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THE CONSISTENCY OF THE EU RENEWABLE ENERGY DIRECTIVE WITH THE WTO AGREEMENTS*

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I Introduction and Conclusions

1. This opinion examines the consistency of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (the ‘EU Renewable Energy Directive’) with the European Communities’ (‘EC’) obligations under the World Trade Organization (‘WTO’) Agreements. The opinion focuses on the obligations under the General Agreement on Tariffs and Trade 1994 (‘GATT’) and the Agreement on Technical Barriers to Trade (‘TBT Agreement’). The purpose of this opinion is to summarise the current state of the law on issues relevant to the EU Renewable Energy Directive and to apply that law to assess the consistency of the Directive with the EC’s WTO obligations. The focus is on the words of the agreements themselves and the previous case law, rather than on general policy arguments that have been repeated constantly in the literature.

2. This opinion reaches two conclusions. First, the EU Renewable Energy Directive is likely to be *prima facie* inconsistent with the EC’s obligations under the GATT. Secondly, it is unlikely to fall within the scope of the TBT Agreement, but if it does, it is likely to be inconsistent with the EC’s obligations under that agreement. The Directive does not by its terms discriminate against biofuels or biofluids from specific countries (references below to ‘biofuels’ are intended to include both biofuels and biofluids). However, if those biofuels that are treated less favourably by the Directive are in practice solely or predominantly from certain WTO Members, this will be inconsistent with the GATT and the TBT Agreement. This is likely to be the case, and could be confirmed with evidence of the source of biofuels that fall in the favoured and disfavoured categories created by the Directive. If so, whether the Directive is ultimately consistent with the GATT requires consideration, largely beyond the scope of this opinion, of the applicability of a general exception under GATT Article XX.

II Outline of the EU Renewable Energy Directive

3. The EU Renewable Energy Directive sets mandatory national targets for the use of renewable energy sources in EU Member states by 2020. Accordingly, the main effect of the Directive is that each EU Member must ensure that, in their country in 2020, the share of gross final consumption of energy from renewable sources is at least the national overall target for that year as fixed by the Directive.\(^1\)

4. To be included in the calculation of gross final consumption of energy from renewable sources, the biofuel must satisfy the sustainability criteria set out in Article 17.\(^2\) According to the ‘emissions-related sustainability criteria’, the use of the biofuel must result in a greenhouse gas emission saving of at least 35%. From 1 January 2017, that figure rises to a saving of at least 50%. From 1 January 2018, for biofuels the production of which started on or after 1 January 2017, the figure rises to a saving of at least 60%. Moreover, according to the ‘land-related sustainability criteria’, for all biofuels other than those produced from waste and residues (with certain

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\(^1\) EU Renewable Energy Directive Art 2.1.
\(^2\) EU Renewable Energy Directive Art 17.
exclusions), the biofuel or bioliquid must not have been made from raw materials obtained from the following areas of land:

a. Land with **high biodiversity value**: Land that had the status on or after January 2008, whether or not it continues to have that status, of: primary forest and other wooded land; areas designated for nature protection purposes or for the protection of endangered eco-systems or species; or highly biodiverse grassland.

b. Land with **high carbon stock**: Land that had the status on or after January 2007 and which no longer has the status of: wetlands; continuously forested areas; or land spanning more than one hectare with trees higher than five metres and a canopy cover of between 10% and 30%

c. **Peatland**: Land that was peatland in January 2008, unless obtaining the raw material did not drain previously undrained soil.

### III WTO Agreements and Case Law

5. No WTO Agreement explicitly requires WTO Members to regulate biofuels in any particular manner. However, specific provisions of the GATT and the TBT Agreement regulate WTO Members' treatment of goods in general, including biofuels.

6. The EU Directive on Renewable Energy raises WTO concerns because it treats certain biofuels differently on the basis of whether they meet the two sets of sustainability criteria. Biofuels that differ only on the basis of the emissions-related sustainability criteria are probably not like products, because the emissions they generate are arguably a physical characteristic of the final product. However, biofuels that differ only on the basis of the land-related sustainability criteria are probably like products, because the land from which they are derived does not affect the physical characteristics of the final product. For example, a biofuel made from raw materials sourced from land with a high biodiversity level is no different physically from one made from raw materials sourced from land without a high biodiversity level. In the WTO literature, this scenario involves a distinction based purely on so-called non-product-related process or production methods (references below to ‘PPMs’ mean ‘non-product-related process or production methods’).

7. Differential treatment is not per se WTO-inconsistent if it does not result in discrimination against other WTO Members. However, biofuels meeting the land-related sustainability criteria are likely to come from certain countries, and those not meeting the land-related sustainability criteria are likely to come from certain others. In practice, then, even if not explicitly in the Directive, the different treatment of like biofuels is likely to result in discrimination against certain WTO Members, contrary to the EC’s WTO obligations.

8. In the following sections, we consider how the above concerns manifest in the specific GATT and TBT Agreement disciplines. First, we consider the GATT disciplines under Articles I:1, III:4 and XI. We then turn to consider the general exceptions under Article XX that could apply to save the Directive from GATT-inconsistency. Finally, we consider the application of the TBT Agreement, which builds on principles developed in the GATT context.

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3 EU Renewable Energy Directive Art 17.2.
A. GATT

i. GATT Article I

9. GATT Article I:1 provides, with respect to measures falling within Art III:4, that ‘any advantage, favour, privilege or immunity granted by any Member 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 Members.’

10. Article I:1 has three elements: (i) any advantage must be extended to (ii) the like products originating in any WTO Member (iii) immediately and unconditionally. None of these terms is defined in the GATT, but they have been clarified in case law. Further, if the Directive falls outside the scope of Art III:4, an issue we consider below at [24], it will also fall outside the scope of Art I:1.

11. **Advantage.** The term ‘advantage’ has been interpreted broadly in the case law, and the Appellate Body has noted that Article I:1 refers to ‘any advantage’. Panels have said that ‘advantages’ are those that create ‘more favourable competitive opportunities’ or ‘affect the commercial relationship between products of different origins’. Examples of ‘advantages’ from the case law include: exemptions from import duties or other fees; intellectual property protection; and freedom from certain legal requirements. Here, allowing certain biofuels to count towards a Member’s gross final consumption of energy from renewable sources is clearly an advantage. It encourages Members to use those biofuels that satisfy the sustainability criteria over those that do not with respect to government procurement. Member states will also inevitably introduce legislation to encourage consumers to purchase biofuels meeting the criteria over those that do not. The Directive itself recognises that biofuels ‘meeting those criteria [must] command a price premium compared to those that do not’ if the criteria are to achieve their environmental goals. For example, the German legislation implementing the Directive entitles electricity producers to payment of a tariff under the Renewable Energy Sources Act with respect to electricity produced from bioliquids only if those bioliquids meet the sustainability criteria.

12. **Like products.** The term ‘like products’ is not defined in the GATT. The Appellate Body has said that ‘[t]he concept of “likeness” is a relative one that evokes the image of an accordion’. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied’. Notwithstanding, the approach to ‘likeness’ is broadly similar under the GATT provisions.

13. In two unadopted GATT Panel reports, it was held that two products are not ‘unlike’ under GATT Article III:4 by virtue of different production methods, where that sole

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4 PR, EC – Commercial Vessels [7.81].
5 ABR, EC – Bananas III, [206]; PR, Colombia – Ports of Entry, [7.340], [7.345].
6 ABR, Canada – Autos, [79] (emphasis in original).
7 PR, Colombia – Ports of Entry, [7.341]; PR, EC – Bananas III (Guatemala and Honduras), [7.239].
8 ABR, Canada – Autos.
9 GPR, US – Customs User Fee, [122].
10 PR, EC – Trademarks (US), [7.710]-[7.716]. This was conceded by the European Communities and not actually found by the Panel, which exercised judicial economy on this claim.
11 PR, Colombia – Ports of Entry, [7.344]-[7.352].
12 EU Renewable Energy Directive preamble (76).
13 Ordinance on requirements pertaining to sustainable production of bioliquids for electricity production Art 3.
14 ABR, Japan – Alcoholic Beverages II, 21.
difference had no impact on the physical characteristics of the final product.\textsuperscript{15} Although unadopted GATT Panel reports have no legal status, they can provide ‘useful guidance’.\textsuperscript{16} Moreover, the principle stated in these Panel reports has not been explicitly overturned, and other cases have found that products are ‘like’ despite differences in the characteristics of the producer.\textsuperscript{17} Applying this view, biofuels that differ only on the basis of the emissions-related sustainability criteria are probably not like because gas emissions created by burning these products are physical characteristics. However, biofuels that differ only on the basis of the land-related sustainability criteria are like. The difference in the nature of the land does not affect the physical characteristics of the final biofuel itself.

14. Leaving the direct position of production methods to one side, the Appellate Body has consistently applied four criteria to determine ‘likeness’. These are: (i) the physical characteristics of the products in question, (ii) the extent to which they share end uses, (iii) the extent to which consumers treat the products as alternative means of satisfying the same demand, and (iv) the tariff classification of the products.\textsuperscript{18} The criteria are not closed, but the Appellate Body has yet to extend the factors further.

15. Commentators have suggested that \textit{EC – Asbestos} supports the contention that different environmental impacts in the production of goods (such as the land sustainability criteria) could result in otherwise ‘like’ products being unlike. In \textit{EC – Asbestos}, the Appellate Body emphasised that consumer perceptions were central to ‘likeness’ under GATT Article III:4. It held that asbestos fibres were not ‘like’ substitute fibres without asbestos for two reasons. First, carcinogenicity was a physical difference between the two sets of fibres. Second, consumers would view those fibres as different on account of the health risk posed by asbestos fibres. If consumers view biofuels that meet the land sustainability criteria as different from those that do not, then they will not be like, or so the argument goes.

16. In our view, \textit{EC – Asbestos} does not necessarily lead to that conclusion. That case can be distinguished because carcinogenicity was itself a physical characteristic of the products and thus a legitimate point of differentiation, whereas the land-related sustainability criteria do not affect the final physical characteristics of biofuels. Moreover, the Appellate Body relied on physical characteristics in two ways. First, the Appellate Body emphasised ‘those physical properties of products that are likely to influence the competitive relationship between products’,\textsuperscript{19} although it also noted the importance of end use and consumer perceptions.\textsuperscript{20} Second, it noted that where there is physical difference between products, there is a ‘higher burden’ to establish likeness.\textsuperscript{21} It may be inferred from this that where products are physically like, there is a higher burden to establish that they are not like. It is unlikely that consumer tastes and preferences could be so strong as to displace that presumption, given that

\textsuperscript{15} GPR, \textit{US – Tuna (Mexico)}, [5.14]; GPR, \textit{US – Tuna (EEC)}, [5.8].


\textsuperscript{18} The first three factors derive from WPR, \textit{Border Tax Adjustments}. The four criteria have been applied in, for example, ABR, \textit{Japan – Alcoholic Beverages}; ABR, \textit{EC – Asbestos}.

\textsuperscript{19} ABR, \textit{EC – Asbestos}, [114] (emphasis added).

\textsuperscript{20} Ibid [117].

\textsuperscript{21} ABR, \textit{EC – Asbestos}, [120].
the biofuels in question will be physically identical with exactly the same end use capabilities.\textsuperscript{22}

17. Accordingly, biofuels different only in terms of the land from which they were produced are probably ‘like’ products.

18. **Immediately and unconditionally.** These terms are generally considered together in the case law, and most attention has been on the meaning of ‘unconditionally’. There are three competing views, but all lead us to the conclusion that the EU Renewable Energy Directive does not confer the advantage identified above ‘immediately and unconditionally’. One view is that ‘unconditionally’ means completely without conditions.\textsuperscript{23} Under this approach, all biofuels and bioliquids should count in calculating Members’ use of renewable energy sources because absolutely no conditions can be imposed on what biofuels can count. Another view is that a Member cannot impose conditions ‘not related to the imported product itself’.\textsuperscript{24} On this view, the land-related sustainability criteria are not related to the product itself, in the sense that the criteria are based on a PPM, and thus not a legitimate condition. The third view explicitly rejects the first two. Under this approach, a condition is valid unless it relates to the ‘situation or conduct’ of another WTO Member, that is, the conditions ‘relate to the origin’ of the products.\textsuperscript{25} In practice, whether a biofuel meets the land-related sustainability criteria is likely to be very much dependent on the ‘situation or conduct’ of the WTO Member because the nature of the land is likely to be especially linked to certain countries. It will thus be indirectly conditioned on origin, and so not ‘unconditional’. In particular, biofuels produced by WTO Members using materials from a tropical climate and landscape with high biodiversity (mostly developing countries) are not likely to meet the land-related sustainability criteria. Incidentally, these are the Members who are likely to have a comparative advantage in the production of these products.

\textit{ii. GATT Article III:4}

19. GATT Article III:4 provides that ‘[t]he products of the territory of any Member imported into the territory of any other Member 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.’

20. Article III:4 has three elements: (i) laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use (ii) must not afford to the imported like product of any Member (iii) less favourable treatment than domestic like products. There is also a preliminary issue of whether Article III should apply at all, or whether Article XI should regulate the particular measure at issue.

21. **Affecting.** Affecting implies that a law or regulation ‘has an effect on’ a product, and is broader than ‘regulating’ or ‘governing’.\textsuperscript{26} In fact, no measure has failed this requirement to date. The EU Renewable Energy Directive clearly affects the sale or


\textsuperscript{23} PR, EC – Tariff Preferences

\textsuperscript{24} PR, Indonesia – Autos, [14.143].

\textsuperscript{25} PR, Colombia – Ports of Entry, [7.361].

\textsuperscript{26} ABR, EC – Bananas III, [220]; ABR, Canada – Autos [150] (interpreting ‘affecting’ in GATS Article I:1); PR, China – Autos, [7.251].
use of biofuels. It creates an incentive for Members to use and encourage the private consumption of those biofuels that do meet the criteria.\textsuperscript{27} It thus ‘adversely modifies’ the conditions of competition between the domestic and imported products’.\textsuperscript{28}

22. \textbf{Like products.} The analysis of ‘like products’ under GATT Article I:1 applies equally here. Under GATT Article III:4, the Appellate Body has emphasised that the provision is ‘concerned with competitive relationships in the marketplace’.\textsuperscript{29} As we suggested above, consumer perceptions with respect to the land from which biofuels are made are unlikely to outweigh the physical likeness of those goods. The domestic biofuels meeting the land-related sustainability criteria are thus like those imports not meeting the criteria.

23. \textbf{Less favourable treatment.} The meaning of ‘less favourable treatment’ remains unsettled in the case law. It is clear that this term is concerned with treatment that ‘modifies the conditions of competition in the relevant market to the detriment of imported products’,\textsuperscript{30} and that differential treatment is not prohibited so long as it is not ‘less favourable treatment’ of the group of like imported products compared with the group of like domestic products.\textsuperscript{31} The interpretation of ‘less favourable treatment’ most favourable to the EC is that ‘less favourable treatment’ occurs only where the ‘less favourable treatment [is] explained by the foreign origin’\textsuperscript{32} of the goods. The EU Renewable Energy Directive appears to afford ‘less favourable treatment’ to imported biofuels according to this interpretation. It clearly treats certain biofuels and bioliquids differently and unfavourably where they do not meet the land-related sustainability criteria. Additional information is needed to ascertain whether those fuels not meeting the criteria are typically from certain countries. We suggested above that this is likely to be the case, as tropical countries typically produce biofuels and bioliquids that do not meet these criteria, while the EC as a whole, or at least particular EU Member states, are likely to produce biofuels that do. If this is correct, the Directive will treat less favourably that group of imported products in practice, and so result in ‘less favourable treatment explained by the foreign origin’ of the goods, contrary to GATT Article III:4.

24. \textbf{Coverage.} A preliminary issue is whether the EU Renewable Energy Directive falls within the scope of GATT Article III at all. Two unadopted GATT Panel reports held that measures based on a good’s PPM fall outside GATT Article III.\textsuperscript{33} The basis for these findings, which have not been overturned,\textsuperscript{34} is that the text of GATT Article III, in addition to earlier GATT Panel reports clarifying that text, refers to ‘products’. Taken literally, a ‘product’ is different from its PPM. There are strong indications that this reasoning would be applied in a future dispute, such that the Directive will fall outside GATT Article III. First, the Appellate Body has typically approached treaty implementation in a manner that strongly emphasises the literal meaning of words taken in their context. GATT Articles I, II, III and XI only refer to ‘products’, and Annex 1A applies to trade in ‘goods’. Second, later case law on other provisions and agreements emphasises this focus on ‘products’ as opposed to

\begin{itemize}
  \item \textsuperscript{27} Cf PR, China – Autos, [7.256].
  \item \textsuperscript{28} GPR, Italy – Agricultural Machinery, [12]; PR, Canada – Autos, [10.80].
  \item \textsuperscript{29} ABR, EC – Asbestos, [117].
  \item \textsuperscript{30} ABR, Korea – Beef, [137].
  \item \textsuperscript{31} ABR, EC – Asbestos, [100].
  \item \textsuperscript{32} ABR, Dominican Republic – Cigarettes, [96].
  \item \textsuperscript{33} GPR, US – Tuna (Mexico); GPR, US – Tuna (EEC).
  \item \textsuperscript{34} PR, US – Shrimp and ABR, US – Shrimp dealt with a similar fact pattern, but the parties in that case assumed that the measure was regulated by GATT Article XI rather than GATT Article III.
\end{itemize}
PPMs. Since this issue has yet to be considered by the Appellate Body, the coverage of GATT Article III is, however, ultimately open to some doubt. There are unresolved suggestions that where GATT Article III applies, GATT Article XI:1 is excluded. But clearly, if GATT Article III does not apply, GATT Article XI:1 will apply if the Directive falls within the latter article’s terms.

### iii. GATT Article XI:1

25. GATT Article XI:1 provides that ‘[n]o prohibitions or restrictions other than duties, taxes or other charges’ may be instituted by any Member on the importation or exportation of any product from or to another Member. GATT Art XI:1 has one element: is there a ‘restriction’ on importation. There is also a preliminary question of the coverage of GATT Article XI:1.

26. **Coverage.** A note to GATT Article III states that ‘any law, regulation or requirement’ applying to an imported product and to a like domestic product enforced in the case of the imported product at the point of importation is to be regarded as a measure subject to GATT Article III. However, Note Ad Article III does not clarify whether the measure can be examined under both GATT Articles III and XI:1, or whether GATT Article XI:1 can be considered only if a measure falls outside GATT Article III. One Panel report suggests that both articles could apply to the one measure. At least if the Directive falls outside the scope of GATT Article III, it will be inconsistent with Article XI:1 if it constitutes a ‘restriction’ on importation.

27. **Restriction on importation.** The disciplines of GATT Article XI:1 have been interpreted broadly. That article prohibits a *de facto* restriction ‘in relation to importation’. For example, in Brazil – Retreaded Tyres, the Panel found that fines on the importation, marketing, transportation, keeping and warehousing of imported tyres constituted a restriction on importation. The fines ‘have the effect of penalizing the act of “importing” retreaded tyres’. Applying similar reasoning, the EU Renewable Energy Directive constitutes a *de facto* restriction by penalising biofuels that do not meet the land-related sustainability criteria. Whether this is a *de facto* restriction on importation requires evidence of whether or not such biofuels are typically penalised on importation. We have suggested above that they are likely to be imported products, and so the Directive is inconsistent with GATT Article XI:1.

### iv. GATT Article XX

28. GATT Article XX provides an exception for certain measures otherwise inconsistent with other GATT provisions as follows:

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

(b) necessary to protect human, animal or plant life or health; …

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

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56 PR, India – Autos, [7.224].
57 PR, Argentina – Bovine Hides, [11.17].
58 PR, India – Autos, [7.246].
59 PR, Brazil – Retreaded Tyres, [7.361]. This finding was not appealed to the Appellate Body.
29. Assuming the EU Renewable Energy Directive is otherwise GATT-inconsistent, whether it would be saved by GATT Article XX depends on a two-tier test: first, whether the measure fits the language of paragraphs (b) or (g), and; second, whether it is applied in accordance with the ‘chapeau’, which prohibits ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ and ‘disguised restriction[s] on international trade’.40

30. To date, only one environmental measure has been upheld under GATT Article XX.41 Nevertheless, it is clear that the Directive is not rendered inconsistent with GATT Article XX simply because the land-related sustainability criteria are directed to production methods that do not affect the physical characteristics of the final product.42 Whether the Directive is otherwise consistent with GATT Article XX will depend on the extent of scientific evidence supporting the environmental effectiveness of the land-related sustainability criteria, and whether the EC’s environmental objective in excluding products that do not meet those criteria could be met in a less trade-restrictive manner.

31. Under GATT Article XX(b), ‘necessary’ has been interpreted as requiring a balancing of the contribution of the measure to its environmental goal against the trade-restrictiveness of the measure, in the light of the importance of the goal itself. Moreover, the measure will be compared with any less trade restrictive alternative that achieves the same benefit as the measure under challenge.43 The Directive suggests that the environmental goals of the land-related sustainability criteria are the preservation of certain environments44 and the reduction of carbon emissions to combat climate change.45 Assuming that the scientific basis for the criteria is correct, the Directive seems ‘apt to make a material contribution’46 to these goals by encouraging the use of those biofuels that meet the criteria. Moreover, the Directive does not appear overly trade-restrictive because it does not prohibit importation. However, there appears to be a less trade restrictive alternative. The Directive excludes biofuels made from raw materials obtained from land with high biodiversity in January 2008, ‘whether or not the land continues to have that status’.47 Most obviously, if the land were to lose that status for reasons unrelated to the production of biofuel (for example, the endangered species in that area became extinct for unrelated reasons), there seems to be no rational reason for excluding biofuels made from raw materials derived from that area.

32. Under GATT Article XX(g), ‘relating to’ has been interpreted less stringently than ‘necessary’ under GATT Article XX(b). The measure must be ‘primarily aimed at’ the conservation of a ‘natural resource’ in the sense of having a ‘substantial relationship’ to that goal.48 The term ‘natural resource’ has been interpreted expansively in the case law, to include living animals49 and clean air.50 Although not directly addressed in the case law, it is likely that the preservation of certain high biodiversity ecosystems, and

41 In ABFR, US – Shrimp (Article 21.5).
43 ABFR, Brazil – Retreaded Tyres, [141]-[143], [178].
44 EU Renewable Energy Directive preamble (69).
45 EU Renewable Energy Directive preamble (73).
46 ABFR, Brazil – Retreaded Tyres, [150].
47 EU Renewable Energy Directive art 17.3.
49 See, eg, ABFR, US – Shrimp.
even the climate, would be found to constitute ‘natural resources’. Assuming that the scientific basis for the land-related sustainability criteria is correct, it is probable that it would satisfy Article XX(g). The criteria ‘relate to’ the conservation goal by encouraging the use of those biofuels that meet the criteria, and the measure is applied to both domestic and imported products as required by the terms of Article XX(g).

33. Given the expansive reading given to GATT Article XX(b) and (g) in the case law, especially in US – Shrimp and Brazil – Retreaded Tyres, it is likely that the EC would satisfy the first step of the two-tier test, at least with respect to GATT Article XX(g). That assumes, however, that the scientific basis for the Directive is correct.

34. The second step is to consider the chapeau requirements. On the one hand, the Appellate Body has clarified in Brazil – Retreaded Tyres that there will be ‘arbitrary or unjustifiable discrimination’ where that discrimination bears no ‘rational connection’ to the environmental objective upheld under GATT Article (b) or (g). On the other hand, the Appellate Body has given little guidance on the meaning of the words ‘disguised restriction on international trade’. However, a series of Panel reports have indicated that the relevant question is whether the ‘design, architecture and revealing structure’ of the measure reveals an intention to ‘conceal the pursuit of trade-restrictive objectives’. Whether the Directive meets these chapeau requirements requires information on the actual application of the Directive, because the primary focus of the chapeau is on how the measure is applied.

B. TBT Agreement

i. Coverage

35. The TBT Agreement applies to a ‘technical regulation’, being a ‘[d]ocument which lays down product characteristics or their related processes and production methods … with which compliance is mandatory.’

36. Based on this definition, the Appellate Body has consistently applied three criteria to be satisfied for the TBT Agreement to apply. First, the measure must apply to an identifiable group of products. Second, it must lay down one or more characteristics of the product. Third, it must be mandatory.

37. **Identifiable group.** The EU Renewable Energy Directive clearly applies to an identifiable group of products, namely, biofuels and bioliquids.

38. **Mandatory.** Compliance with the EU Renewable Energy Directive is mandatory for EU Member States.

39. **Product characteristics.** Product characteristics are defined in Annex 1.1 to include ‘terminology, symbols, packaging, marking or labelling requirements’. The Appellate Body has taken an expansive approach to this requirement: it has said that product characteristics include ‘objectively definable “features”, “qualities”, “attributes”, or other “distinguishing mark” of a product’ such as ‘size, shape, colour, [and] texture’. Product characteristics also include ‘not only features and qualities intrinsic to the

51 ABR, Brazil – Retreaded Tyres, [225], [227].
52 PR, EC – Asbestos, [67]-[70].
54 TBT Agreement, Annex 1.1.
55 ABR, Brazil – Retreaded Tyres, [225], [227].
product itself, but also related “characteristics”, such as the means of identification, the presentation and the appearance of a product.

However, it is uncertain whether a regulation based on a PPM (such as the land-related sustainability criteria) is a relevant ‘product characteristic’. Although Annex 1.1 refers explicitly to ‘processes and production methods’, it refers specifically to ‘their related processes and production methods’. Many commentators suggest that this restricts the TBT Agreement to those production methods that influence the final physical characteristics of the product. This is confirmed by the negotiating history of Annex 1.1, which can be consulted where the ordinary meaning of the provision in context remains ambiguous or obscure. No case has yet found that a regulation based on a PPM is a ‘technical regulation’ under the TBT Agreement.

40. On the basis of the text and negotiating history of the TBT Agreement, we conclude that the TBT Agreement does not apply, at least in relation to the land-related sustainability criteria. The emissions-related sustainability criteria relate to product characteristics and so fall within the definition of Annex 1.1. In the following sections, we proceed on the basis that this agreement does apply. A WTO Member challenging the EU Renewable Energy Directive in the WTO should argue that the TBT Agreement does apply, because it imposes obligations ‘different from, and additional to’ those imposed by the GATT.

ii. TBT Agreement Article 2.1

41. Article 2.1 provides that ‘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.’

42. Article 2.1 has not been applied by a WTO Panel or the Appellate Body to date. It appears clear from its terms, however, that it adopts the concepts and the application of those concepts, from GATT Arts I:1 and III:4 above.

43. The only possible differences are that ‘likeness’ could be narrower under TBT Agreement Article 2.1 or that ‘likeness’ could include consideration of production methods. It could be narrower because the TBT Agreement contains no ‘general exceptions’ comparable to GATT Art XX. The production methods of products could be relevant to ‘likeness’ because Annex 1.1 specifically defines product characteristics to include processes and production methods. For the Directive to pass the coverage hurdle, ex hypothesi the TBT Agreement applies also to non-product-related process and production methods in addition to product-related process and production methods.

44. Even if ‘likeness’ under TBT Agreement Art 2.1 is narrower than under the GATT, or if production methods can be taken into account, biofuels meeting the land-related sustainability criteria may nonetheless be like those that do not meet the criteria. The goods are like in every other way but the original land-use, and so it is doubtful that this alone can displace the presumption of likeness created by their

57 ABR, EC – Asbestos, [67].
58 See Committee on Trade and Environment, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, WT/CTE/W/10 (29 August 1995).
60 The cases to consider the TBT Agreement are: EC – Asbestos (products containing asbestos fibres, a physical characteristic); EC – Sardines (a naming/labelling requirement); EC – Trademarks (Australia) (a labelling requirement).
61 ABR, EC – Asbestos, [80].
62 The provision was raised in EC – Trademarks (Australia) but the Panel did not have to consider the claim.
absolute physical similarity. If the biofuels are ‘like’, there is ‘less favourable treatment’ of imported products compared to like domestic products for the same reasons as we suggest there is ‘less favourable treatment’ for the purposes of GATT Article III:4. Thus, the land-related sustainability criteria are inconsistent with TBT Agreement Article 2.1

iv. **TBT Agreement Article 2.2**

45. Article 2.2 provides as follows: ‘Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.’

46. Protection of the environment is specifically listed as a legitimate objective under Article 2.2. The issue is whether the sustainability criteria are ‘more trade-restrictive than necessary’ to protect the environment. The land-related sustainability criteria have been considered above under GATT Article XX. Unlike the GATT, however, the emissions-related sustainability criteria must also be no more trade-restrictive than necessary. Under the GATT analysis, the emissions-related criteria did not have to undergo ‘necessity’ analysis because they are unlikely to be inconsistent with the substantive GATT disciplines. Thus, those criteria did not require justification under GATT Article XX. The structure of the TBT Agreement is different. Technical regulations must not discriminate between like products, and they must be no more trade restrictive than necessary.

47. The Appellate Body has stressed in the context of GATT Article XX(b) that a measure is not ‘necessary’ if there is a reasonably available less restrictive measure available. An alternative measure must also achieve the same environmental goal to the same extent as the measure at issue.\(^63\) This approach seems applicable in the context of TBT Agreement Article 2.2. Applying this approach, the emissions-related sustainability criteria appear to be more trade restrictive than necessary, because they create a bright-line 35% cut-off in greenhouse gas savings before a biofuel can be counted in calculating gross final consumption of energy from renewable sources. Thus, a biofuel that results in a 34% saving could not be counted. A less restrictive measure would allow a biofuel to be counted in an amount proportionate to the greenhouse gas savings of that biofuel. If this analysis is correct, the emissions-related sustainability criteria are thus inconsistent with TBT Agreement Article 2.2.

**IV Conclusion**

48. By restricting the biofuels and bioliquids that can be taken into account in calculating gross final consumption of energy from renewable sources in EU Members to those that meet the sustainability criteria, the EU Renewable Energy Directive is probably inconsistent with the EC’s obligations under the GATT. On the current state of the law, products are ‘like’ where the only distinction between them is their method of production. In terms of the land-related sustainability criteria, such a distinction is drawn between certain biofuels and bioliquids. Thus, the less favourable treatment of biofuels not meeting those criteria is likely to result in inconsistency with the EC’s substantive obligations under GATT. Under GATT, the Directive might be saved

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\(^{63}\) ABR, *Brazil – Retreaded Tyres*, [156].
under GATT Article XX if the EC could present sufficient evidence to justify the differential treatment on environmental grounds.

49. The TBT Agreement probably does not apply to the EU Renewable Energy Directive in relation to the land-related sustainability criteria, because those criteria are based on a non-product-related process or production method. However, if it were found to apply, it is likely that the Directive is inconsistent with the EC’s obligations under that agreement. Unlike the GATT, there is no general exceptions provision to justify any inconsistency with the TBT Agreement.

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