

Let us put to bed, for once and for all, the false distinction between product standards and standards based on process and production methods (PPMs).¹ This distinction is neither based in GATT text and negotiating history, nor useful in application.

The traditional interpretation of GATT law holds that distinguishing among products at the border on the basis of PPMs is a violation of the GATT principles of non-discrimination.² This is based on a reading of the national treatment and most-favoured nation clauses (GATT Arts. III and I, respectively) that defines "like" products as those that are distinguishable by their characteristics as products. Some recent dispute panels have used the criterion of commercial substitutability to determine which products are "like," and therefore subject to identical treatment at the border of the importer. But in neither case is there scope for products produced differently to be considered "unlike," and thus treated differently.

This interpretation has caused no small amount of concern in the environmental community, for whom how a product is produced is one of the central aspects of effective environmental management.³ In fact, the "PPMs issue" is at the heart of the long-running trade and environment debates, and its satisfaction would contribute powerfully to making the objectives of environmental integrity and increased welfare through trade to be mutually supportive.

It has been convincingly argued that the distinction between PPM-based standards and product-based standards is not based in GATT text or in GATT negotiating history.⁴ This paper takes that proposition as a given, and goes on from there to argue that the distinction is neither warranted nor useful in practice. It concludes with some recommendations for helping exporters, particularly in developing countries, adapt to new standards, both product-based and PPM-based.

¹ In this text, "PPMs" stand for non-product-related PPMs. Similarly, "product standards" are shorthand for both product standards and product-related PPM-based standards. For an explanation of these distinctions, see International Institute for Sustainable Development/United Nations Environment Programme, *Environment and Trade Handbook*. Winnipeg: IISD, 2000, 41 – 42. (<http://www.iisd.org/trade/handbook>).

² For a thorough statement of this view see, for example, Janet Chakarian, "PPMs and the GATT," in OECD, *Trade and Environment: Process and Production Methods*. Paris: OECD, 1994, 113 – 120.

³ It has also caused consternation for other groups such as animal welfare advocates and those concerned with human rights.

⁴ See Rob Howse, "The Product/Process Distinction - An Illusory Basis for Disciplining "Unilateralism" in Trade Policy," *European Journal of International Law*, 11, No. 2, 2000.

Unpacking the objections to PPMs

Aside from the issue of PPM-based standards' GATT-legality, those who object to them offer three main arguments. First, such standards provide unacceptable scope for protectionist measures by those setting them. Second, enforcing them is difficult in practice. Third, they infringe on sovereignty by exporting the values of the standard-setter to exporting countries. Because of these factors, the argument goes, PPM-based standards impose unacceptable costs on exporters, particularly in developing countries. These considerations are dealt with in turn below.

It is quite true that allowing countries to distinguish at the border among goods based on how they were produced opens up a whole new field of possibilities in which to exercise protectionist tendencies. Canada might, for example, support its domestic automobile industry by decreeing that all imported automobiles must be manufactured by workers who are fans of ice hockey, Canada's *de facto* national game.

But it is also true that we have the tools to address such problems. In fact they are currently in use to protect exporters from exactly the same sort of behaviour in the context of product-based standards. There is no fundamental difference between a WTO panel trying to distinguish between protectionism and legitimate protection of health and environment in the context of a product standard – say, a ban on asbestos in building materials – and in the context of a PPM-based standard. The task is the same, and the tools at hand – for example, the chapeau to GATT's Article XX – are the same.⁵

Those tools in fact help to cool off a long-standing hot-spot of trade and environment disputes: the question of unilateral measures for environmental protection. If we accept that the rules governing product-based measures are already working to weed out protectionism, and are capable of doing the same in the context of PPM-based measures, we have made the question of unilateral measures meaningless. Any PPM-based measure is propounded within the framework of multilaterally-agreed rules, and thus is not in any meaningful sense unilateral at all.

So while it must be conceded that the scope for protectionism may be increased by allowing countries to use PPM-based distinctions at the border, it should not

⁵ In fact, the Article XX chapeau has been used successfully to weed out PPM-based protectionism. The WTO *Shrimp-Turtle* case (United States — Import prohibition of certain shrimp and shrimp products) is an excellent example of this dynamic at work – the Appellate Body had no fundamental problems with the application of PPM-based distinction, but found that the measure was applied in a manner that was arbitrary and unjustifiable, and constituted a disguised barrier to trade.

be conceded that the existing tools are not up to the job, or that the task is fundamentally different in the context of PPM-based standards than it is in the context of product standards.

The argument that enforcing PPM-based standards is impractical seems to present a real-world reason for distinguishing them from product-based standards. The latter, it is argued, can be checked at the border for compliance. The former cannot – compliance or non-compliance has no physical effect on the final product.

This argument may have held water when the GATT was negotiated. It even had merit when negotiators of the Agreement on Technical Barriers to Trade (TBT) used it in the Tokyo Round. But it has lost all relevance in today's world. Third-party certifications and testing are now a basic fact of life for many businesses, with multinational specialized standards firms ready to service the growing demands. And the reality is that a huge number of PPM-based standards are already in effect, albeit imposed by buyer firms rather than governments. ISO 14001, which in many sectors is becoming a prerequisite for international trade, is clearly a PPM-based environmental management standard. Governments, too, propound PPM-based standards. Many sanitary and phytosanitary (SPS) standards are PPM-based, as are rules for intellectual property protection. None of the practical difficulties predicted for PPM-based standards has proved insurmountable in these contexts.

The notion that PPM-based standards constitute an infringement on sovereignty is on its face reasonable: they force producers in developing countries to produce to the standards of the importers, which may be inappropriate for the country of manufacture. But on closer examination this objection does not hold water. First, it should be noted that there is no difference in effect between such standards and product standards. Both mandate a change in the production process, both presumably imply increases in production costs – at least in the short run. And both constitute a new condition of entry into the market of the standard-setter. So the effects of product-based standards – which it is agreed do not necessarily violate the principle of non-discrimination – are no different than those of PPM-based standards.

But more fundamentally, it seems strange to contend that an importer specifying its preferences, either with regard to the final product or with regard to the method of production, is infringing on sovereignty. Absent protectionist motives, how is such a specification any different than the countless buyers' specifications with which exporters are routinely faced, many of which detail the PPMs to be used? It is not. If the producer wishes to ignore these specifications, there is no force that can change his or her mind, and thus no infringement on sovereign rights. Neither is there an export of values as such. In fact, the real forceful export

of values would take place were a country forced to import goods produced in ways of which it did not approve – the situation under the traditional interpretation of GATT law.

The one force that might change an exporter's mind is the market; if the production process does not change, the buyer will go elsewhere. As in response to any sort of market change due to consumer preferences, an exporter facing PPM-based standards will either adapt or perish.

Impacts on less-developed countries

This brings us to the fourth issue – the effects of such standards on developing country exporters. If the proper framework for discussion were trade and environment, the dictum “adapt or perish” would be the end of the story. But, as has been forcefully argued in the past, the proper framework for discussion is in fact trade and sustainable development.⁶ We therefore need to be concerned if the preferences of the affluent importer adversely affect the lives and livelihoods of exporters in less well-off nations.

Whether the prospect is a ban on azo dyes in textiles, or on old growth forest products – that is, whether it is a product-based measure or a PPM-based measure – the decision to enact new standards needs to be taken responsibly, and in line with the well-established objects and purposes of WTO special and differential treatment for developing countries. In a break with such well-established tradition, however, such treatment should be based in hard law requirements. The soft-law commitments to special and differential treatment as now specified are demonstrably more honoured in their breach than in their observance.⁷

Some of the guidelines that any standard-setter should have to observe include:⁸

- Transparency in the process of standard-setting, and the opportunity to comment on draft measures.
- Adequate lead-time in announcing new standards to allow for adaptation.
- Where appropriate, efforts to work toward international agreements on standards.

⁶ See IISD (1994), *Trade and Sustainable Development Principles*. Winnipeg: IISD.

⁷ See Ricardo Meléndez-Ortiz and Ali Dehlavi, 2000, “Trade, Environment and Sustainable Development, The Case for Updating Special and Differential Treatment in the WTO,” in, Peider Kőnz et al., eds., *Trade, Environment and Sustainable Development, Views From Sub-Saharan Africa and Latin America: A Reader*, Tokyo/Geneva: The United Nations University/International Centre for Trade and Sustainable Development.

⁸ The reader will note that some of these guidelines are derived from the Appellate Body decision in the WTO *Shrimp-Turtle* case (AB-1998-4).

- Allowance for functional equivalence in meeting standards (i.e., not specifying particular technologies or production methods, but rather outcomes).
- Where requested by exporters, assistance in adapting, such as:
 - training and technology transfer;
 - establishment of centres for testing and certification; and
 - financial assistance for one-time adjustment costs.

The costs of the latter measures could be borne by the standard-setter, or by some cost-sharing arrangement between that country and a special WTO fund for adaptation. The practical benefit of forcing standard-setters to help in the adjustment to their standards – respect for the principles of sustainable development aside – is that it works to abolish the separation between costs and benefits now inherent in the system. In the context of domestic standards, governments are forced to balance the costs and benefits of regulation at some level, since both are incurred nationally. In the international context these costs and benefits are separated so that there is little incentive for countries to act reasonably in demanding improved producer performance. This can lead to extremely costly standards that have only slight benefits.⁹

In summary, there is no practical difference between standards based on product characteristics, and standards based on process and production methods. Both offer the same challenges, and for both tools exist to address the problems that can arise in their use. It is time that the trade and environment debates moved beyond this false distinction to address issues of real import, such as the need to address the needs and special difficulties faced by developing countries in the face of the existing system of multilateral trade rules. Doing so will help to ensure that those rules contribute to sustainable development.

⁹ For example, a recent World Bank study estimated that the European Union's new aflatoxin standards would reduce African exports to Europe of nuts, cereals, and dried fruits, cutting exports by \$670 million compared with the levels that would prevail under international standards. The benefits are estimated to be an annual reduction of 1.4 deaths per billion. Tsunehiro Otsuki, John S. Wilson, and Mirvat Sewadeh, "A Race to the Top? A Case Study of Food Safety Standards and African Exports," World Bank Working Paper No. 2563, Washington, D.C.: World Bank, 2001.