico then requested the establishment of a panel to hear the issue, on the basis that the measures were inconsistent with, *inter alia*, art III:4 of the GATT (which operates to ensure that internal measures are not applied to protect domestic production). The GATT Dispute Settlement Panel ruled that art III:4 of the GATT did not apply to the production processes of a product, only to the final product in itself.[43] The consequence of this ruling was that tuna caught by harmful methods—in this case, purse-seine net fishing—was considered alike to tuna caught using other non-harmful methods, as the GATT Dispute Settlement Panel found that there was no impact on the final tuna product itself. Therefore, the US did not have the right to distinguish between these two tuna products, despite the differences in their impact on the environment, making for a controversial decision.

However, in *EC—Asbestos*,[44] the Appellate Body found that an imported carcinogenic product and a domestic non-carcinogenic substitute were not like products, as the associated health risks of the products impacted

Doc DS21/R (n 13) [5.15].

41 Howse (n 40) 37; GATT Panel Report, *US—Tuna I (Mexico)*, GATT Doc DS21/R (n 13) [5.15].

42 GATT Panel Report, *US—Tuna I (Mexico)*, GATT Doc DS21/R (n 13).

43 Tran (n 8).

44 Appellate Body Report, *EC—Asbestos*, WTO Doc WT/DS135/AB/R (n 25).

on their physical characteristics.[45] The Appellate Body clarified that 'health risks associated with a product may be pertinent in an examination of likeness under [art III:4]'.[46] This case clarified that health risks associated with a product may be enough to deem two products unlike. It is important to note that the health risks in this case impacted on the final product itself (falling into the category of product-related process and production methods), unlike the circumstances in *US—Tuna I (Mexico)*, where there was no distinguishable basis found for the final product.

Furthermore, in *US — Import Prohibition of Certain Shrimp and Shrimp Products* ('*US—Shrimp*'), [47] the Appellate Body accepted the possibility of non-product-related process and production methods being a legitimate basis for discrimination by a Member State, although provided for under the general GATT exceptions for less favourable treatment, rather than under a determination of likeness in itself.[48] This reflects a significant shift in previous GATT interpretations and decisions whereby differential treatment can now potentially be afforded to products based on their process and production methods, provided non-discrimination is still present. The case of *US—Shrimp* will be discussed in greater detail below in the context of no less favourable treatment.

2 *Process and Production Methods in Determining Likeness under the TBT Agreement*

Academics suggest that art 2.1 of the TBT Agreement adopts a broader scope in determining 'likeness' than the GATT, as process and production methods are specifically recognised as an inherent part of a technical regulation;

45 Ibid 99.
46 Ibid 113.
47 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9).
48 Ibid.

though it was previously unclear whether determining likeness extended to non-product-related process and production methods.[49]

The case of *US — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico* (‘*US—Tuna II (Mexico)*’) concerned Mexico challenging a series of US statutory and regulatory measures to establish conditions for using ‘dolphin safe’ labels on canned tuna. The label could not be provided if, amongst other things, the tuna was caught through methods harmful to dolphins.[50] Unlike the decision in *US—Tuna I (Mexico),* the Appellate Body accepted that dolphin-friendly and dolphin-unfriendly tuna are not like products.[51] The Appellate Body heard evidence that US consumers preferred dolphin-safe tuna products over non dolphin-safe tuna products, speaking to the competitive relationship between the products and suggesting that art 2.1 can, in fact, apply to non-product-related process and production methods.[52] *US—Tuna II (Mexico)* raises questions as to the future determination of likeness under art III:4 in similar circumstances, as the competitive relationship between two products is a fundamental consideration for determining likeness.

Although ‘likeness’ was once interpreted narrowly, WTO case law decisions have resulted in a positive shift towards what constitutes ‘likeness’, by now allowing for the consideration of process and production methods as a legitimate basis for distinguishing between products, particularly where there is an impact on the competitive relationship between products.[53] However, even if process and production methods do not render products

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49 Trachtman (n 29) 282; Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) 169; Gabrielle Marceau, ‘A Comment on the Appellate Body Report in EC — Seal Products in the Context of the Trade and Environment Debate’ (2014) 23 *Review of European Community & International Environmental Law* 318, 325–8.

50 Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9).

51 Ibid [7.12]–[7.14].

52 Meredith A Crowley and Robert Howse, ‘Tuna-Dolphin II: A Legal and Economic Analysis of the Appellate Body Report’ (2014) 13(2) *World Trade Review* 321, 327; Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9) [6.66].

53 Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9).

unlike, there still might be a legitimate basis for providing less favourable treatment through the general exceptions, as illustrated in the case of *US—Shrimp*.[54] Ultimately, there is now greater potential for Member States to apply measures inconsistently to like products, as long as non-discrimination is present.

IV NO LESS FAVOURABLE TREATMENT EXCEPTIONS

Although the general proposition is that there must be no less favourable treatment between like products, less favourable treatment may actually be justified if considered a legitimate objective, and non-discrimination is present. Therefore, 'legitimate objective' can be considered an exception to the no less favourable treatment obligations in art III:4 of the GATT or art 2.1 of the TBT Agreement.

Interpretation of 'no less favourable treatment', which is not defined in the Agreements, has gained increasing attention in recent years.[55] Less favourable treatment arises where Members products are disadvantaged compared to the treatment of a like domestic, or otherwise imported, product. In *US — Measures Affecting the Production and Sale of Clove Cigarettes* ('*US—Clove Cigarettes*'),[56] menthol and clove cigarettes were interestingly deemed like products.[57] The Appellate Body then found that banning imported clove cigarettes while exempting domestic menthol cigarettes afforded less favourable treatment to imported clove cigarettes as clove cigarettes were placed at some disadvantage with no regulatory justification.[58]

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54 *GATT 1994* (n 2).

55 Won-Mog Choi, *'Like Products' in International Trade Law*: *Towards a Consistent GATT/WTO Jurisprudence* (Oxford University Press, 2003); Damien Neven and Joel P Trachtman, 'Philippines – Taxes on Distilled Spirits: Like Products and Market Definition' (2013) 12(2) *World Trade Review* 297, 326.

56 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11).

57 Ibid [173]–[182].

58 K William Watson, 'As Expected, WTO Clove Cigarette Case Goes Nowhere', *CATO Institute* (Web Page, 8 October 2014) <https://www.cato.org/blog/expected-wto-clove-cigarette-case-goes-nowhere>.

Similarly, in *US — Standards for Reformulated and Conventional Gasoline* ('*US—Gasoline*'),[59] the US implemented a measure establishing baseline figures for gasoline sold on the US market (which had different methods for domestic and imported gasoline), with the overarching purpose to prevent air pollution, through regulating the composition and emission effects of gasoline.[60] Despite this purpose, the Appellate Body found that this measure violated art III:4 as the imported gasoline experienced less favourable sale conditions than those afforded to domestic gasoline, strictly being treated less favourably.[61]

No less favourable treatment does not require identical treatment between like products; however, it does require effective equality of competitive conditions,[62] as acknowledged in *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* ('*EC—Seal*').[63] Yet *US—Gasoline* demonstrates that having regard only to competition conditions can result in unfair outcomes.[64] This interpretation prevents the possibility of Members making legitimate regulatory distinctions, although these are largely covered under the GATT's general exceptions and the TBT Agreement's equivalent.[65]

Even where less favourable treatment appears, measures may still be excused where a legitimate objective is present.[66] However, if a legitimate objective is construed too narrowly, it may prevent Members from pursuing important policy objectives. On the other hand, if a legitimate objective is construed too broadly, it could undermine free trade objectives.[67] As such, an

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59 Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WTO Doc WT/DS2/AB/R (29 April 1996) ('US—Gasoline').
60 Ibid.
61 Ibid 22.
62 Appellate Body Report, *United States—Section 337 of the Tariff Act of 1930,* WTO Doc BISD 36S/345 (1989) [5.11]–[5.13].
63 Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9) [5.101].
64 Ibid; Appellate Body Report, *US—Gasoline*, WTO Doc WT/DS2/AB/R (n 59) 22.
65 Trachtman (n 29) 284.
66 *GATT 1994* (n 2) art XX; *TBT Agreement* (n 2) art 2.1.
67 Glyn Ayres and Andrew D Mitchell, 'General and Security Exceptions Under the GATT and the GATTS' (2012) *International Trade Law and WTO* 2, 15.

appropriate balance of these competing considerations is necessary to adequately uphold the non-discrimination principle. For less favourable treatment to be justified, the measure in question must be both a legitimate objective and be applied in a non-discriminatory manner.

The GATT art III:4 no less favourable treatment jurisprudence, inclusive of its justifications, is also applicable to the interpretation of no less favourable treatment under art 2.1 of the TBT Agreement. Under the GATT, no less favourable treatment justifications are specifically considered under the general exceptions, whereas under the TBT, they are considered more generally. Although this suggests an approach inconsistent between the two Agreements, the same factors are ultimately still considered under both Agreements and are applied in such a way to deliver similar outcomes. For convenience, these justifications will be discussed together.

A *Justifications Under the Agreements*

Even where a Member has acted inconsistently with art III:4 of the GATT or art 2.1 of the TBT Agreement by affording a like product less favourable treatment, the measure may still be justified provided that the Member is pursuing a legitimate objective in a non-discriminatory manner.[68] The notion of what constitutes a legitimate objective has a broad ambit and includes, *inter alia*, measures for the protection of the environment and human health.[69] The legitimate objective notion falls within the ambit of the general exceptions in the GATT and is more specifically contained within articles in the TBT Agreement, namely art 2.2.

Article XX of the GATT provides for a number of instances where Members may be excused from acting in breach of GATT rules; these are

[68] *GATT 1994* (n 2) art XX; *TBT Agreement* (n 2) art 2.2.
[69] *TBT Agreement* (n 2) art 2.2.

known as the 'general exceptions'.[70] To justify protection of a GATT breach under art XX, the conduct in question must fall within one of the sub-ss (a)-(j) and must also satisfy the stringent requirements imposed by the opening clause of art XX, known as the 'chapeau'.[71] The chapeau essentially requires that non-discrimination be present. Most relevant to the environment and human health, art XX(b) establishes an exception for measures that are necessary to protect human or animal life or health, and art XX(g) provides an exception for measures taken in relation to the conservation of exhaustible natural resources.[72] Case law interpreting these sub-sections has long allowed for a broad interpretation, however, the chapeau (being the second hurdle) continues to be interpreted narrowly.

1 *The Use of Legitimate Objective under the GATT*

In *US—Tuna I (Mexico),* the Panel accepted that art XX(b) could apply to measures protecting dolphin life and, therefore, would allow for distinction between the established like products. However, the US' justification ultimately failed for not satisfying the chapeau requirements of non-discrimination.[73] This finding was also supported in *US — Restrictions on Imports of Tuna* ('*US—Tuna (EEC)*').[74] In 2018, *US—Tuna II (Mexico)* qualified the art XX(b) exception by holding that protection of the life or health of individual animals will be a legitimate objective, even if the environment does not comprise part of the measure, thereby confirming an even broader application for the first requirement under art XX.[75]

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70 'WTO Rules and Environmental Policies: GATT Exceptions', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm>.
71 *GATT 1994* (n 2) art XX, sub-ss (a)–(j).
72 Ibid art XX, sub-ss (b), (g).
73 GATT Panel Report, *US—Tuna I (Mexico)*, GATT Doc DS21/R (n 13).
74 GATT Panel Report, *US—Tuna (EEC)*, GATT Doc DS29/R (n 13) [5.25].
75 Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9); Cunningham and Vindedzis (n 39) 332.

The phrase 'relating to' under art XX(g), merely requires a direct connection, which generally has not proven difficult to satisfy.[76] The meaning of the term 'necessary' under art XX(b) requires the weighing of several factors, including the importance or value protected by the measure, the contribution of the measure to its overall objective and the trade-restrictiveness of the measure.[77] If a less trade-restrictive alternative is reasonably available, the measure will not be 'necessary'.[78] Despite this, these sub-sections are not difficult to satisfy when pursuing a legitimate objective in a non-discriminatory manner.

2 *The Use of Legitimate Objective Under the TBT Agreement*

Unlike the GATT, the TBT Agreement does not contain specific general exceptions. However, art 2.2 of the TBT Agreement provides that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'.[79] These 'legitimate objectives' include, *inter alia*: protection of human health or safety; animal or plant life or health; and the environment (similar to that provided for under the GATT general exceptions).[80] The term 'necessary' under art 2.2 is interpreted similarly to the same term under art XX(b) of the GATT, thus requiring a weighing exercise of all relevant factors, with consideration given to any alternatives.[81] The 'necessity' requirement is not typically a high standard to meet and has been given an expansive application under WTO case law, similar to that under the GATT.[82] Although

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76 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc, WT/DS161/AB/R (10 January 2001) 16–18 ('*Korea—Beef*').

77 Cunningham and Vindedzis (n 39) 336; Ibid [164].

78 Appellate Body Report, *Korea–Beef*, WTO Doc, WT/DS161/AB/R (n 76) [166].

79 *TBT Agreement* (n 2) art 2.2.

80 Ibid.

81 Appellate Body Report, *Korea–Beef*, WTO Doc, WT/DS161/AB/R (n 76); Anyi Wang, 'The Necessity Test in Article 2.2 of the TBT Agreement' (MSc Thesis, Wageningen University, 2019) 58; Gisele Kapterian, 'A Critique of the WTO Jurisprudence on Necessity' (2010) *International and Comparative Law* 59(1) *Quarterly* 89, 97.

82 Appellate Body Report, *Korea–Beef*, WTO Doc, WT/DS161/AB/R (n 76).

a legitimate objective is likely to be interpreted broadly, the legitimate objective principle must be applied in accordance with the non-discriminatory principle, which has a stricter application.

B *The Non-Discrimination Principle and No Less Favourable Treatment*

Even if a legitimate objective is present, Members are still limited in applying measures in accordance with the non-discrimination principle under both the GATT and TBT Agreement. The chapeau of GATT art XX provides that the objectives contained in sub-ss (a)-(j) are not to be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and must not be 'a disguised restriction on international trade'.[83] The chapeau is said to be included to prevent the abuse of art XX for protectionism, given the sub-sections have such a broad ambit.[84] A measure will be arbitrary or unjustified where it is not rationally connected to the objective of the measure.[85] The requirement in the chapeau has proven more difficult to satisfy, as opposed to the legitimate objective discussed above. This necessitates a balance between traditional free trade principles and allowing Members to pursue a legitimate objective where needed.[86]

In *US—Clove Cigarettes*, the Appellate Body stated that a technical regulation which is de facto discriminatory may still comply with art 2.1 of the TBT Agreement if the discrimination comes from a legitimate regulatory distinction in the sense of being 'even-handed' in its application.[87] Although not provided for in the same form (i.e. as a 'general exception'), it appears

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83 *GATT 1994* (n 2) art XX.
84 Van den Bossche and Zduoc (n 3) 573.
85 Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9) [337]–[339]; Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [227].
86 Johanna Sutherland, 'International Trade and the GATT/WTO Social Clause: Broadening the Debate' (1998) 14(1) *Queensland University of Technology Law Journal* 83, 85.
87 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) [173]–[182].

that the scope of art 2.2 (encompassing the non-discrimination principle) of the TBT Agreement applies similarly to art XX of the GATT.[88] Thus, where arbitrary or unjustified discrimination is present, there will also be a violation under art 2.1 of the TBT Agreement.[89] The chapeau test and the similar even-handedness requirement under the TBT Agreement both fall under the broader umbrella of non-discrimination requirements.[90]

The non-discrimination requirement is well illustrated through the case of *US—Shrimp*.[91] In *US—Shrimp*, the US implemented a ban on the importation of shrimp caught by shrimp trawl fishing on the basis that this method of fishing contributed to the mortality of sea turtles (similar to the issues presented in *US—Tuna I (Mexico)* and *US—Tuna II (Mexico)*).[92] In order to import shrimp caught by this method of fishing, importers were required to use a 'turtle excluder device' or an equivalent system to minimise incidental fishing of sea turtles when harvesting shrimp.[93] The Appellate Body viewed this measure as directly connected to the policy of conservation of sea turtles within the ambit of art XX(g), further clarifying that it is possible to distinguish likeness based on non-product-related process and production methods.[94] However, the US' justification ultimately failed as the measure was not applied consistently and was not in the 'spirit' of the chapeau.[95] This is because there was evidence that the US provided turtle excluder devices to other jurisdictions—such as the Caribbean—but not to the complainants. Therefore, the measure had a discriminatory application, breaching the chapeau.[96]

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88 Cunningham and Vindedzis (n 39) 334.
89 Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R (29 June 2012) [271].
90 Marceau (n 49) 325.
91 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9).
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.
96 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9); Cunningham and Vindedzis (n 39) 319–20.

Similarly, in *US—Tuna II (Mexico)*, the Appellate Body found that the measure seeking to address fishing through the purse-seine method in the Eastern Tropical Pacific Ocean did not address other similar methods, which also harmed dolphins in other jurisdictions. As such, the measures lacked even-handedness, preventing them from being justified.[97] Following this determination, the US now requires certification that no dolphin has been injured before any tuna products are eligible for the dolphin-safe label, applying consistently to all Members in a non-discriminatory manner.[98]

Finally, in *EC—Seal*, the European Union placed a ban over the import of seal-related products (including meat, oil, blubber, organs, raw fur skins and fur skins) for animal welfare concerns but allowed for several exceptions which did not address the same concerns, such as for the indigenous communities.[99] Canada and Norway challenged the consistency of the European Union measure. The WTO held that prohibiting other jurisdictions—such as Canada and Norway—from commercial hunting for animals was not rationally connected to the measure's objective, as the same concerns existed with the exceptions but were not adequately addressed, lacking even-handedness.[100] Following this, the European Communities now base the indigenous community exception on the satisfaction of animal welfare conditions, achieving a consistent application across the board.[101] It is likely that if *EC—Seal* or *US—Tuna II (Mexico)* were reconsidered today, the measures would be justified as they are no longer applied in a discriminatory manner due to the subsequent certification and conditions implemented, which previously hindered its effectiveness.

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97 Cunningham and Vindedzis (n 39) 319–20.
98 Ibid 337; Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9) [7.266].
99 Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9).
100 Ibid [5.338].
101 Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 Amending Regulation (EC) No 1007/2009 on Trade in Seal Products and Repealing Commission Regulation (EU) No 737/2010 [2015] OJ L 262/1; Cunningham and Vindedzis (n 39) 337.

Although the GATT's chapeau and the TBT's similar even-handedness requirements are a more difficult burden to satisfy than the achievement of a legitimate objective, the WTO case law discussed above provides authority for the proposition that less favourable treatment can be afforded to like products, so long as a legitimate objective is being pursued in a non-discriminatory manner.[102] This provides an appropriate balance between protection of free-trade and the pursuance of legitimate objectives by Member States, both of which have validity.

V CONCLUSION

This article has argued that interpretations of 'likeness' and 'less favourable treatment' under the GATT and the TBT Agreement have broadened through the development of WTO jurisprudence, resulting in a greater balance between the competing concerns of free trade protection and the pursuit of legitimate objectives. Ultimately, it appears that it is now possible to have 'less favourable treatment' between 'like products', so long as there is a legitimate objective involved which is applied in a non-discriminatory manner. While this approach seeks to uphold traditional WTO objectives, it also allows a balance for Member's sovereign freedoms to be achieved. Although this approach could continue to change over time, as has been seen in WTO history, it provides the current framework in assessing whether a Member State has acted in accordance with either the TBT Agreement or the GATT when engaging in trade.

The task of interpreting 'likeness' and 'no less favourable treatment' under both art III:4 of the GATT and art 2.1 of the TBT Agreement continues to develop under WTO jurisprudence. Recent cases tend to indicate a broader interpretation of 'like products', allowing for consideration of process and

[102] Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9); Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9).

production methods as a legitimate basis to provide less favourable treatment under both the GATT and TBT Agreement.[103] This is particularly justifiable when the process and production methods impact the product's competitive relationship, falling under traditional factors for determining likeness. However, further clarification is necessary as to applicability for art III:4 of the GATT.

Additionally, even where less favourable treatment is afforded to like products, the measures may still be justified by the nature of art XX of the GATT and art 2.2 of the TBT Agreement. Both [104] arts require a broad legitimate objective, applied in accordance with non-discriminatory objectives, where a stricter standard remains.[105] This outcome is achieved through the requirements in the chapeau, prohibiting arbitrary or unjustified discrimination, and the similar even-handedness requirements in the TBT Agreement.[106] This approach allows for a more appropriate balance between tensions of free trade, on the one hand; and allowing Members to achieve legitimate objectives, on the other. The modern approach evoked in these cases contrasts with traditional WTO jurisprudence, which previously held that trade restrictions in response to other countries' environmental policies were inconsistent with the GATT.

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103 Ibid.
104 Howse (n 40) 36.
105 Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9).
106 *GATT 1994* (n 2) art XX.