

COMMENTS

TOTAL RECALL ON CHINESE IMPORTS: PURSUING AN END TO UNSAFE HEALTH AND SAFETY STANDARDS THROUGH ARTICLE XX OF GATT

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INTRODUCTION

Recently, inadequate health and safety regulations of foreign countries have negatively affected international trade and put the health of American consumers at great risk.¹ In an effort to protect against unsafe foreign products, some countries have unsuccessfully attempted to impose bans on foreign imports.² Yet despite these

1. See John Russell & Tom Spalding, *Chinese-made Toothpaste Joins Recalls*, INDIANAPOLIS STAR, Aug. 14, 2007, at C1 (reporting that samples of complimentary hotel toothpaste, imported from China, contained chemicals used as coolants in automobiles).

2. See Report of the Panel, *Thailand - Restrictions on Importation of Internal Taxes on Cigarettes* (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) ¶ 81 (1991) [hereinafter *Thailand Cigarette*] (rejecting Thailand's attempt to implement a blanket ban on imported cigarettes). The stated purpose of the ban was to protect Thai citizens from imported cigarettes that contained artificial, overly-addictive ingredients. *Id.* ¶ 14. See also Stephen Castle & Dan Bilefsky, *Europe Reconsiders Plan to Relax Consumer Product Safety Rules*, N.Y. TIMES, Sept. 18,

unsuccessful attempts, the legal framework of the international trade regime would not prohibit a properly formulated protective ban, and the United States should consider taking such a measure to protect its citizens.³

In the spring of 2007, American consumers experienced massive recalls of Chinese toy imports because these products contained unsafe materials.⁴ These recalls raise questions as to the safety of all Chinese-made toys and stress the need for China to improve its health and safety standards so that it does not risk becoming subject to harsh countermeasures from the United States.⁵

Although the Chinese government has assured the United States that it will take measures to ensure that its toy products are safe⁶ and increase its internal health and safety standards,⁷ there is no guarantee that Chinese officials will fulfill these promises.⁸ While

2007, at C4 (explaining that the European Union is considering introducing tougher measures to prevent the importation of dangerous products).

3. See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, ¶ 192, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *European Asbestos AB Report*] (justifying a French import ban on Canadian white asbestos on the grounds that white asbestos posed a high health risk).

4. See Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent from China*, N.Y. TIMES, Aug. 15, 2007, at A1 (reporting on the recall of over 18 million Chinese-made toy cars distributed by Mattel, the world's largest toy company, due to the use of lead paint and other hazardous materials).

5. See William Neikirk, *Anger, Indignation Mark Toy Recall Hearing*, CHI. TRIB., Sept. 20, 2007, at C4 (noting Congress' suggestion that toy plants be relocated from China to the United States in an effort to regain trust as well as its pledge to vest new authority and funds to the Consumer Product Safety Commission).

6. See Stephen J. Hedges, *China, U.S. in Pact on Safety*, CHI. TRIB., Sept. 12, 2007, at C1 (reporting that China pledged to eliminate the use of lead paint in the manufacturing of toys exported to the United States).

7. See David Barboza, *China Acts to Cleanse Reputation*, N.Y. TIMES, Sept. 4, 2007, at C1 (explaining that China is responding to foreign recalls by introducing a new food and toy recall system). China has initiated what it is dubbed a "special war" against poor-quality products and unlicensed manufactures. The goal is to safeguard the "Made in China" label, place more rigorous quality controls on manufacturing inspections, improve monitoring systems of food products, and hold Chinese officials accountable. *Id.*

8. See *New Lead-paint Toy Recall*, NEWSDAY, Sept. 28, 2007, at A53 (noting that even though Beijing's Commerce Ministry spokesman Wang Xinpei stressed China's strong commitment to safety standards, it minimized the extent of the

the Chinese government has attempted to better enforce its safety regulations with respect to exported goods in the past,⁹ significant improvements are still needed.¹⁰

In order to protect American children from harmful Chinese toy products, the United States should take legal action through the World Trade Organization (“WTO”) and impose a temporary ban on Chinese toy products until Chinese manufacturers refrain from using unsafe materials in their products.¹¹ Article XX(b) of the General Agreement on Tariffs and Trade (“GATT”) provides the United States with such recourse.¹²

This Comment explores whether the imposition of a temporary ban on Chinese toy products violates Article III of GATT, whether these import restrictions are nevertheless valid under the Article XX(b) exception, and the United States’ potential legal and political repercussions from using Article XX(b)’s import restrictions to guard against defective or dangerous Chinese toy products. Part I of this Comment introduces the development of GATT, its successor, the WTO, and the development of the WTO as an international body for dispute resolution for trade. Next, this Comment examines the relevant provisions of Article I, Article III, and Article XX(b), as well as other Article XX jurisprudence. Part II contends that while the United States violates Article III of GATT by imposing a temporary ban on Chinese toy products, the action is nonetheless lawful under Article XX(b) of GATT. Part III recommends that the United States impose health and safety restrictions on Chinese imports to protect American children from hazardous toy products.

problems by estimating that unsafe products only arise once in every one thousand cases).

9. See Claudia Lauer, *China Offers Export Safety Measures*, L.A. TIMES, Aug. 16, 2007, at C3 (outlining some of China’s new measures to ensure food and product safety, such as requiring a seal showing that food products have met quality standards and conducting random quality and safety testing on products).

10. See Don Lee, *Safer Chinese Products Will Come at a Cost*, L.A. TIMES, Sept. 9, 2007, at A1 (attributing China’s product safety problems to unscrupulous entrepreneurs, a lack of clear standards, faulty designs, and deadline pressures).

11. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter WTO Agreement].

12. See General Agreement on Tariffs and Trade art. XX(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (providing that contracting parties may impose restrictions on imports “necessary to protect human, animal or plant life or health” notwithstanding other provisions of the GATT).

However, because it is necessary to ensure amicable relations with China,¹³ this Comment also suggests that the United States, during the course of the temporary ban, should assist China with improving its health and safety regulations and enforcement measures. If these measures are insufficient, the United States should seek international support to pressure China into complying with adequate safety standards.

I. BACKGROUND

The underlying function of GATT and the WTO is to serve as a means of liberalizing trade between members. The principles contained in Articles I and III, discussed below, form the fundamental mechanisms that ensure this result, providing members with a simplified framework for fashioning international trade agreements with multiple parties for multiple goods. Yet despite committing countries to extending certain trading terms to all members, the GATT and WTO do not force countries to accept trading provisions that would harm their citizens or otherwise endanger other key national interests. Instead, GATT and the WTO provide for protective measures and exceptions to rules when a country can demonstrate that those actions are necessary. The following section traces the historical evolution of GATT and the development of the WTO before examining Article I, Article III, and the Article XX exceptions. It then addresses the interpretations of Article XX(b) made by previous WTO Panels.

A. THE HISTORICAL EVOLUTION OF GATT AND THE CREATION OF THE WTO

Twenty-three countries signed GATT in 1947 to revitalize the world's economies after World War II.¹⁴ The objective of GATT was

13. Cf. Eric S. Lipton & David Barboza, *More Toys Are Recalled, the Trail Ends in China*, N.Y. TIMES, June 19, 2007, at A1 (noting that over eighty percent of all toys sold in the United States come from China); United States Census Bureau, *Exhibit 6. Exports, Imports and Trade Balance by Country and Area, Not Seasonally Adjusted: 2008*, available at http://www.census.gov/foreign-trade/Press-Release/current_press_release/exh6s.pdf (listing China as the United States' number one export trading partner and number two import trading partner).

14. See RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 133 (2d ed. 2001); see also Note, *Free Trade and Preferential Tariffs: The Evolution of*

to reduce trade barriers between countries through the reduction of tariffs, the reduction of subsidies, and the elimination of import quotas and discriminatory trade policies.¹⁵ To achieve this liberalized trading regime, contracting parties to GATT underwent eight extensive rounds of negotiations where countries would agree to specific reductions to the barriers to trade between nations. At the Uruguay Round, which concluded in 1994, the contracting parties to the GATT decided to establish the WTO.¹⁶

The purpose of the WTO is to facilitate trade among nations through trade agreements.¹⁷ As early as 1997 these agreements governed over ninety percent of all international trade.¹⁸ On January 1, 1995, the international community established the WTO in order to reduce trade barriers through multilateral negotiations.¹⁹ With its

International Trade Regulation in GATT and Unctad, 81 HARV. L. REV. 1806, 1806-07 (1968) (recognizing that GATT was originally intended as a temporary contractual framework). The International Trade Organization (“ITO”) would eventually replace the temporary frameworks and assume the administrative functions of GATT. *Id.* However, when the United States Senate refused to ratify the ITO, GATT remained the primary international trade agreement, though one without an administrative body. *Id.*; Douglas A. Irwin, *The GATT in Historical Perspective*, 85 AM. ECON. REV. 323, 323-25 (1995) (outlining the various developmental phases of international trade and monetary relations prior to GATT and attributing the creation of the framework to the resulting economic devastation of World War II).

15. See Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT’L L.J. 429, 438 (1997). But see Peter M. Gerhart, *The World Trade Organization and Participatory Democracy: The Historical Evidence*, 37 VAN. J. TRANSNAT’L L. 897, 900 (2004) (claiming that the objective of GATT was not to reduce trade barriers but rather to counter political protectionist interests abroad); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514-15 (2000) (emphasizing that the creators of GATT intended it to fight special interests in domestic economies).

16. See generally BHALA, *supra* note 14, at 132-33, 193-94.

17. See WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 9 (2007), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf [hereinafter UNDERSTANDING THE WTO]. But see Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT’L L. 28, 31-36 (2002) (asserting that the primary mission of the WTO is unclear and difficult to establish because the organization has multiple purposes).

18. SARAH ANDERSON & JOHN CAVANAGH, WORLD TRADE ORGANIZATION 1 (1997), available at <http://www.fpiif.org/pdf/vol2/14ifwto.pdf>.

19. See WTO Agreement, *supra* note 11, arts. I-III.

creation, the WTO subsumed GATT and formed the first international trade organization.²⁰

The international community created the WTO as a response to the growing problems facing GATT as the world economy became more globalized.²¹ The WTO consists of various committees and councils that address novel trade issues and create stronger international agreements.²² Any WTO member may participate in any committee or council.²³ However, WTO members may not participate in the appellate body, dispute settlement panels, or plurilateral committees.²⁴ The WTO also provides members with many benefits that facilitate the flow of international trade.²⁵

The WTO has a number of fundamental principles that every WTO member must follow. These principles include: transparency, national treatment, most-favored nation (“MFN”), and reciprocity.²⁶ Transparency requires that member-states publish their trade policies and regulations and apply them equitably.²⁷ National Treatment

20. See *id.* at pmb1. (“The *Parties* to this Agreement . . . [*r*]esolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the result of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations . . .”).

21. See UNDERSTANDING THE WTO, *supra* note 17, at 17-18 (describing how problems arising within the GATT framework—including exploitation of loopholes, increased uses of subsidies, and the establishment of bilateral market-sharing arrangements—prompted the creation of the Uruguay Round and ultimately the WTO).

22. See *id.* at 101-03 (enumerating the four levels of committees by level of authority as: the Ministerial Conference, the General Council, area of trade-specific councils, and subsidiary bodies).

23. See *id.* at 101.

24. See *id.* at 57 (relegating appellate authority to the members of the permanent seven-member Appellate Body). Members of the Appellate Body serve four-year terms and must be knowledgeable of international trade and law. *Id.* In addition, the members serving the Appellate Body cannot be affiliated with any governments. *Id.*

25. See *id.* at 9-10 (outlining that the WTO provides its members with the following: (1) a negotiation forum where members can attempt to solve trade disagreements; (2) a legal foundation of trade rules for international commerce that bind members; and (3) a dispute settlement mechanism).

26. See Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Convention Program Act*, 37 AM. BUS. L. J. 73, 79 (1999).

27. See *id.* (noting that the concept of transparency also prohibits retroactive application of trade rules, policies and regulations).

requires that member-states treat imported products the same as domestic products.²⁸ The MFN principle requires members to extend the same privileges, benefits, or advantages to all WTO members.²⁹ Reciprocity requires that parties in trade agreements meet their respective trade obligations.³⁰

In addition to providing an international trade framework, the WTO provides its members with a dispute resolution Panel to resolve disputes among member-states. If a dispute arises among contracting parties, they must first enter into consultation.³¹ After sixty days, if the parties cannot agree, then they may submit their dispute to a WTO Panel for study.³² Thereafter the Dispute Settlement Body appoints a three- to five-member Panel of independent trade experts to review the dispute.³³ The Panel evaluates the facts, reviews GATT principles, and submits a report with its decision.³⁴ The decision binds the parties unless, within sixty days, the Dispute Settlement Body unanimously decides to reject the report or either party appeals the decision.³⁵

28. *See id.* (specifying that a member-state may treat imports differently with respect to customs and point-of-entry duties but must treat both equally once the products are in the country).

29. *See id.* (explaining that according to the MFN principle, a WTO member-state must not discriminate against "like products").

30. *See id.* (noting that participation in trade agreements is rooted on an expectation of receiving reciprocal benefits).

31. *See UNDERSTANDING THE WTO, supra* note 17, at 56 (describing that the process allows for consultation between the parties themselves as well as recourse to the WTO director-general for mediation or general assistance).

32. *See id.* (vesting the complaining party with the right to request the appointment of a panel and the party "in the dock" with the power to block its formation); *see also* Miller & Croston, *supra* note 26, at 80 (emphasizing that only member states and not private parties, such as businesses, can sponsor the submission of cases to the panel).

33. *See* Miller & Croston, *supra* note 26, at 80.

34. *See UNDERSTANDING THE WTO, supra* note 17, at 56 (stating that the panel has six months to conclude); Miller & Croston, *supra* note 26, at 80 (noting that the panel may also consider expert opinions).

35. *See UNDERSTANDING THE WTO, supra* note 17, at 56-57 (stressing that conclusions are difficult to overturn due to the requirement for consensus).

B. THE FUNDAMENTAL PRINCIPLES GOVERNING TRADE UNDER GATT

1. Article I: Most Favored Nation Principle

The MFN principle, articulated in Article I of GATT, precludes discrimination among imported goods, requiring member-states to treat imported products of a given nation no less favorably than similar products from other member-states.³⁶ GATT does, however, allow for certain limited exceptions to the MFN principle.³⁷ For example, countries that form free trade agreements or provide special access to developing countries do not need to adhere to the principle.³⁸

2. Article III: National Treatment Principle

The national treatment principle minimizes incidents of unfair trade discrimination by requiring member-states to refrain from treating foreign products less favorably than domestic products.³⁹ The purpose of the national treatment principle is to prohibit hidden protectionism and circumvent measures that create trade barriers.⁴⁰ Under the national treatment principle, contracting parties must treat imported and domestic products equally.⁴¹ Article III:2 prohibits contracting parties from imposing internal taxes or charges, either directly or indirectly, on imported products in order to afford

36. GATT, *supra* note 12, art. I.

37. See UNDERSTANDING THE WTO, *supra* note 17, at 34 (qualifying that GATT allows for exempting pre-existing preferential agreements only once, and for no longer than ten years).

38. See *id.* at 11.

39. GATT, *supra* note 12, art. III; see Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environmental Debate*, 22 LOY. L.A. INT'L & COMP. L. REV. 1, 5 (1999) (arguing that Articles I, III, and XI of GATT have been essential in minimizing discriminatory trade and non-transparent practices).

40. See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan Beverages*] (finding that the fundamental purpose of Article III is to avoid protectionism through the application of internal measures applied to either domestic or international products with the intention of protecting domestic products).

41. GATT, *supra* note 12, art. III.

protection to domestic products.⁴² Contracting parties substantiate an Article III:2 violation by failing to tax two directly competitive or substitutable (“DCS”) products similarly.⁴³ Finally, Article III:4 requires that contracting parties may not provide less favorable treatment to imported products than to domestic products.⁴⁴

Article III:2 and III:4 violations occur when a member-state applies a tax or creates a measure that treats like imported products less favorably than like domestic products.⁴⁵ In the WTO Appellate Body decision *Japan – Taxes on Alcoholic Beverages* (“*Japan Beverages*”), the Appellate Body rejected a Japanese tax on imported liquor and interpreted the term “like products.”⁴⁶ Japan imposed a tax on shochu—a domestic liquor—at a lower rate than on imported liquors.⁴⁷ The Appellate Body analyzed whether the imported and domestic liquors were “like” by examining the products’ tariff

42. See, e.g., *Japan Beverages*, *supra* note 40, at 27-28 (holding that legislative intent is not a factor the WTO uses to determine the purpose of a regulatory measure). Instead, the relevant factor is whether the regulatory measure discriminates between domestic and international products to the benefit of domestic products. *Id.*

43. See *id.* at 29 (noting that when analyzing an Article III:2 violation an Appellate Body will often examine the “design . . . architecture . . . [and the] revealing structure” of the measure to determine its actual purpose).

44. See GATT, *supra* note 12, art. III (explaining that member-states of the WTO must apply measures that affect the “internal sale, offering of sale, purchase, transportation, distribution or use” equally to both imported and domestic products).

45. See Peter M. Gerhart & Michael Baron, *Understanding the National Treatment: The Participatory Vision of the WTO*, 14 IND. INT'L & COMP. L. REV. 505, 530-31 (2004) (stating that when analyzing an Article III violation, one should use the Article III:2 “like product” analysis when evaluating a tax regulation and use the Article III:4 “like product” analysis when evaluating a non-tax regulation). An Article III:2 analysis involves a “like products” analysis which evaluates likeness based upon products’ tariff classification, end-uses in the market, consumers tastes and habits, and the product’s properties, nature, and quality. *Id.* An Article III:4 analysis requires that a contracting party show: (1) that the imported and domestic products are “like,” (2) that the measure is a “law, regulation, or requirement affecting [the] internal sale, purchase, transportation, distribution, or use” and (3) that the measure extends “less favorable treatment” to the imported product than to the domestic product. *Id.*

46. See *Japan Beverages*, *supra* note 40, at 20-21 (asserting that WTO Panels decide likeness on a case-by-case basis and emphasizing that this analysis is not arbitrary but rather discretionary). The Panel, however, followed the approach of the *Border Tax Adjustments* Panel. *Id.*

47. See *id.* at 4.

classification, end-uses in the market, consumers' tastes and habits, and the properties, nature, and quality of the products.⁴⁸ The Appellate Body held that the Japanese liquor tax violated Article III:2 because shochu and vodka were like products, given that both were white/clean liquors composed of similar raw materials, had similar physical characteristics and end-uses, and had a comparable tariff schedule.⁴⁹

Similarly, a WTO Panel decision and a WTO Appellate body decision, arising from the same dispute, provide the appropriate "like product" analysis under Article III:4.⁵⁰ The WTO Panel, in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("European Asbestos Panel Report"), and WTO Appellate Body, in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("European Asbestos Appellate Body Report"), analyzed whether a French Decree banning the importation of white asbestos violated Article III:4.⁵¹ According to France, the use of the Canadian white asbestos had severe negative health consequences.⁵² The Appellate Body found that the two cement-based products containing different types of chrysotile asbestos fibers were not "like products."⁵³ The

48. See *id.* at 21-22 (applying the criteria of the Working Party Report on *Border Tax Adjustment*); Michael Trebilcock, *The National Treatment Principle in International Trade Law* 7 (Am. Law & Econ. Ass'n, Working Paper No. 8, 2004) (listing the Working Party Report on *Border Tax Adjustments*' criteria as: "(i) the product's end uses in a given market, (ii) consumers' tastes and habits which change from country to country, and (iii) the product's properties, nature and quality").

49. *Japan Beverages*, *supra* note 40, at 31-32 (agreeing with the language of paragraph 6.35 of the Panel Report).

50. Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000) [hereinafter *European Asbestos Panel Report*]; *European Asbestos AB Report*, *supra* note 3.

51. Compare *European Asbestos Panel Report*, *supra* note 50, ¶ 8.144 (holding that the two cement-based asbestos fibers were "like products" and therefore violated Article III:4), with *European Asbestos AB Report*, *supra* note 3, ¶ 192(c) (reversing the Panel's finding).

52. See *European Asbestos AB Report*, *supra* note 3, ¶ 114 (acknowledging carcinogenic properties of the Canadian asbestos).

53. See *id.* ¶ 109 (finding that the European Asbestos Panel did not conduct an appropriate "likeness" analysis because the Panel concluded that chrysotile asbestos and PCG fibers were "like products" after examining only the first of the four criteria required by the *Border Tax Adjustments* "likeness" analysis). An appropriate "likeness" analysis requires the Panel to examine the four criteria of

Appellate Body also concluded that the French Decree satisfied the language of Article XX(b) and held that the decree was “necessary to protect human . . . life or health.”⁵⁴

C. THE GENERAL EXCEPTION TO GATT PROVISIONS: ARTICLE XX

Article XX allows member-states of the WTO to use otherwise illegal trade measures by invoking an enumerated exception for valid public policy purposes.⁵⁵ A member-state can only invoke an Article XX exception after a WTO Panel concludes that the measure, or some part thereof, violates a GATT provision.⁵⁶ Thereafter the WTO Panel must determine whether the measure falls within one of the Article XX exceptions.⁵⁷ Throughout the proceedings the member-state invoking the Article XX exception carries the burden of proof.⁵⁸

1. Article XX(b): The Necessary Analysis

Article XX(b) allows a party to adopt or enforce measures “necessary to protect human, animal or plant life or health,” through the use of measures otherwise inconsistent with GATT.⁵⁹ Under an

the “likeness” analysis, weigh the four criteria along with other relevant evidence, and then make a determination as to whether the products are “like.” *Id.*

54. See *id.* ¶¶ 161-163 (asserting that a Panel has discretion in assessing the value it will place on evidence presented when determining whether a measure was created to protect human life or health).

55. See GATT, *supra* note 12, art. XX (enumerating ten general exceptions that member-states can invoke when otherwise violating GATT principles); see also JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 532-33 (4th ed. 2002) (discussing the most frequently litigated provisions under Article XX).

56. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 146-147, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *United States Shrimp Turtle*]; see also Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 405 (2003) (noting that the Article XX exceptions operate as affirmative defenses to GATT violations).

57. See GATT, *supra* note 12, art. XX (enumerating the ten exceptions covering the protection of morals and life to the conservation of exhaustive natural resources).

58. See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, 22-23, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *United States Gasoline*] (holding that a party satisfies its burden of proof when the party demonstrates that the proposed measure falls under an enumerated Article XX exception).

59. GATT, *supra* note 12, art. XX(b).

Article XX(b) analysis, a Panel must determine that a trade measure is “necessary” to achieve its health policy objective.⁶⁰ In the GATT Panel decision *Thailand - Restrictions on Importation of Internal Taxes on Cigarettes Thai Cigarettes* (“*Thailand Cigarette*”), the Panel analyzed the phrase “necessary to protect human . . . life or health” under Article XX(b).⁶¹ The *Thailand Cigarette* dispute dealt with the Royal Thai Government’s import ban on cigarettes.⁶² According to the Panel, in order for a measure to be necessary under Article XX(b), there must be no less intrusive alternatives to achieve the measure’s stated policy objectives.⁶³ In reviewing Thailand’s policy objective, the Panel acknowledged the negative human health effects of smoking.⁶⁴ However, the Panel found that the import ban on cigarettes was not necessary in terms of Article XX(b) because less trade restrictive alternatives were available that would be consistent with GATT.⁶⁵

2. *The Chapeau of Article XX: Preventing Discrimination and Protectionist Measures*

In addition to falling under one of the enumerated provisions of Article XX, a party must meet the standards set forth in the introductory phrase of Article XX, otherwise known as the “chapeau.”⁶⁶ The chapeau provides as follows:

60. See *Thailand Cigarette*, *supra* note 2, ¶ 75.

61. *Id.* ¶¶ 72, 74 (finding that the purpose of Article XX(b) is to allow contracting parties to “impose trade restrictive measures inconsistent with [GATT] to pursue overriding public policy goals to the extent that such inconsistencies [are] unavoidable”).

62. *Id.* ¶ 1 (alleging the imposition of restrictions and internal taxes on imported cigarettes).

63. *Id.* ¶ 75.

64. *Id.* ¶ 73.

65. *Id.* ¶ 77 (observing that advertising restrictions and mandatory labeling were alternative measures consistent with GATT that could help Thailand achieve its public health objectives); see Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 69 (2001) (suggesting that inclusion of Article XX exceptions evidences the express allowance of measures that, while harmful to market access, have sufficient social and political justification).

66. See, e.g., Report of the Panel, *United States- Import of Certain Automobile Spring Assemblies*, ¶¶ 52-64, L/5333 (June 11, 1982), GATT B.I.S.D. (30th Supp.) (1983) [hereinafter *United States Automobile*] (applying the Article XX analysis to a patent infringement case brought by Canada against the United States).

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 contracting party of measures . . .⁶⁷

The purpose of the chapeau is to prevent discrimination and guard against protectionist policies by prohibiting the application of arbitrarily or unjustifiably discriminative measures between countries.⁶⁸

In *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*United States Shrimp Turtle*”), a WTO Appellate Body analyzed whether a United States law banning imported shrimp from countries that failed to wholly adopt United States shrimp fishing regulations violated the chapeau of Article XX.⁶⁹ The Appellate Body ruled that the American policy did not satisfy Article XX’s chapeau because the policy unjustifiably and arbitrarily discriminated between countries.⁷⁰ The Appellate Body found that the shrimp ban had a coercive effect on the policy decisions of foreign countries and further stressed that, despite this negative effect, the United States failed to attempt to negotiate an international agreement before imposing a harsh blanket ban.⁷¹ As a

67. GATT, *supra* note 12, art. XX.

68. See *United States Shrimp Turtle*, *supra* note 56, ¶¶ 14-15 (asserting that the proper analysis under the Article XX chapeau is whether a non-protectionist policy objective outweighs the measure’s discriminative effect); see also Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 47-48 (1991) (highlighting the broad interpretation of “disguised restrictions” by noting that GATT has routinely held that trade measures which are publicly announced do not violate the discrimination provision of the chapeau precisely because they are openly announced).

69. See *United States Shrimp Turtle*, *supra* note 56, ¶¶ 147-165.

70. See *id.* ¶¶ 161, 175-176 (holding that the measure was unjustifiably and arbitrarily discriminatory because its application required WTO members wishing to export shrimp products to the United States to fully adopt American shrimping policies and enforcement practices).

71. See *id.* ¶¶ 169-172 (underscoring the existence of non-violative alternative measures evidenced by the existence of the Inter-American Convention agreement, which the United States failed to apply evenly to all member-states).

result, the import ban failed to adhere to the requirements of the chapeau.⁷²

II. ANALYSIS

By placing a temporary ban on Chinese toy products, the United States would violate Article III.⁷³ Nonetheless, after analyzing the parties' arguments, a WTO Panel would likely find a temporary import ban on Chinese toy products permissible to protect the health of American children under Article XX(b).⁷⁴ Moreover, in light of the findings of a violation of Article III:4, a Panel would likely find it unnecessary to consider the claims of a violation under Article I.⁷⁵

A. THE BAN ON CHINESE TOY PRODUCTS IS INCONSISTENT WITH ARTICLE III:4

A United States temporary import ban on Chinese toy products would violate Article III:4 because it would treat Chinese-made toys less favorably than American-made toys.⁷⁶ In order to reach this likely conclusion, a Panel would first need to undertake a "like product" analysis to determine whether U.S.-made and Chinese-made toys are "like products" under the meaning of Article III:4.⁷⁷

72. See *id.* ¶¶ 177-184 (determining that procedural requirements and rigid certification of the United States regulation constituted arbitrary and discriminatory policies and thus failed to meet the requirement of the chapeau).

73. See generally discussion *infra* Part II.A (arguing that by imposing a temporary ban on Chinese-made toy products, the United States ban would be treating imported products from China less favorably than domestic products).

74. See discussion *infra* Part II.B (discussing how the use of lead on children's toys is dangerous to the life and health of children).

75. See, e.g., *European Asbestos Panel Report*, *supra* note 50, ¶ 8.99 (suggesting that once a Panel finds a violation of a GATT principle it is unnecessary to consider claims of a violation under another GATT principle).

76. See GATT, *supra* note 12, art. III:4; see also *European Asbestos AB Report*, *supra* note 2, ¶¶ 98-100 (explaining that an Article III:4 violation occurs when a measure affects the competitive relationship between "like" domestic and imported products).

77. See *European Asbestos AB Report*, *supra* note 2, ¶¶ 84-85, 92 (finding that the term "like" may encompass many different levels and degrees of "similarities" and "likeness").

Next, a Panel would inquire whether the member-state treats the like imported product less favorably than the domestic product.⁷⁸

In determining whether imported and domestic products are “like products,” a Panel may examine the following factors: (1) the properties, nature and quality of the product; (2) the end use of the product; (3) consumers’ tastes and habits; and (4) the product’s tariff classification.⁷⁹ A Panel must consider the circumstances peculiar to each case, which requires a degree of discretionary judgment.⁸⁰

Chinese toy imports are “like products” with respect to American-made toys under the definition promulgated by Article III:4 because the ban would affect the “internal sale, offering for sale, purchase, transportation, distribution or use” of the Chinese toys.⁸¹ Chinese toys and American toys are of similar nature and quality.⁸² The nature of a toy is to entertain children. The fact that the toy is made in either China or the United States does not change its nature.⁸³

Secondly, toys generally have the same end-users: children. Toy consumers are usually parents who buy toys for their children, or children purchasing toys for themselves. Some of these consumers do not seem to differentiate between buying American-made toys or Chinese-made toys.⁸⁴ In fact, many of Mattel’s “Barbies” are made in China.⁸⁵ In addition, many American toy companies, like Mattel,

78. *Id.* ¶ 100 (establishing that the finding of “likeness” alone do not constitute a violation of Article III:4). In order for a violation of Article III:4 to occur a panel must find that “like” imported products receive “less favorable treatment” than “like” domestic products. *Id.*

79. *Id.* ¶¶ 101-102.

80. *Id.* ¶ 102.

81. See GATT, *supra* note 12, art. III.

82. See *European Asbestos Panel Report*, *supra* note 50, ¶ 8.124 (holding that products need only be the same to “the extent that one product can replace the other” to be considered a like product).

83. Cf. *Japan Beverages*, *supra* note 40, at 25-26, 32 (determining that imported alcohol such as vodka, wine and domestically produced alcohol, such as shochu were “like products” because of their similar properties, end-uses, and substitutability).

84. See Andrew A. Newman, *What’s a Parent to Do?*, N.Y. TIMES, Sept. 29, 2007, at C1 (reporting that some parents view the potential danger of recalled Chinese-made toys as remote or unavoidable and thus continued purchasing Chinese and American-made toys equally).

85. See Louise Story, *Putting Playthings to the Test*, N.Y. TIMES, Aug. 29, 2007, at C1 (tracing Mattel’s long manufacturing relationship with China to 1959 when it first outsourced the production of its iconic American doll, Barbie).

manufacture their toys predominantly in China, which blurs the line between American-made and Chinese-made toys.⁸⁶ Weighing all these factors together, a Panel would likely conclude that Chinese toys are “like” American toys.

If a Panel rules that the products are “like products,” then it must determine whether the United States treats Chinese products less favorably than domestic products.⁸⁷ The *European Asbestos Appellate Body Report* interpreted less favorable treatment to mean that the proposed measure cannot affect the competitive relationship between products “so as to afford protection to domestic products.”⁸⁸ Since the ban fails to apply to domestic products, a Panel would likely rule that the temporary ban establishes less favorable treatment to Chinese-made toys.⁸⁹ Chinese toy manufacturers completely lose market access to the United States because the ban would allow the sale of American toys and ban the sale of Chinese toys.⁹⁰ A Panel, therefore would likely conclude that the ban violates Article III:4.

B. THE TEMPORARY BAN ON CHINESE TOY PRODUCTS IS VALID UNDER ARTICLE XX(B)

Despite violating GATT Article III:4, a Panel would likely find the temporary ban on Chinese toy products valid under Article XX(b).⁹¹ To justify this conclusion, a Panel must find: (1) that the imported product poses a health risk; (2) that there is no alternative

86. See Anne D’Innocenzio, *More Toys by Mattel Recalled*, CHI. TRIB., Sept. 5, 2007, at C1 (indicating that sixty-five percent of Mattel’s toys are made in China where only about fifty percent of this production is at company-owned plants).

87. See *European Asbestos AB Report*, *supra* note 3, ¶ 100.

88. See *id.* ¶¶ 91-97 (holding that a measure that applies only to imported products and not “like” domestic products discriminates, and thus constitutes less favorable treatment).

89. *Cf. id.* ¶ 100.

90. *Cf. European Asbestos Panel Report*, *supra* note 50, ¶ 9.1(c) (concluding that because the French Decree prohibited the sale of chrysotile fibers and chrysotile-cement it negatively affected the competitive relationship between imported and domestic “like products”).

91. *Cf. European Asbestos AB Report*, *supra* note 3, ¶¶ 162-163, 192 (holding that asbestos created a health risk and fell under Article XX(b)). See generally Bradley J. Condon, *GATT Article XX and Proximity of Interest: Determining the Subject Matter of Paragraphs B and G*, 9 UCLA J. INT’L & FOREIGN AFF. 137, 144 (2004) (arguing that courts should address disputes regarding domestic concerns under Article XX(b) and bilateral or multilateral concerns under an Article XX(g)).

measure consistent with GATT; and (3) that the proposed ban satisfies the conditions of Article XX's chapeau.⁹²

1. The Temporary Ban on Chinese Toys Is Within the Policies Designated to Protect the Human Life and Health of American Children

If the United States claims that the temporary ban falls under Article XX(b), then it also bears the burden of proving that the temporary ban is necessary to protect human life or health.⁹³ The WTO Appellate Body in *United States Gasoline* interpreted this language to require that the proposed measure fall within a range of policies designed to protect human life or health.⁹⁴ *European Asbestos Appellate Body Report* further elaborated on this language by stating that a member-state must prove that the product poses a sufficient risk to human life to trigger the exception.⁹⁵ As a result, a Panel must find that lead contamination in imported Chinese toys poses a health risk to the human life of American children.

Just as the Panel in *Thailand Cigarette* recognized the negative human health effects of smoking,⁹⁶ a Panel would likely conclude that the use of lead in children's toys creates a negative health effect.⁹⁷ Lead may cause serious health effects in children, making its use in toy production a public health risk.⁹⁸ A Panel would likely then find that the United States sufficiently sets forth a *prima facie* case for an Article XX(b) exception.⁹⁹

92. See *United States Shrimp Turtle*, *supra* note 56, ¶¶ 147, 149 n.156, 171.

93. See *European Asbestos AB Report*, *supra* note 3, ¶¶ 155-163.

94. See *United States Gasoline*, *supra* note 58, at 16.

95. See *European Asbestos AB Report*, *supra* note 3, ¶ 157.

96. *Thailand Cigarette*, *supra* note 2, ¶ 73.

97. See National Safety Council, Lead Poisoning, http://www.nsc.org/resources/Factsheets/environment/lead_poisoning.aspx (last visited Apr. 22, 2008) (discussing lead toxicity in children and adults).

98. See U.S. DEP'T OF HEALTH & HUMAN SERV., PUB. HEALTH SERV. AGENCY FOR TOXIC SUBSTANCE & DISEASE REGISTRY, TOXFAQS FOR LEAD 2 (2007), available at <http://www.atsdr.cdc.gov/tfacts13.pdf> (stating that lead exposure may cause anemia, neurological impairment, stomachache, muscle weakness and developmental delays).

99. See *European Asbestos AB Report*, *supra* note 3, ¶ 175 (illustrating the once a WTO Panel recognizes a health risk exists, the member-state has a *prima facie* case under Article XX(b)).

Consequently, the Panel must evaluate whether an alternative measure consistent with GATT exists.¹⁰⁰

2. *No Other Alternative Measure Exists to Achieve the U.S. Policy Objective*

The temporary ban on Chinese toys is necessary to prevent children from dangerous exposure to lead.¹⁰¹ Assuming that a Panel finds that the temporary ban falls within the scope of Article XX(b), the United States must then prove that the measure is “necessary” to fulfill its policy objective.¹⁰² Under *Thailand Cigarette*, a measure is “necessary” when no alternative measure, consistent with other GATT principles, would satisfy the stated objective.¹⁰³ Panels strictly interpret whether reasonable alternative measures exist to resolve a trade dispute.¹⁰⁴

A Panel would likely find that no alternative measure could adequately diminish the high risk of lead contamination of Chinese

100. *See id.* ¶ 169 (finding that an alternative measure does not cease to be reasonably available simply because it may pose administrative difficulties to a member-state).

101. *Cf.* Keith Bradsher, *Chinese Company Says It's Sorry for Making Poisonous Toy Beads*, N.Y. TIMES, Nov. 30, 2007, at C4 (detailing that the recall of Chinese-made toy beads responsible for the illness of fourteen children, some of which fell into comas); Marc Lifsher, Leslie Earnest, & Victoria Kim, *Lead Found in Toy Jewelry*, L.A. TIMES, Dec. 13, 2007, at A1 (reporting on the wide-ranging problem with lead in children's jewelry). Testing in California found that children's jewelry contained more than 600 times the allowable amount of lead considered safe. The problem is magnified by the fact that children often place toy jewelry in their mouths.

102. *See Thailand Cigarette*, *supra* note 2, ¶¶ 74-75 (holding that, in order for a Panel to find that a restriction is “necessary,” no alternative measure can be available); *see also* Jan Klabbers, *Jurisprudence in International Trade Law, Article XX of GATT*, 26 J. WORLD TRADE 63, 90-91 (providing that WTO Panels make a necessity determination based on whether alternative measures exist that are consistent with GATT).

103. *Thailand Cigarette*, *supra* note 2, ¶ 75.

104. *See European Asbestos AB Report*, *supra* note 3, ¶¶ 169-175; *United States Shrimp Turtle*, *supra* note 56, ¶¶ 171-172. *But see* Bal, *supra* note 65, at 82-85 (criticizing the narrow application by the WTO Panel when analyzing the “necessary” clause under an Article XX exception as this means that very few, if any policy measures will be valid under Article XX).

toys, and therefore hold the strict measure valid.¹⁰⁵ Although a Panel could find that less trade-intrusive policies exist,¹⁰⁶ the unsuccessful attempts by the United States to find an amicable solution will likely persuade a Panel that the United States reasonably attempted to impose a less trade-intrusive policy. The United States has no reasonable alternative but to impose a temporary ban on Chinese toy products because Chinese officials have been uncooperative in creating and enforcing efficient health and safety regulations.¹⁰⁷

Unlike the *Thailand Cigarette* dispute, where the Thai government imposed a permanent ban on imported cigarettes from all countries, the United States ban should be temporary and target Chinese toy products until the Chinese government creates and enforces adequate health and safety regulations. In addition, alternative measures suggested by *Thailand Cigarette*, such as advertising restrictions and mandatory labeling, would be ineffective.¹⁰⁸ Simple warnings would not prevent contaminated toys from entering the marketplace.¹⁰⁹

105. Cf. *European Asbestos AB Report*, *supra* note 3, ¶¶ 157-175 (noting that the Appellate Body found that the health risk from asbestos is very high, justifying the adoption of the strict measure to prevent the spread of the risk).

106. See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 48-49 (Paterson Inst. For Int'l Econ. 1994) (arguing that a WTO Panel can always find a less trade-intrusive policy making it difficult for environmentalists to satisfy this requirement under Article XX(b)).

107. See Louise Story, *Putting Playthings to the Test*, N.Y. TIMES, Aug. 29, 2007, at C1 (explaining that Chinese companies broke an agreement with Mattel to use only certified paint suppliers by purchasing lead-tainted paint from uncertified paint suppliers); Neikirk, *supra* note 5 (noting even where standards were given to Chinese manufactures by Mattel, they were ignored). It is therefore reasonable to foresee that current agreements to train manufactures will not suffice to protect human life. See also *European Asbestos AB Report*, *supra* note 3, ¶¶ 157, 174-175 (holding that a ban on asbestos was the only recourse available to fulfill France's policy objective).

108. See Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL L. 205, 206-211 (1996) (discussing the use of labels to warn consumers about human health and environmental issues, production methods, and the effects of the products); see also *Thailand Cigarette*, *supra* note 2, ¶ 77 (finding that warning labels adequately protect the public from the increased risk of imported cigarettes).

109. See David Barboza, *Why Lead in Toy Paint? It's Cheaper*, N.Y. TIMES, Sept. 7, 2007, at C1 (emphasizing that while China's written lead safety regulations are stricter than those of the United States, it is not adequately enforced). The lack of enforcement encourages manufacturers to ignore the regulations in favor of higher profits. *Id.*

Secondly, unwise consumers may disregard a warning label and risk buying a contaminated toy.¹¹⁰ Finally, current measures that require American inspectors to monitor vast amounts of toy imports are inadequate because when inspectors issue recalls a significant amount of time lapses before retail stores actually adhere to the recall, leading many consumers to continue buying contaminated products.¹¹¹ As a result, a Panel would likely conclude that a United States temporary ban is necessary because there is no alternative measure consistent with GATT.

*3. The Temporary Ban on Chinese Toy Products Satisfies the
Chapeau of ARTICLE XX*

In addition to finding the temporary ban on Chinese toy products valid under Article XX(b), a Panel would also likely find that the temporary ban meets the standard set forth in the chapeau.¹¹² A valid measure under the chapeau requires that the measure not be “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.”¹¹³

The *European Asbestos Panel Report* held that the manner in which a member-state applies a proposed measure determines whether it is arbitrarily or unjustifiably discriminatory.¹¹⁴ The Panel

110. See John J. Emslie, *Labeling Programs As a Reasonably Available Least Restrictive Measure Under Article XX's Nexus Requirement*, 30 BROOK. J. INT'L L. 485, 501-505 (2005) (discussing the disadvantages of labeling systems including the potential for abuse, inconsistency, inaccuracy, and manufacturing resistance).

111. See Maurice Possley, *Recalled Thomas Toys in Stores*, CHI. TRIB., June 28, 2007, at C1 (reporting that state investigators found that retailers responded inadequately to recalls).

112. See Allan Rosas, *Non-Commercial Values and the World Trade System: Building on Article XX*, in *ESSAYS OF THE FUTURE OF THE WTO: FINDING A NEW BALANCE* 75, 80 (Kim Van der Borght et al. eds., 2003) (underscoring that parties may satisfy the provisional requirements under Article XX and still fail to satisfy the chapeau).

113. GATT, *supra* note 12, art. XX; see *European Asbestos AB Report*, *supra* note 3, ¶ 185 (holding that the chapeau of Article XX requires that a Panel examine the application of the measure, not the measure itself).

114. See *European Asbestos Panel Report*, *supra* note 50, ¶ 8.226 (asserting that even if the measure is found to be discriminatory, a panel must still determine whether the discrimination is arbitrary or unjustifiable). A panel should determine

examined whether a ban on white asbestos discriminated against the supplier country in favor of domestic products.¹¹⁵ The Panel held that the French Decree did not discriminate because the ban applied to the import of white asbestos from all countries, including a ban on domestic production.¹¹⁶

A Panel would likely find that the temporary ban does not arbitrarily or unjustifiably discriminate against Chinese toy imports.¹¹⁷ An exclusive ban on Chinese toy imports would discriminate between Chinese imports and imports from other countries.¹¹⁸ Although the ban discriminates, the ban is not applied in an arbitrary or unjustifiable manner.¹¹⁹ The ban targets Chinese toy imports because previous U.S. measures failed to curtail the significant volume of contaminated Chinese toys entering the U.S. markets.¹²⁰

Since 2005, the United States has cooperated with China to improve the safety of Chinese products.¹²¹ Thus, unlike the parties in *United States Shrimp Turtle* who failed to attempt to solve their dispute by engaging in consultations and agreements with foreign governments,¹²² the Panel is likely to find that the United States has

whether a clause is arbitrary or unjustifiable by looking at “both the legal duties of the party claiming the exception and the legal rights of the other parties concerned.” *Id.*

115. *Id.* ¶¶ 2.3-2.5.

116. *Id.* ¶¶ 8.223-8.240.

117. *See id.* ¶¶ 8.223-8.230 (holding that a measure does not arbitrarily or unjustifiably discriminate between products when the measure is applied to both domestic and imported “like products”).

118. *Contra id.* ¶¶ 8.223-8.229 (stating that the French Decree was not discriminating between countries and satisfied the chapeau of Article XX because the ban applied to white asbestos imports from any country).

119. *See id.* ¶ 8.225-8.229 (finding that a ban is not arbitrary and is justified when used as a response to valid public health considerations).

120. *Cf.* David Lazarus, *Imports not Bringing Much Holiday Cheer to Toy District*, L.A. TIMES, Dec. 5, 2007, at C1 (discussing that the current American policy, which relies on overseas manufacturers to adhere to American safety standards, makes it difficult for American retailers to prevent unsafe toys from reaching children).

121. *See* Tony Pugh, *U.S., China Set New Rules on Toy Safety*, SEATTLE TIMES, Sept. 12, 2007, at A10 (noting on-going discussions regarding product safety between the United States and Chinese Consumer Product Safety organizations).

122. *See United States Shrimp Turtle*, *supra* note 56, ¶¶ 168-172 (holding that the United States did not engage in alternative measures to solve trade disputes before implementing drastic measures with all relevant member-states).

attempted to resolve the issue of unsafe toys through the tools provided by the WTO.¹²³ In addition, the United States would not create rigid requirements for the production of Chinese products. Unlike the *United States Shrimp Turtle* dispute where the United States tried to force all foreign governments to adopt United States regulatory measures,¹²⁴ the temporary ban does not require that the Chinese adopt United States law. China must simply create adequate safeguards and enforce them effectively.

A Panel would also likely conclude that the measure is not a “disguised restriction on international trade.”¹²⁵ In evaluating this factor of Article XX’s chapeau, a Panel must focus on the word “disguise.”¹²⁶ Thus, it must determine whether the measure is a “disguised restriction” that conceals the pursuit of trade-restrictive objectives by examining the measure’s “design, architecture, and revealing structure.”¹²⁷

Like in *European Asbestos Panel Report*, where the French authorities enacted a ban on asbestos in a panic over justifiable health scares,¹²⁸ the United States would impose a temporary ban on Chinese toy products in response to an overwhelming concern by parents and government officials regarding the use of lead in the

123. *Cf. id.* ¶¶ 168-170 (providing that when countries make good faith efforts to negotiate via international agreements a panel will be less likely to find that a measure is arbitrary and unjustifiable discriminatory).

124. *See id.* ¶¶ 168-172 (finding that member-states that create rigid import requirements unfairly prevent contracting member-states the opportunity to create their own policy that fulfill the needs of both parties).

125. *See European Asbestos Panel Report, supra* note 50, ¶ 8.227 (establishing that a Panel, in considering whether a measure is a disguised restriction on international trade, cannot use the same discrimination standard in GATT Article III:4).

126. *But see* Klabbers, *supra* note 102, at 90-91 (criticizing the analysis used to determine disguised restrictions under Article XX because it revolves around the term “disguised” rather than focusing on the “restriction”).

127. *See Japan Beverages, supra* note 40, at 29 (noting that while the aim of a measure may be difficult to analyze, the application of “design, architecture and revealing structure” is the best approach to discern the measure”); *see also* Bal, *supra* note 65, at 73-74 (arguing that the goal of the term “disguised restrictions” in Article XX is to prevent parties from adopting protectionist measures); Rosas, *supra* note 112, at 81 (forwarding that the central goal of Article XX is to guard against protectionist measures).

128. *European Asbestos Panel Report, supra* note 50, ¶ 8.238.

manufacturing of children's toys.¹²⁹ Moreover, the United States has a history of preventing the sale of lead contaminated products; it has had a ban on many products containing lead since 1971.¹³⁰ In addition, a ban on Chinese products would not benefit domestic products because toy manufacturers purchase most of their products from China.¹³¹ Since there are no ulterior "protectionist objectives," the measure is not a "disguised restriction" under Article XX's chapeau.¹³² Given that the temporary ban satisfies all the requirements of Article XX(b), a Panel would likely rule that it does not violate GATT principles.

III. RECOMMENDATIONS

A WTO Panel should conclude that a temporary ban on Chinese toy imports violates Article III:4 of GATT; however, this violation is lawful under exception Article XX (b). Nevertheless, a Panel should recommend that the United States eliminate its temporary ban promptly to conform to its national treatment obligations. Meanwhile, the United States should work with China to create efficient health and safety standards.

A Panel should remind the United States that a temporary ban will not be valid for an extended period of time, and that the United States should make concerted efforts to prevent the lead contamination of toys or seek international support to pressure China to comply.¹³³ By implementing these measures, the United States will

129. See Bonnie Miller, *Doctors Hear Lead Worries; Parents Concerned About Defective Toys*, CHI. TRIB., Aug. 22, 2007, at C2 (exemplifying parents' overwhelming concerns over the adverse health effects of Chinese-made toys containing lead by the huge increase of parents asking physicians to test their children for lead poisoning).

130. See Consumer Product Safety Act, 15 U.S.C. § 2057 (1978) (banning lead-based paint and certain consumer products bearing lead paint such as toys).

131. See Lipton & Barboza, *supra* note 13 (asserting that up to more than eighty percent of United States toys are made in China).

132. See *European Asbestos Panel Report*, *supra* note 50, ¶¶ 8.237-8.240 (finding that a measure that satisfies the condition of Article XX chapeau, and falls within Article XX(b), is valid under Article XX and thus can violate a GATT principle).

133. Cf. *United States Shrimp Turtle*, *supra* note 56, ¶¶ 166-172 (discussing alternative GATT-consistent measures with regard to the United States' importation ban). The Appellate Body noted with disapproval that the United

avoid future disputes,¹³⁴ alienation, and tension with one of its biggest trade partners¹³⁵ as well as avoid a potential Article III violation.¹³⁶

A. THE BAN ON CHINESE TOY PRODUCTS SHOULD BE
TEMPORARY

If the WTO Panel finds a temporary ban on Chinese toy products valid under the Article XX(b), the United States must nevertheless work to make the ban a temporary solution to meet its Article III obligations and avoid the negative economic and political repercussions of a prolonged ban.¹³⁷ By failing to eliminate the ban promptly, the United States could run the risk of an Appellate Body determining that the ban has become permanent instead of temporary.¹³⁸ A permanent ban would not be valid because it would violate section (b) of Article XX.¹³⁹

In addition, a prolonged ban would negate the purpose of the WTO, which is to promote international trade to improve the overall

States failed to work with the international community to form an international agreement that satisfied both parties. *Id.*

134. See David Barboza, *China Says It Does Care About Product Safety*, N.Y. TIMES, Aug. 18, 2007, at C3 (demonstrating the backlash that can occur when countries act in a reactionary manner). In the wake of the U.S. recalls of Chinese-made toys, China responded to the extraordinary media attention by claiming its own safety concerns over U.S.-made products and called the toy recalls an attempt at protectionism. *Id.*; see also Hedges, *supra* note 6 (indicating that while China entered into talks to improve safety of its products it also laid blame on the faulty toy design of American companies).

135. See Department of State, Background Note: China, <http://www.state.gov/r/pa/ei/bgn/18902.htm> (last visited Apr. 22, 2008) (asserting that the United States is currently the second largest trade partner of China and China is the United States' third largest trade partner).

136. See GATT, *supra* note 12, art. III (stating that countries cannot treat imported products differently than domestic products).

137. See Jason Leow, *China Exports Could Start to Slow*, WALL. ST. J., Aug. 6, 2007, at A2 (explaining that although the Chinese toy recalls have not hurt the overall trade sector, they affect the toy industry because it is difficult for American importers to replace China as a source of products).

138. See *Thailand Cigarette*, *supra* note 2, ¶ 81 (determining that a permanent ban is invalid under Article XX(b) when less trade restrictive alternatives exist that would solve the dispute and be consistent with GATT).

139. See *id.*

welfare of member-states.¹⁴⁰ A permanent ban may also drastically affect trade and political relations with China because it could cause China to terminate other trade or political agreements in retaliation.¹⁴¹ A permanent ban could also negatively affect the toy market in the United States because a majority of toys sold in the United States come from China.¹⁴²

B. THE UNITED STATES SHOULD WORK WITH CHINA TO CREATE EFFICIENT HEALTH AND SAFETY STANDARDS

During the implementation of the temporary toy ban, the United States should work with China to create satisfactory safety standards to prevent the contamination of toys. The United States may create more efficient health and safety standards by having the its Consumer Product Safety Commission (“CPSC”)¹⁴³ and China’s General Administration of Quality Supervision, Inspection, and Quarantine (“AQSIQ”)¹⁴⁴ develop a binding agreement outlining new health and safety standards for the production of children’s toys.¹⁴⁵ Such a mutual agreement would eliminate any potential argument that China was unaware of the new standards.¹⁴⁶ By creating bilateral

140. See UNDERSTANDING THE WTO, *supra* note 17, at 12-13 (asserting that liberal trade policies improve economic growth because they allow nations to prosper by capitalizing on their particular comparative advantages).

141. See Steven Weisman & Marjorie Connelly, *Americans Are Not Shunning Chinese Goods, Poll Finds*, N.Y. TIMES, Oct. 22, 2007, at C3 (highlighting China’s ban of some American imports like meat and wood products in response to criticism over the recalls).

142. See David Barboza & Louise Story, *Dancing Elmo Smackdown*, N.Y. TIMES, July 26, 2007, at C1 (noting that about fifty percent of Mattel’s revenue comes from products made by Chinese toy companies).

143. See U.S. Consumer Product Safety Commission, CPSC Overview, <http://www.cpsc.gov/about/about.html> (last visited Apr. 22, 2008) (designating the CPSC as the agency tasked with protecting the American public from unreasonable risks of serious injury or death from consumer products).

144. See General Administration of Quality Supervision, Inspection and Quarantine of the People’s Republic of China, Mission, <http://english.aqsiq.gov.cn/AboutAQSIQ/Mission/> (last visited Apr. 22, 2008) (declaring that the AQSIQ enforces and supervises the quality of Chinese products).

145. See Hedges, *supra* note 6 (noting that the CPSC and AQSIQ entered into a joint agreement to deal with product safety between the United States and China).

146. See *U.S. and China Agree on Tainted Toy Exports*, BALT. SUN, Sept. 12, 2007, at A5 (asserting that Chinese officials believe that the recent toy recalls stem

health and safety standards both Chinese producers and American consumers can be confident that imported Chinese toy products are safe.¹⁴⁷ In the wake of the negative exposure that Chinese products have received and the willingness of the Chinese government to work with other countries to improve its product inspections, it is an ideal time for the United States to help China improve its health and safety standards.¹⁴⁸

C. IF CHINA FAILS TO COOPERATE WITH THE UNITED STATES TO
CREATE AN EFFICIENT SAFETY STANDARD, THE UNITED STATES
SHOULD SEEK INTERNATIONAL SUPPORT TO PRESSURE CHINA TO
COMPLY

If the temporary ban fails, the United States should seek the support of the international community to pressure China to comply with the creation of more efficient safety standards.¹⁴⁹ The international community also has a stake in forcing China to comply because the use of unsafe chemicals in Chinese products affects the entire international community.¹⁵⁰ Since China became a member-state of the WTO in 2001, China must follow WTO rules.¹⁵¹ By failing to comply with the new safety regulations, China would risk the loss of WTO benefits.¹⁵² In addition, other WTO members could

from differences in Chinese and American standards for quality control for manufacturers).

147. See Lazarus, *supra* note 120, at C1 (signaling that sales in the Los Angeles toy district are down forty percent because consumers do not want to purchase Chinese-made toys).

148. See David Barboza, *China Moves to Refurbish a Damaged Global Image*, N.Y. TIMES, July 29, 2007, at A6 (noting that Chinese officials are taking extraordinary steps to improve China's image by imposing new safety regulations).

149. See *United States Shrimp Turtle*, *supra* note 56, ¶¶ 168-184 (establishing that the countries must first attempt to resolve their disputes through negotiations and written agreements before a ban qualifies under an Article XX exception).

150. See Stephen Castle, *Suspect Toothpaste from China Is Seized*, N.Y. TIMES, July 10, 2007, at C14 (indicating that Spain and Italy seized tens of thousands of tubes of potentially toxic Chinese-made toothpaste).

151. See generally Peter K. Yu & Gordon G. Chang, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003) (discussing the obligations that China must uphold after joining the WTO).

152. See UNDERSTANDING THE WTO, *supra* note 17, at 105 (establishing that member-states must adhere to their obligations or risk losing WTO benefits).

impose internal taxes, tariffs, quotas, or other trade restrictions.¹⁵³ The loss of the benefit and the risk of repercussive measures could pressure China to cooperate with the United States.¹⁵⁴ Seeking the assistance of the international community will help pressure China to adopt acceptable standards.¹⁵⁵

CONCLUSION

Due to recent recalls of Chinese-made toys the United States must pressure China to improve its health and safety standards. A temporary ban on Chinese toy products is the best method to pressure China to comply. Though the imposition of a temporary ban on Chinese toy products would violate Article III of GATT, a WTO Panel would likely find the measure valid under Article XX(b) because it protects the health and life of American children. In order to satisfy its Article III obligations, the United States must work to eliminate the temporary ban promptly. During the application of the ban, the United States should work with China to create efficient health and safety standards for the production of its toys or seek international support to pressure China to work with the United States. By first attempting to negotiate efficient health and safety standards with China, the United States will avoid alienating one of its largest trading partner and continue to satisfy Article XX(b).

153. See Neuling, *supra* note 39, at 5-12 (expounding on the WTO articles a member-state may employ to justify the imposition of internal taxes or import bans). While the discussion is with reference to environmental issues, the application of the articles is relevant to all subject matters.

154. See Barboza, *supra* note 7 (stating that China is trying to work with the international community to fix product safety because of its growing fear that international pressure may lead to sanctions or embargos).

155. See David Barboza, *China Suspends Exports from 750 Toy Makers*, N.Y. TIMES, Nov. 2, 2007, at C3 (stating that Chinese regulators suspended the export license of more than seven hundred and fifty toy companies in response to American and European pressure).