CAVEAT EMPTOR: HOW CAFTA IMPERILS STATE RECYCLED PAPER PROCUREMENT PREFERENCES

Ben Stafford

Abstract: The federal government's use of its control over foreign commerce increasingly conflicts with powers reserved to the states. Article 9 of the Central American Free Trade Agreement (CAFTA) establishes requirements by which government agencies must abide in procuring goods and services. Specifically, CAFTA Article 9 establishes that procuring entities must afford "national treatment" to goods imported from other CAFTA nations by treating such foreign goods at least as favorably as similar domestic goods. The federal government reached an agreement wherein a number of states became bound by these rules, including fourteen states with state statutes related to governmental procurement preferences for recycled paper. This Comment argues that three of these state statutes violate CAFTA by requiring that procuring governmental entities give preference to local recycled paper products over their foreign recycled and virgin paper counterparts. Such a violation places the United States in breach of treaty. Accordingly, these states must modify their laws to bring them into compliance with CAFTA or risk federal preemption or targeted trade sanctions.

On March 6, 2006, the Washington State Legislature unanimously passed Senate Joint Memorial 8019.[1] The Legislature addressed the Memorial to President Bush, the President of the Senate, the Speaker of the House, and the U.S. Trade Representative (USTR).[2] The Memorial calls for the establishment of a Federal-State International Trade Policy Commission to coordinate communication between federal and state trade policy officials.[3] According to the Washington State Legislature, the establishment of such a Commission has become necessary due to recent international trade agreements entered into by the U.S. government, which "have proceeded beyond discussion of tariffs and quotas and now address government regulation, taxation, procurement, and economic development policies that are implemented at state and local levels."[4]

1. *See* 1 Legislative Digest and History of Bills of the Senate and House of Representatives, 59th Leg., Reg. Sess., at 551–52 (Wash. 2006).

2. *See* E.S.J. Memorial 8019, 59th Leg., Reg. Sess. (Wash. 2006). The USTR is a member of the President's Cabinet and serves as the "[P]resident's principal trade advisor, negotiator, and spokesperson on trade issues." *See* Office of the U.S. Trade Representative, Mission of the USTR, http://www.ustr.gov/Who_We_Are/Mission_of_the_USTR.html (last visited Oct. 31, 2006).

3. E.S.J. Memorial 8019.

4. *Id.*

As set forth in Joint Memorial 8019, free trade agreements, which are the province of the federal government, are increasingly reaching the core functions of state governments.[5] Among other issues, this has dramatic implications for the ability of state governments to use their purchasing power to advance local economic development and environmental policy.[6] The potential scope of conflict is expanding rapidly with the recent proliferation of bilateral and multilateral free trade agreements between the United States and other nations.[7] These agreements are allowable exceptions to the general vision of the World Trade Organization (WTO) as an overarching global trade system.[8] States must therefore be cognizant not only of WTO rules and ongoing WTO developments, but also of a series of side trade agreements and negotiations.

Government procurement practices can dramatically shape markets, social development, and environmental protection[9] because government expenditures constitute a large percentage of gross domestic product in most industrialized nations.[10] This power has led many governments to use procurement to advance sustainable development.[11] Free trade agreements entered into by the federal government increasingly affect state government procurement.[12]

---

5. *See infra* Part I.B.

6. *See, e.g.*, Central America-Dominican Republic-United States Free Trade Agreement art. 9, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA] (requiring state agencies to abide by procurement rules).

7. *See, e.g.*, Office of the U.S. Trade Representative, Trade Agreements, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Jan. 6, 2007) (listing recent bilateral and multilateral trade agreements).

8. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XXIV, ¶ 5, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATT] (authorizing formation of "customs unions" and "free-trade areas").

9. *See* Marie-Claire Cordonier Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 FORDHAM INT'L L.J. 1118, 1195 (2004).

10. Government procurement constitutes ten to twenty-five percent of Gross Domestic Product for member states of the Organisation for Economic Co-operation and Development (OECD). *See id.* The OECD includes most of the world's largest economies. *See* OECD, THE OECD 29 (2006), http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (follow "pdf version of our brochure" hyperlink).

11. *See* Cordonier Segger, supra note 9, at 1195.

12. *See, e.g.*, CAFTA Annex 9.1.2(b)(i) § B Schedule of the United States & Notes to the Schedule of the United States, Aug. 5, 2004, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file977_3927.pdf [hereinafter CAFTA U.S. Schedule & CAFTA U.S. Schedule Notes] (covering procurement of twenty-two states).

The Central American Free Trade Agreement (CAFTA) is a recent example of this new breed of trade agreement.[13] CAFTA requires that government procurers, including states, afford "national treatment" to other CAFTA members by treating foreign goods no less favorably than similar domestic goods.[14] CAFTA also, however, provides limited environmental exceptions to the national treatment requirement.[15]

This Comment argues that the procurement laws of Arkansas, Louisiana, and New York, which give preference to recycled paper over virgin paper, violate the national treatment rules of CAFTA, fail to qualify for any of CAFTA's environmental exceptions, and place the United States in breach of that treaty. Part I explains the place of trade treaties in our federal system of government. Part II provides information about the history and structure of the WTO and CAFTA. Part III examines the national treatment principles of the WTO, which CAFTA incorporates. Part IV discusses the limited environmental exceptions of CAFTA that potentially excuse otherwise non-compliant laws. Part V examines the recycled paper procurement laws of the fourteen states bound by CAFTA's government procurement rules. Part VI argues that three states' recycled paper procurement laws violate the national treatment rules of CAFTA.

I. THE CONSTITUTION VESTS THE FEDERAL GOVERNMENT WITH NEAR-PLENARY FOREIGN AFFAIRS POWERS

Under the federal system of the United States, control of foreign affairs rests with the federal government.[16] The federal government exercises control over foreign commerce primarily through the use of treaties and other international agreements.[17] These agreements increasingly reach the core functions of state governments.[18] Although states are insulated from direct action for treaty violations, the federal government faces consequences for a state's breach.[19]

13. *See* CAFTA, *supra* note 6.
14. *See* CAFTA, *supra* note 6, art. 3.2; *see also infra* Part III.B.
15. *See infra* Part IV.
16. *See infra* Part I.A.
17. *See infra* Part I.A.
18. *See infra* Part I.B.
19. *See infra* Part I.C.

A. The Federal Government Plays the Dominant Role in Foreign Affairs

States play a minor role in foreign affairs because the federal government has near-plenary power over the foreign relations of the United States.[20] The U.S. Constitution prohibits states from performing numerous foreign relations functions, including entering into treaties with foreign nations.[21] Instead, the Constitution gives the President exclusive authority to enter into treaties with the concurrence of two-thirds of the Senate.[22] Moreover, Congress has the power "[t]o regulate Commerce with foreign Nations."[23] The United States thus conducts foreign commerce through a framework of treaties and other international agreements negotiated at the federal level.[24]

B. Trade Treaties Increasingly Reach the Core Functions of State Governments

Modern trade treaties increasingly impact the regulatory authority of state governments.[25] Foreign affairs and international trade posed little danger to state sovereignty until the emergence of the General Agreement on Trades and Tariffs[26] in the post-World War II era[27] and its subsequent transformation into the World Trade Organization (WTO) in 1995.[28] In addition to U.S. membership in the WTO, the administration

---

20. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). However, in the race for economic betterment, states have expanded their international role by, for example, establishing trade programs and seeking out foreign investment. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1459 (1994).

21. *See* U.S. CONST. art. I, § 10.

22. *Id.* art. II, § 2, cl. 2.

23. *Id.* art. I, § 8, cl. 3.

24. *See* Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay*, 56 U. MIAMI L. REV. 25, 33 (2001).

25. *See* Friedman, *supra* note 20, at 1453–59.

26. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. The Agreement subsequently underwent significant amendment, culminating in the creation of the WTO in 1994, when the parties adopted the current version of the Agreement. *See* GATT, *supra* note 8.

27. *See* Friedman, *supra* note 21, at 1454.

28. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1144 (1994). Federal control over foreign affairs

of George W. Bush actively expanded the participation of the United States in other bilateral and multilateral free trade agreements.[29] The scope of trade agreements has increased dramatically since the creation of the WTO and now reaches areas as diverse as services,[30] intellectual property,[31] and government procurement.[32] While in the past the obligations of trade agreements applied only to the national level of government in federalist nations, many free trade agreements now also apply to subnational units.[33] States are thus increasingly affected by international trade agreements.[34]

C. Foreign Nations May Not Sue States Directly for Treaty Violations, but Must Instead Rely on Federal Preemption and International Dispute Settlement Bodies

States, as subnational units, are largely insulated from direct consequences for treaty violations. Foreign nations may obtain relief for such violations through a federal declaratory action brought to preempt

---

threatens state sovereignty because treaties trump state law. *See* U.S. CONST. art. VI, § 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

29. *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2006 TRADE POLICY AGENDA AND 2005 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 114-123 (2006), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Trade_Policy_Agenda/asset_upload_file765_9077.pdf (last visited Feb. 1, 2007) (listing recent bilateral trade agreements).

30. *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1167 (1994).

31. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994).

32. *See* Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, Legal Instruments—Results of the Uruguay Round, 1915 U.N.T.S. 103. Prior to GATT, such international trade agreements generally were limited in scope because they dealt primarily with tariffs and excluded such significant sectors as services and procurement. *See* Friedman, *supra* note 20, at 1454–55 (noting that prior to 1994 most GATT negotiations concerned trade in goods, and "state authority was involved little and remained reasonably intact"); *see also* INFO. & MEDIA RELATIONS DIV., WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 16 (3d ed. 2003) [hereinafter UNDERSTANDING THE WTO].

33. *See, e.g.*, CAFTA, *supra* note 6, art. 3.2(2) (applying national treatment rules to subnational governments).

34. *See, e.g.*, Report of the Panel, *United States—Measures Affecting Alcoholic and Malt Beverages*, ¶ 6.1, DS23/R (June 19, 1992), GATT B.I.S.D. (39th Supp.) at 206, 297–99 (1993) (GATT Panel ruling that various taxes and regulations of numerous states violated GATT).

the offending state law[35] or international trade tribunals.[36] Foreign nations cannot sue individual U.S. states.[37] Instead, nations seeking redress against U.S. state actions must either spur federal preemption of the state law[38] or lodge a complaint before the appropriate international dispute settlement body.[39] If such an international dispute settlement body finds against the United States, and the U.S. government does not act to eliminate the nonconforming state law, the tribunal may authorize use of retaliatory trade sanctions against the United States to provoke elimination of the offending law.[40] Using such trade sanctions, the aggrieved nation(s) may selectively target an offending state's products to disrupt that state's economy.[41]

Crosby v. National Foreign Trade Council[42] provides perhaps the most well-known example of a state running afoul of the federal government's foreign-affairs powers. *Crosby* addressed a government

35. Under the U.S. legislation implementing CAFTA, only a declaratory action brought by the federal government can invalidate a state law on the basis that it is inconsistent with CAFTA. 19 U.S.C.A. § 4012(b)(1) (West 2005).

36. *See, e.g.*, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 2.1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU] (granting the WTO Dispute Settlement Body authority to adjudicate disputes arising out of certain covered agreements).

37. *See* 19 U.S.C.A. § 4012(c) ("No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with [CAFTA].").

38. Federal statutes may preempt conflicting state laws on the subject of foreign affairs. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (holding that a Massachusetts law targeting Burma was preempted because it interfered with Congress's approach to the same issue); *see also* Hines v. Davidowitz, 312 U.S. 52, 60, 74 (1941) (holding a Pennsylvania act was preempted by a conflicting federal act).

39. *See, e.g.*, DSU, *supra* note 36, art 2.1 (stating that the WTO Dispute Settlement Body administers disputes arising out of covered WTO agreements). Nations cannot bring U.S. states before a dispute settlement body directly because the federal government is the relevant international actor. *See* Casebeer, *supra* note 24, at 33.

40. *See* CAFTA, *supra* note 6, art. 20.16(2) (authorizing such sanctions).

41. *See* David I. Spector, Note, *Trade Treaty Threats and Sub-National Sovereignty: Multilateral Trade Treaties and Their Negligible Impact on State Laws*, 27 HASTINGS INT'L & COMP. L. REV. 367, 385–87 (2005); *see also* John Simons, *Handbags, Bed Linens Included in List of Goods Covered by Trade Sanctions*, WALL ST. J., Apr. 12, 1999, at A24 (reporting on "banana dispute" between the United States and the European Union, during which the United States selectively levied trade sanctions against products of certain European nations).

42. 530 U.S. 363 (2000).

procurement law[43] enacted by Massachusetts in response to human rights violations perpetrated by the government of Burma (now Myanmar).[44] Save for a few narrow exceptions, the law prohibited state agencies from procuring goods and services from those doing business with Burma.[45] In response to the law's enactment, the European Union and Japan lodged formal complaints against the United States with the WTO.[46] Before the WTO ruled on the offending law, the U.S. Supreme Court determined that a federal law[47] preempted the Massachusetts law.[48] While the Massachusetts law flatly prohibited state entities from buying goods or services from any person doing business with Burma,[49] the federal law vested authority in the President to devise the appropriate national level of economic sanction against Burma.[50] The Court found that the Massachusetts law was preempted because the Massachusetts law conflicted with the federal statute's delegation of authority to the President to devise flexible sanctions.[51]

II. THE WTO GOVERNS INTERNATIONAL TRADE AND PERMITS REGIONAL AGREEMENTS SUCH AS CAFTA

The WTO provides a set of substantive trading rules and serves as a dispute settlement body for purported violations of these rules.[52] The decisions of WTO tribunals create de facto precedent often followed by later WTO tribunals adjudicating trade disputes.[53] The WTO also allows regional side agreements such as CAFTA.[54] During CAFTA negotiations, twenty-two U.S. states agreed to apply Article 9 of CAFTA

---

43. *See* MASS. ANN. LAWS ch. 7, §§ 22G–22M (LexisNexis Supp. 1998), *invalidated by Crosby*, 530 U.S. 363.

44. *See Crosby*, 530 U.S. at 376–77.

45. *See* MASS. ANN. LAWS ch. 7, §§ 22H–22J; *see also Crosby*, 530 U.S. at 367.

46. *Crosby*, 530 U.S. at 383.

47. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-121, 166–67 (1997).

48. *Crosby*, 530 U.S. at 388.

49. *See* MASS. ANN. LAWS ch. 7, §§ 22H–22J; *see also Crosby*, 530 U.S. at 367–68.

50. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act § 570; *see also Crosby*, 530 U.S. at 374–76.

51. *See Crosby*, 530 U.S. at 388.

52. *See* UNDERSTANDING THE WTO, *supra* note 32, at 9–10.

53. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 5.6, WT/DS8/AB/R (Oct. 4, 1996).

54. *See* GATT, *supra* note 8, art. XXIV, ¶ 5.

to their government procurement practices.[55] Only a declaratory action brought by the federal government can invalidate state law as a violation of CAFTA,[56] although CAFTA tribunals may authorize trade sanctions designed to force a state to change laws that do not conform with CAFTA.[57]

A. The WTO Creates De Facto Precedent Through Its Dispute-Resolution System

GATT members formed the WTO in 1995.[58] The WTO serves three overarching purposes. First, it is a forum for trade negotiations among nations.[59] Second, it is a set of international trade rules developed through a series of agreements and treaties.[60] The WTO framework specifically authorizes its members to enter into regional trade agreements such as CAFTA.[61] Third, the WTO serves as an arbiter to resolve disputes arising under the organization's agreements.[62]

If two WTO members cannot resolve a dispute collaboratively, the WTO's dispute-resolution system allows either party to ask for an expert panel to adjudicate the dispute.[63] If the panel determines that a WTO agreement or obligation has been violated by a member's laws, it will recommend that the offending party either revise or eliminate the challenged measure to conform with WTO rules.[64] Either party may appeal a panel decision to the WTO Appellate Body.[65] The WTO Dispute Settlement Body, composed of all WTO members, has the ultimate authority to accept or reject a panel report or an Appellate Body decision.[66] Although the Dispute Settlement Body favors resolving

---

55. *See* CAFTA U.S. Schedule, *supra* note 12; *see also infra* notes 81–88 and accompanying text.

56. *See* 19 U.S.C.A. § 4012(b)(1) (West 2005).

57. *See* CAFTA, *supra* note 6, art. 20.16(2).

58. *See* UNDERSTANDING THE WTO, *supra* note 32, at 10.

59. *See* UNDERSTANDING THE WTO, *supra* note 32, at 9.

60. *See* UNDERSTANDING THE WTO, *supra* note 32, at 9.

61. *See* GATT, *supra* note 8, art. XXIV, ¶ 5.

62. *See* UNDERSTANDING THE WTO, *supra* note 32, at 10.

63. *See* UNDERSTANDING THE WTO, *supra* note 32, at 56.

64. *See* DSU, *supra* note 36, art. 19.1.

65. *See* DSU, *supra* note 36, art. 16.4. The Appellate Body is a standing body of seven persons who are appointed for four-year terms. *See* DSU, *supra* note 36, art. 17.1–.2. They must be experts in international law who are unaffiliated with any government. *See* DSU, *supra* note 36, art. 17.3.

66. *See* UNDERSTANDING THE WTO, *supra* note 32, at 56–57. In practice, panel reports and Appellate Body decisions are almost always adopted because rejection requires unanimous

disputes through consultations,[67] it possesses the power to recommend that countries cure laws inconsistent with the WTO.[68] Nations that do not correct such laws may face trade sanctions.[69]

Decisions of either a WTO panel or the WTO Appellate Body do not officially bind later panels or the Appellate Body; rather, such decisions bind only the parties to the dispute.[70] Nonetheless, WTO decisions are highly persuasive[71] and their legal reasoning is generally followed by subsequent WTO tribunals.[72] Accordingly, the decisions of WTO tribunals create an emerging body of WTO jurisprudence.

B. CAFTA Covers Government Procurement and Has a Dispute Settlement Body with the Power to Demand Elimination of Non-Conforming State Laws

CAFTA is a regional free trade agreement among the United States, the Dominican Republic, and five Central American countries.[73] Twenty-two U.S. states have agreed to apply CAFTA, which incorporates WTO national treatment rules,[74] to their government procurement practices.[75] In the United States, the legislation

---

consensus. *See id.* at 56. WTO tribunal reports do not bind the disputants until adopted by the Dispute Settlement Body. *See id.* at 56–57.

67. *See* UNDERSTANDING THE WTO, *supra* note 32, at 55. "Consultations" are the collaborative, interactive methods by which nations seek to resolve disputes. *See* BLACK'S LAW DICTIONARY 335 (8th ed. 2004).

68. *See* DSU, *supra* note 36, art. 19.1.

69. *See* DSU, *supra* note 36, art. 22.2.

70. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 5.6, WT/DS8/AB/R (Oct. 4, 1996).

71. *See id.* ("Adopted panel reports are . . . . often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.").

72. *See id.* ¶ 8.5.

73. On August 5, 2004, the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua signed CAFTA. *See* 19 U.S.C.A. §4011(a)(1) (West 2005). CAFTA has entered into force in the United States, El Salvador, Honduras, and Nicaragua. *See* Press Release, Office of the U.S. Trade Representative, Statement of USTR Portman Regarding Entry into Force of the U.S. – Central America – Dominican Republic Free Trade Agreement (CAFTA-DR) for Honduras and Nicaragua (Mar. 31, 2006), http://www.ustr.gov/Document_Library/Press_Releases/2006/March/Statement_of_USTR_Portman_Regarding_Entry_Into_Force_of_the_US_-_Central_America_-_Dominican_Republic_Free_Trade_Agreement_(CA.html.

74. *See* CAFTA, *supra* note 6, art. 3.2(2).

75. *See infra* notes 81–82 and accompanying text.

implementing CAFTA provides that only a declaratory action brought by the federal government can preempt a state law inconsistent with CAFTA.[76] Nevertheless, CAFTA tribunals can authorize retaliatory sanctions against the United States for state non-compliance with CAFTA.[77]

1. Twenty-Two U.S. States Agreed To Be Bound by CAFTA Government Procurement Rules and Thus by WTO National Treatment Rules

CAFTA regulates government procurement, which it defines as "the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes."[78] Article 9 of the Agreement delineates member obligations related to government procurement.[79] In addition, CAFTA incorporates WTO national treatment requirements.[80]

During CAFTA negotiations, the USTR sent a letter to the governors of various states asking that they bind their states to follow CAFTA procurement rules.[81] The governors of twenty-two U.S. states agreed[82] to do so in relation to Costa Rica, the Dominican Republic, El Salvador, Guatemala, and Nicaragua.[83] Sixteen of those states also chose to follow

76. *See* 19 U.S.C.A. § 4012(b)(1).

77. *See* CAFTA, *supra* note 6, art. 20.16.

78. *See* CAFTA, *supra* note 6, art. 2.1.

79. *See* CAFTA, *supra* note 6, art. 9.

80. *See* CAFTA, *supra* note 6, art. 3.2.

81. *See, e.g.*, Letter from Gary Locke, Governor, State of Washington, to Robert B. Zoellick, U.S. Trade Representative (Sept. 30, 2003), *available at* http://www.citizen.org/documents/WA%20_LocketoUSTR.pdf (agreeing to cover Washington State procurement under CAFTA); Office of the U.S. Trade Representative, The Dominican Republic – Central America – United States Free Trade Agreement – Impact on State and Local Governments 3, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Transmittal/asset_upload_file242_7825.pdf (last visited Jan. 31, 2007) (noting in this transmittal to Congress that the USTR had requested that every state bind state government procurement under CAFTA).

82. Whether this process is constitutional under various state constitutions is hotly debated. Which state governmental branch has constitutional authority to bind states to international trade agreements is almost always unclear. *See, e.g.*, TRACEY TAYLOR, WASH. STATE HOUSE OF REPRESENTATIVES, THE LEGISLATURE, THE GOVERNOR & INTERNATIONAL TRADE AGREEMENTS: AN ANALYSIS OF WASHINGTON LAW 2 (2004), http://www1.leg.wa.gov/documents/OPR/2005/JLOCTP.pdf (concluding that the Washington State Constitution does not clearly delegate the power to enter trade agreements to either the Governor or the Legislature).

83. *See* CAFTA U.S. Schedule, *supra* note 12.

such rules in relation to Honduras.[84] Moreover, each state designated which of its agencies would be covered by CAFTA,[85] and each also exempted certain industries from CAFTA, such as construction services, software, and motor vehicles.[86] Each CAFTA member designated which, if any, subnational levels of its government would be bound by CAFTA procurement rules.[87] The specific procuring entities of each member bound by Article 9 rules appear in Annex 9.1.2(b)(i).[88]

2. CAFTA Panels Can Authorize Trade Sanctions, but Only a Federal Declaratory Action Can Invalidate State Laws that Violate CAFTA

Only a declaratory action brought by the federal government in a U.S. court can invalidate a state law for violating CAFTA.[89] An offended nation may not bring a lawsuit directly against an offending U.S. state.[90] However, if the federal government fails to bring such a declaratory action, a CAFTA panel is empowered to authorize other remedies.[91] CAFTA panels have jurisdiction over, inter alia, any CAFTA member's claim that the law of another member has nullified or impaired its expected benefits under CAFTA.[92] If a panel finds for the complaining member, it must initially recommend that the offending party eliminate or modify the law in question.[93] If the parties cannot agree on an appropriate resolution, a panel may authorize the prevailing party to levy retaliatory sanctions or monetary penalties.[94] However, CAFTA Article

84. *See* CAFTA U.S. Schedule, *supra* note 12.

85. *See* CAFTA U.S. Schedule, *supra* note 12.

86. *See* CAFTA U.S. Schedule, *supra* note 12.

87. CAFTA, *supra* note 6, Annex 9.1.2(b)(i).

88. *See, e.g.*, CAFTA U.S. Schedule, *supra* note 12 (listing U.S. state procuring agencies bound under CAFTA).

89. *See* 19 U.S.C.A. § 4012(b)(1) (West 2005) ("No State law, or the application thereof, may be declared invalid . . . on the ground that the provision or application is inconsistent with [CAFTA] except in an action brought by the United States for the purpose of declaring such law or application invalid.").

90. *Id.* § 4012(c)(2) ("No person other than the United States . . . may challenge . . . any action or inaction by any . . . State . . . on the ground that such action or inaction is inconsistent with [CAFTA].").

91. *See* CAFTA, *supra* note 6, art. 20.15–16.

92. *See* CAFTA, *supra* note 6, art. 20.2(c).

93. *See* CAFTA, *supra* note 6, art. 20.15(2).

94. *See* CAFTA, *supra* note 6, art. 20.16(2).

20.16 requires a prevailing nation, whenever possible, to limit retaliatory sanctions to the "same sector" affected by the challenged law.[95]

III. GATT AND CAFTA NON-DISCRIMINATION RULES REQUIRE THAT LIKE PRODUCTS BE TREATED EQUALLY

"National treatment" rules of both the WTO and CAFTA promote the goal of creating competitive trading relationships among nations[96] and ensure that foreign products are treated as favorably as similar domestic products.[97] National treatment thus minimizes a government's ability to use procurement policy either to discriminate against the products of another country or to force another country to adopt its labor, environmental, or other standards in order to compete in its markets.[98]

A. WTO Members Must Afford National Treatment to the Products of Other Members That Are "Like" Similar Domestic Products

WTO members owe a broad duty to give "national treatment" to products of other nations.[99] Specifically, national treatment forbids member states from applying internal measures[100] to imported or domestic products where the effect is to afford protection to domestic production.[101] GATT Article III contains the primary national treatment requirements.[102]

GATT Article III, Paragraph 2 (Paragraph 2) forbids a member state from taxing imported products in excess of similar domestic products.[103] The degree of similarity between two products determines the specific

95. *See* CAFTA, *supra* note 6, art. 20.16(5).

96. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.3, WT/DS8/AB/R (Oct. 4, 1996).

97. GATT, *supra* note 8, art. III.

98. *See* Arthur E. Appleton, *Environmental Labelling Schemes: WTO Law and Developing Country Implications*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM 195, 199 (Gary P. Sampson & W. Bradnee Chambers eds., 2000).

99. *See* GATT, *supra* note 8, art. III.

100. Internal measures are those applied to imported products that have already entered a nation's internal markets. *See* GATT, *supra* note 8, art. III. A different regime governs border measures. *See, e.g.*, GATT, *supra* note 8, art. VII (governing customs valuation).

101. *See* GATT, *supra* note 8, art. III.

102. *See* GATT, *supra* note 8, art. III.

103. *See* GATT, *supra* note 8, art. III, ¶ 2.

requirements with which a member state's taxation regime must comply.[104] Specifically, Paragraph 2 provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject . . . to internal taxes . . . in excess of those applied . . . to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes . . . to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.[105]

The first sentence of Paragraph 2 applies only to "like" domestic products.[106] Whether two products are "like" is determined on a case-by-case basis; they need not be identical.[107] The second sentence of Paragraph 2 encompasses, in addition to "like" goods, the broader category of "directly competitive" or "substitutable" goods.[108] Products are directly competitive or substitutable when they are interchangeable, as shown by evidence that consumers consider or could consider the two products as alternative means of satisfying a particular need or taste.[109] Evidence of cross-price elasticity,[110] distribution of two products through similar channels,[111] and relevant changes in consumer consumption patterns[112] all provide strong evidence that products are interchangeable.[113]

---

104. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 8.17, WT/DS8/AB/R (Oct. 4, 1996).

105. GATT, *supra* note 8, art. III, ¶ 2.

106. *See* GATT, *supra* note 8, art. III, ¶ 2.

107. *See* Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.21, WT/DS8/R (July 11, 1996); *see also infra* Part III.A.1.

108. *See* GATT, *supra* note 8, Annex I, Ad Article III, ¶ 2 ("A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between . . . the taxed product and . . . a directly competitive or substitutable product which was not similarly taxed."). The Addendum to Article III, containing official interpretative notes to various GATT provisions, is part of the original GATT agreement.

109. *See* Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, ¶ 115, WT/DS75/AB/R, WT/DS84/R (Jan. 18, 1999).

110. *See* Panel Report, *Chile—Taxes on Alcoholic Beverages*, ¶ 7.43, WT/DS87/R, WT/DS110/R (June 15, 1999) (discussing relationship between domestic spirits and foreign spirits).

111. *See id.* ¶ 7.57.

112. *See id.* ¶ 7.24 ("[P]anels should look at evidence of trends and changes in consumption patterns and make an assessment as to whether such trends and patterns lead to the conclusion that the products in question are . . . directly competitive or substitutable . . . .").

113. *See id.* ¶¶ 7.77–78.

GATT Article III, Paragraph 4 (Paragraph 4) applies national treatment rules to a member nation's internal laws and regulations.[114] Paragraph 4 provides, in relevant part: "The products . . . of any contracting party . . . shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements . . . ."[115] Although the text of Paragraph 4 also addresses "like" products, the scope of the term in Paragraph 4 is broader than that in Paragraph 2.[116] The Appellate Body has given "like" in Paragraph 4 a broader reading because Paragraph 4 must protect the same interests as Paragraph 2, but omits Paragraph 2's broader category of "directly substitutable or competitive" products.[117] However, it is unclear whether the term "like" in Paragraph 4 is as broad as the combination of the Paragraph 2 categories of "like" products and "directly substitutable or competitive" products.[118]

A Paragraph 4 violation requires proof of three elements.[119] First, the imported and domestic products at issue must be "like products" within the meaning of the term as used in Paragraph 4.[120] Second, the objectionable measure must be a law, regulation, or requirement affecting internal sale, offering for sale, purchase, transportation, distribution, or use of a product.[121] Third, the imported products must be given less favorable treatment than that given to like domestic products.[122]

1. WTO Panels Determine Whether Products Are "Like" on a Case-by-Case Basis by Examining Four Factors

When faced with an alleged violation of Paragraph 4, a WTO panel determines whether imported and domestic products are "like" on a

---

114. *See* GATT, *supra* note 8, art. III, ¶ 4.

115. *See* GATT, *supra* note 8, art. III, ¶ 4.

116. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001).

117. *See id.*

118. *Id.* This ambiguity does not arise in CAFTA, which explicitly provides that national treatment must be afforded to like, directly competitive, and directly substitutable goods. *See* CAFTA, *supra* note 6, art. 3.2(2).

119. *See* Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000).

120. *See* GATT, *supra* note 8, art. III, ¶ 4.

121. *See* GATT, *supra* note 8, art. III, ¶ 4.

122. *See* GATT, *supra* note 8, art. III, ¶ 4.

case-by-case basis.[123] The Appellate Body has suggested that the determining criterion by which to judge "likeness" under Paragraph 4 is whether two products are in a competitive relationship with each other.[124] To make this determination, WTO panels examine four nondispositive factors for each product: (1) the product's properties, nature, and quality; (2) the product's end uses in a given market; (3) consumers' tastes and habits, which may vary from country to country; and (4) the product's international tariff classification.[125]

First, the criterion of properties, nature, and quality examines whether the products share physical similarities that affect their competitiveness.[126] WTO jurisprudence suggests that "[t]he determination of whether two products are 'like' has traditionally turned to a great[] extent . . . on the physical characteristics of products."[127] Some panel decisions have indicated that the inquiry could largely end here, stating that "like" products are those sharing most physical characteristics.[128]

In addition, WTO panels apply the criteria of "end uses" and of "consumer tastes and habits," which both examine facets of the competitive relationships between two products.[129] The criterion of end uses focuses on the extent to which products are capable of performing the same, or similar, functions.[130] Similarly, WTO tribunals examine the criterion of consumer tastes and habits to determine the extent to which consumers are willing to use the products to perform these functions.[131]

---

123. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 8.4, WT/DS8/AB/R (Oct. 4, 1996).

124. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001).

125. *Id.* ¶ 101.

126. *See id.* ¶ 114 ("Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace.").

127. Panel Report, *Korea—Taxes on Alcoholic Beverages*, ¶ 10.66, WT/DS75/R, WT/DS84/R (Sept. 17, 1998).

128. *See* Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.23, WT/DS8/R (July 11, 1996).

129. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 117, WT/DS135/AB/R (Mar. 12, 2001).

130. *Id.*

131. *Id.*

Finally, WTO panels sometimes examine whether the products at issue share the same tariff classification.[132] Because sufficiently detailed product tariff classifications can demonstrate what WTO members consider "like," WTO panels have found it helpful to consider tariff classifications when determining likeness.[133]

2. National Treatment Rules Forbid Distinguishing Between Products Based on How They Are Made

National treatment rules generally forbid differentiating between products because of "processes and production methods" unrelated to the product itself.[134] Whether products are "like" therefore depends on an examination of the products themselves and not how they are made.[135] For example, a product made by child labor may be "like" a product made by adult labor.[136] Vodka is "like" the Japanese liquor shochu because both are clear alcoholic beverages, even though they are filtered differently.[137] Similarly, a GATT panel refused to distinguish tuna on the basis that some tuna were caught with nets that kill dolphins, while others were caught using dolphin-friendly methods.[138]

---

132. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶¶ 8.8–8.9, WT/DS8/AB/R (Oct. 4, 1996) ("A uniform tariff classification of products can be relevant in determining what are 'like products'. If sufficiently detailed, tariff classification can be a helpful sign of product similarity.").

133. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 8.8, WT/DS8/AB/R (Oct. 4, 1996).

134. These sorts of process and production methods (PPMs) are commonly called non-product related PPMs. *See* Appleton, *supra* note 98, at 199. For an example of a national treatment rule forbidding such PPMs see GATT, *supra* note 8, art. III.

135. *See* Appleton, *supra* note 98, at 199.

136. *See* Exec. Order No. 13,126, 3 C.F.R. 195, 197 (1999), *reprinted in* 41 U.S.C. § 35 (2000) (banning federal procurement of products made using child labor, but exempting purchase from members of the WTO Agreement on Government Procurement, *supra* note 32, which contains national treatment rules forbidding such distinctions between "like" products).

137. *See* Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.23, WT/DS8/R (July 11, 1996).

138. *See* Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.15, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155, 195 (1993).

B. CAFTA Article 3 Expressly Extends National Treatment Both to "Like" Goods and to Directly Substitutable and Competitive Goods

CAFTA explicitly requires governmental procurement entities to follow national treatment rules.[139] CAFTA also incorporated WTO national treatment rules *mutadis mutandis*[140] into the agreement.[141] In regard to U.S. states, Article 3.2(2) of CAFTA provides that a subnational level of government must give treatment no less favorable than the most favorable treatment it gives to any "like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part."[142]

CAFTA Article 3.2(2) amalgamates Paragraphs 2 and 4 of GATT Article III.[143] GATT Paragraph 2 applies to discriminatory taxation against both "like" and "directly competitive or substitutable" goods,[144] while GATT Paragraph 4 governs discriminatory laws, regulations, and other measures against "like products."[145] CAFTA's national treatment rules, however, apply uniformly to "like," "directly competitive," and "substitutable" goods.[146] Products are "directly competitive" or "substitutable" when they are interchangeable.[147] Therefore, state procurement laws implicate CAFTA if they discriminate against interchangeable products.[148]

---

139. *See* CAFTA, *supra* note 6, art. 9.2(1).

140. "All necessary changes having been made; with the necessary changes." BLACK'S LAW DICTIONARY 1044 (8th ed. 2004). The phrase is used to incorporate earlier treaties or agreements into later ones. *Cf. id.* (discussing contracts).

141. *See* CAFTA, *supra* note 6, art. 3.2(1) ("Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT 1994, including its interpretive notes, and to this end Article III of the GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, *mutadis mutandis*.").

142. *See* CAFTA, *supra* note 6, art. 3.2(2).

143. *See supra* Part III.A.

144. *See supra* notes 103–08.

145. *See supra* notes 114–15.

146. *Compare* CAFTA, *supra* note 6, art. 3.2(2) *with* GATT, *supra* note 8, art. III, ¶ 2.

147. *See* Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, ¶ 115, WT/DS75/AB/R, WT/DS84/R (Jan. 18, 1999); *see also supra* notes 109–13 and accompanying text. Because CAFTA incorporated WTO national treatment rules, WTO reports interpreting GATT Article III also inform analysis of CAFTA's national treatment rules.

148. *See id.* (discussing GATT, *supra* note 8, art. III, ¶ 2).

IV. CAFTA PROVIDES TWO ENVIRONMENTAL EXCEPTIONS TO NATIONAL TREATMENT RULES

CAFTA includes two exceptions from national treatment rules for government procurement rules designed to benefit the environment. The two exceptions created are measures "necessary . . . to protect plant life"[149] and measures that "promote the general environmental quality" in a state.[150] However, a measure does not qualify for an exception if it fails the chapeau,[151] or preface, to CAFTA Article 9.14.[152] A measure fails that chapeau if CAFTA-consistent measures addressing the environmental concern are available.[153]

A. CAFTA Excepts Measures "Necessary" to Protect the Environment Provided No Less Restrictive Alternatives Are Available

Article 9.14 begins with a chapeau nearly identical to that of GATT Article XX, which governs similar WTO exceptions.[154] Like GATT Article III, CAFTA incorporated GATT Article XX *mutadis mutandis* into the agreement.[155] CAFTA Article 9.14 lists four exceptions that

149. *See* CAFTA, *supra* note 6, art. 9.14(1)(b).

150. *See* CAFTA U.S. Schedule Notes, *supra* note 12.

151. Chapeau literally means "hat" in French. MARGUERITE-MARIE DUBOIS, MODERN FRENCH-ENGLISH DICTIONARY 120–21 (1960). In international trade law, it refers to the introductory paragraph of a section or article that modifies all items in a list of provisions that follow after it. *See* UNDERSTANDING THE WTO, *supra* note 32, at 67.

152. *Cf.* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 147, WT/DS58/AB/R (Oct. 12, 1998) (discussing identical GATT chapeau).

153. *Cf.* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 157, WT/DS58/AB/R (Oct. 12, 1998) (discussing chapeau to equivalent WTO exceptions).

154. *Compare* CAFTA, *supra* note 6, art. 9.14(1) ("Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures [of the type specified in Article 9.14].") *with* GATT, *supra* note 8, art. XX ("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 [of the type specified in Article XX].").

155. *See* CAFTA, *supra* note 6, art. 21.1(1) ("Article XX of the GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, *mutadis mutandis*.").

might legitimize an otherwise CAFTA-inconsistent measure.[156] In particular, Article 9.14(1)(b) contains an exception for measures "necessary . . . to protect plant life"[157] and encompasses "necessary" environmental measures.[158] CAFTA Article 9.14(1)(b) is identical to GATT Article XX(b).[159]

WTO tribunals have construed GATT Article XX(b) narrowly, finding a measure to be "necessary" only if there exist no reasonably available alternative measures that are either GATT-consistent or less GATT-inconsistent.[160] One factor used to determine whether an alternative is reasonably available is the extent to which the alternative measure successfully realizes the end pursued.[161] Further, "the more vital or important the common interests or values pursued," the more likely that a measure designed to achieve that end is necessary.[162]

Measures that are "necessary" under Article 9.14(1)(b) must further comply with the chapeau of Article 9.14 in order to qualify for exceptions to CAFTA's national treatment rules.[163] The purpose of the chapeau is to minimize a member nation's ability to misuse exceptions to substantive trade rules.[164] Because panels will interpret the CAFTA chapeau in the same way as the GATT chapeau, a measure that would otherwise qualify for an exception violates the CAFTA Article 9.14 chapeau if it constitutes "arbitrary or unjustifiable discrimination."[165] For a measure to violate the chapeau to GATT Article XX: (1) the measure must discriminate on its face or in effect; (2) the discrimination must be

156. *See* CAFTA, *supra* note 6, art. 9.14(1) (listing exceptions for measures related to promoting public morality; the environment; intellectual property; and goods and services related to handicapped persons, prison labor, and philanthropic institutions).

157. *See* CAFTA, *supra* note 6, art. 9.14(1)(b).

158. *See* CAFTA, *supra* note 6, art. 9.14(2).

159. *Compare* CAFTA, *supra* note 6, art. 9.14(1)(b) ("necessary to protect human, animal, or plant life or health") *with* GATT, *supra* note 8, art. XX(b) ("necessary to protect human, animal or plant life or health").

160. *See* Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200, 223 (1991).

161. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (Mar. 12, 2001).

162. *See id.*

163. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 157, WT/DS58/AB/R (Oct.12, 1998) (discussing chapeau to equivalent WTO exceptions).

164. *See id.* ¶ 160.

165. *See* CAFTA, *supra* note 6, art. 9.14(1).

arbitrary or unjustifiable; and (3) either the discrimination must occur between countries where substantially the same conditions prevail or application of the measure must fail to consider the appropriateness of a regulatory scheme for the conditions in the exporting country.[166] The Appellate Body has found that a measure that technically complies with an Article XX exception, but that amounts to arbitrary or unjustifiable discrimination, constitutes a "disguised restriction on international trade."[167] The Appellate Body has found "unjustifiable discrimination" where a nation's environmental standards fail to consider differing conditions in foreign nations.[168] WTO tribunals have also found violations of the GATT Article XX chapeau where laws acted to coerce other nations to adopt essentially the same regulatory scheme,[169] and where a nation unilaterally devised a regulatory regime resulting in discriminatory impacts without first resorting to diplomacy with affected member nations.[170]

B. The CAFTA Annex Allows Laws Promoting Environmental Quality Provided They Are Not Disguised Barriers to Trade

The Annex extending CAFTA's coverage to certain U.S. states provides the second potential source of environmental protection in Article 9.[171] In the Annex, the United States appended a set of exclusions to its government procurement commitments.[172] The exclusion found in Note 3 purports to allow state laws "that promote [a state's] general environmental quality."[173] Textually, the exception in the CAFTA Annex clearly encompasses more types of measures than those

166. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 150, 165, WT/DS58/AB/R (Oct. 12, 1998).

167. *See* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 4.9, WT/DS2/AB/R (Apr. 20, 1996).

168. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 3–4, 165, WT/DS58/AB/R (Oct. 12, 1998) (discussing U.S. ban on shrimp importation from nations that did not require vessels to use "turtle excluder devices" comparable in effectiveness to those required under U.S. regulatory scheme, unless that nation's fishing environment did not threaten incidental taking of protected sea turtle species).

169. *See id.* ¶ 161.

170. *See id.* ¶¶ 166–72; *see also* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 4.17, WT/DS2/AB/R (Apr. 20, 1996).

171. *See* CAFTA, *supra* note 6, Annex 9.1.2(b)(i).

172. *See* CAFTA U.S. Schedule Notes, *supra* note 12.

173. *See* CAFTA U.S. Schedule Notes, *supra* note 12. By contrast, the WTO does not authorize an exception for measures "that promote the general environmental quality."

"necessary . . . to protect plant life" in CAFTA Article 9.14.[174] However, like the chapeau to Article 9.14, the Annex exclusion requires that a law may not act as a "disguised barrier to international trade."[175] Therefore, regardless of its precise scope, the Annex exception remains strictly limited because it does not allow environmentally-promotive procurement measures that act as disguised "barriers" to international trade.[176]

V. THE PROCUREMENT LAWS OF THREE STATES FAVOR RECYCLED PAPER MADE OR RECOVERED LOCALLY

Fourteen of the states bound under CAFTA Article 9 have local legislation mandating that state governmental agencies give preference to recycled paper when procuring paper,[177] despite the ready availability of low-cost virgin paper.[178] Of these states, only Washington used the Annex to exempt paper products from the reach of CAFTA.[179] As a result, the paper procurement laws of the remaining thirteen states are subject to the requirements of CAFTA.[180]

---

174. *Compare* CAFTA U.S. Schedule Notes, *supra* note 12 *with* CAFTA, *supra* note 6, art. 9.14(1)(b). A law could "promote" environmental quality without being "necessary" to promote environmental quality.

175. *See* CAFTA U.S. Schedule Notes, *supra* note 12.

176. *Compare* CAFTA, *supra* note 6, art. 9.14 ("Provided that such measures are not applied in a manner that would constitute . . . a disguised restriction on trade between the Parties . . . . ") *with* CAFTA U.S. Schedule Notes, *supra* note 12 ("Nothing in this Annex shall be construed to prevent any state entity from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade."). WTO panels use the term "disguised restriction on international trade" interchangeably with the term "disguised barrier to international trade" when discussing the chapeau of Article XX. *See* Panel Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 4.308, WT/DS276/R (Apr. 6, 2004). The Article XX chapeau is nearly identical to the CAFTA Article 9.14 chapeau. *See supra* note 154 and accompanying text.

177. *See* ARK. CODE ANN. § 19-11-260 (Supp. 2005); COLO. REV. STAT. ANN. § 24-103-207 (West 2001); FLA. STAT. ANN. § 283.32 (West 2003); IDAHO CODE ANN. § 67-2349 (2000); LA. REV. STAT. ANN. § 30:2415 (2000); MD. CODE ANN., STATE FIN. & PROC. § 14-405 (LexisNexis 2006); N.H. REV. STAT. ANN. § 21-I:65 (2000); N.Y. PUB. AUTH. LAW § 2878-a (McKinney 2002); OR. REV. STAT. ANN. § 279A.155 (West 2003); R.I. GEN. LAWS § 37-2-76 (1997); S.D. CODIFIED LAWS § 5-23-22.4 (2004); UTAH CODE ANN. § 63-56-406 (West 2004); VT. STAT. ANN. tit. 29, § 903 (Supp. 2005); WASH. REV. CODE § 43.19A.050 (2006).

178. *See* Rodney Young, *Recovered Paper and the U.S. Solid Waste Dilemma*, *in* SECONDARY FIBER RECYCLING 1, 3 (Richard J. Spangenberg ed., 1993).

179. *See* CAFTA U.S. Schedule, *supra* note 12.

180. *See* CAFTA U.S. Schedule, *supra* note 12.

The procurement laws of the thirteen states fall into three different categories. Type One laws allow a procurer to select a bidder using recycled paper either made in-state or utilizing in-state waste even if the lowest bid was submitted by a bidder using virgin paper.[181] Type Two laws either favor bids using recycled paper, wherever produced, over lower bids using virgin paper or more generally favor recycled paper when the price of recycled paper and virgin paper is "competitive."[182] Type Three laws simply establish minimum goals for the percentage of purchased paper which is to be recycled paper.[183]

This Comment examines Type One laws.[184] Arkansas requires government procurers to purchase recycled paper if the use of the products is technically feasible[185] and the price is within ten percent of the lowest bid (i.e., a ten percent price preference).[186] An additional one percent preference is granted for products containing the largest amount of post-consumer recycled materials recovered within Arkansas.[187] New

181. *See* ARK. CODE ANN. § 19-11-260; LA. REV. STAT. ANN. § 30:2415; N.Y. PUB. AUTH. LAW § 2878-a.

182. *See* COLO. REV. STAT. ANN. § 24-103-207; FLA. STAT. ANN. § 283.32; IDAHO CODE ANN. § 67-2349; MD. CODE ANN., STATE FIN. & PROC. § 14-405; UTAH CODE ANN. § 63-56-406.

183. *See* N.H. REV. STAT. ANN. § 21-I:65 (2000); OR. REV. STAT. ANN. § 279A.155 (West 2003); R.I. GEN. LAWS § 37-2-76 (1997); S.D. CODIFIED LAWS § 5-23-22.4 (2004); VT. STAT. ANN. tit. 29, § 903 (Supp. 2005).

184. This Comment confines its analysis to Type One laws because the explicitly local component of the discrimination in Type One laws inevitably will favor local recycled paper products over their "like" foreign counterparts. *See infra* Part VI.A.3. Whether the facially neutral Type Two and Three laws violate CAFTA's national treatment rules depends on whether a CAFTA nation exports substantially more virgin paper than recycled paper. This factual inquiry is beyond the scope of this paper.

In addition, facially neutral and consistently applied paper procurement laws generally are more likely to pass the Article 9.14 chapeau's "smell" test. An inquiry into a chapeau violation is inherently particularized, giving CAFTA panels wide latitude in deciding close cases. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 159, WT/DS58/AB/R (Oct. 12, 1998) ("The location of the line of equilibrium [between a member's right to invoke GATT Article XX exceptions and other members' substantive GATT rights] is not fixed and unchanging; *the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ*." (emphasis added)). Accordingly, this Comment leaves open the question of whether Type Two and Three laws violate CAFTA.

185. *See* ARK. CODE ANN. § 19-11-260(c)(1). Historically, recycled paper possessed a generally lower quality than virgin paper. *See* R.L. Ellis & K.M. Sedlachek, *Recycled- Versus Virgin-Fiber Characteristics: A Comparison*, *in* SECONDARY FIBER RECYCLING, *supra* note 178, at 7, 7. Advances in the processes by which recycled paper is produced have largely eliminated quality concerns. *See id.*; *see also* R.C. Howard, *The Effects of Recycling on Pulp Quality*, *in* TECHNOLOGY OF PAPER RECYCLING 181, 197 (R.W.J. McKinney ed., 1995).

186. *See* ARK. CODE ANN. § 19-11-260(c)(2)(A).

187. *See id.* § 19-11-260(c)(2)(B).

York similarly requires procurers to purchase recycled products if their cost is within ten percent of that of comparable products, and offers an additional five percent price preference where at least fifty percent of the secondary materials used in the manufacture of the product are generated from the New York waste stream.[188] Finally, Louisiana grants a five percent price preference for recycled products manufactured in Louisiana.[189]

VI. THE RECYCLED PAPER LAWS OF THREE STATES PLACE THE UNITED STATES IN BREACH OF CAFTA

Type One laws—the pro-recycling procurement laws of Arkansas, Louisiana, and New York—place the United States in breach of the national treatment rules of CAFTA. Virgin paper is both "like" recycled paper as well as directly competitive and substitutable with recycled paper.[190] Yet, Type One laws treat foreign virgin and recycled paper less favorably than local recycled paper.[191] The Article 9 "necessary" exception and the environmental exception in the Annex fail to justify Type One laws.[192]

A. Type One Laws Violate CAFTA's National Treatment Requirements

Type One recycled paper procurement laws violate CAFTA national treatment rules. Recycled paper is both "like" and "directly substitutable and competitive" with virgin paper. Despite this likeness, Type One laws treat virgin paper less favorably than recycled paper.

1. Recycled Paper Is "Like" Virgin Paper

The weight of the relevant factors indicates that recycled paper and virgin paper are "like" products.[193] First, recycled paper and virgin paper share the same properties, nature, and quality, a criterion concerned primarily with the physical similarities between two products.[194]

188. *See* N.Y. PUB. AUTH. LAW § 2878-a(1) (McKinney 2002).

189. *See* LA. REV. STAT. ANN. § 30-2415 (2000).

190. *See infra* Part VI.A.1–2.

191. *See infra* Part VI.A.3.

192. *See infra* Part VI.B.

193. *See supra* Part III.A.1.

194. *See* Appellate Body Report, *European Communities—Measures Affecting Asbestos and*

Physically, recycled paper and virgin paper are identical, save for the fact that one contains already-used paper.[195] While recycled paper has historically possessed a somewhat lower quality[196] and uses a different manufacturing process, the quality of recycled paper is largely influenced by events that take place prior to recycling processes.[197] Properly treated, most recycled paper is virtually indistinguishable from virgin paper.[198]

The second and third factors of "end uses" and "consumer tastes and habits" also favor a finding of "likeness."[199] Recycled paper and virgin paper share precisely the same end uses.[200] Moreover, recycled paper products are intended to take the place of virgin paper products—they serve the same functions while leaving a smaller environmental footprint.[201] Nevertheless, the fact that recycled paper and virgin paper are produced differently is irrelevant to the inquiry of "likeness" because WTO jurisprudence rejects distinguishing goods based on how they are made, harvested, or produced.[202] In addition, consumers are increasingly willing to use recycled paper products instead of their virgin paper counterparts.[203]

Tariff classification, the final factor considered in trade jurisprudence, also supports a finding of "likeness."[204] Scrap and waste paper is

---

Asbestos-Containing Products, ¶ 110, WT/DS135/AB/R (Mar. 12, 2001); *see also supra* notes 126–28 and accompanying text.

195. *See* Ellis & Sedlachek, *supra* note 185, at 7 ("The apparent deficiency of recycled fiber can be overcome by refining or by the addition of chemicals to the papermaking process.").

196. *See* Ellis & Sedlachek, *supra* note 185, at 7.

197. *See* Howard, *supra* note 185, at 195.

198. *See* Ellis & Sedlachek, *supra* note 185, at 7 ("The apparent deficiency of recycled fiber can be overcome by refining or by the addition of chemicals to the papermaking process.").

199. *See supra* notes 129–31 and accompanying text.

200. *See, e.g.*, Young, *supra* note 178, at 2 (discussing use of recycled paper in tissue, newsprint, and paperboard).

201. *See* Young, *supra* note 178, at 1 (discussing United State's drive to increase the use of recycled paper to counter solid-waste disposal concerns).

202. *See supra* Part III.A.2.

203. *See* U.S. FOREST SERV., U.S. DEP'T OF AGRICULTURE, REPORT OF THE UNITED STATES ON THE CRITERIA AND INDICATORS FOR THE SUSTAINABLE MANAGEMENT OF TEMPERATE AND BOREAL FORESTS 7-10 (1997), http://www.fs.fed.us/global/pub/links/report/contents.html (follow "Chapter 7 Criterion 6: Socio-Economic Benefits" hyperlink). Studies have even found that consumers may be willing to pay more for recycled paper products than their virgin paper equivalents. *See, e.g.*, Gregory A. Guagnano, *Altruism and Market-Like Behavior: An Analysis of Willingness to Pay for Recycled Paper Products*, 22 POPULATION & ENV'T 425, 433 (2001) (finding that consumers are willing to pay more for paper towels incorporating recycled paper).

204. *See supra* notes 132–33 and accompanying text.

classified differently from finished paper products.[205] However, paper products containing recycled paper and paper products containing virgin paper are given the same tariff classification.[206]

2. Even Assuming Recycled Paper Is Not "Like" Virgin Paper, the Two Products Are Directly Substitutable and Competitive

Even if recycled paper is not "like" virgin paper, it is directly substitutable and competitive with virgin paper. Despite the ample supply of low-cost virgin fiber,[207] consumption of recycled paper has continued to expand in the United States since the passage of procurement laws favoring recycled paper.[208] This suggests that virgin paper and recycled paper are directly substitutable and competitive.[209] If so, and if the price distortions created by Type One procurement laws were eliminated, the demand for virgin paper would rise.[210] Evidence of such price elasticity strongly suggests that products are directly competitive and substitutable.[211]

States have also demonstrated through the structure of their procurement laws that they consider recycled paper and virgin paper to be interchangeable products that offer alternative ways of satisfying the same need.[212] Many state recycled paper procurement laws only authorize the procuring entity to buy recycled paper when it is cost-effective to do so.[213] If recycled paper is too expensive, even Type One

---

205. *Compare* U.S. Int'l Trade Comm'n, Harmonized Tariff Schedule of the United States, ch. 47 (2006) (containing classifications of waste and scrap paper) *with id.*, ch. 48 (2006) (classifying finished paper products).

206. *See id.*, ch. 48 (2006). Chapter 48 of the Harmonized Tariff Schedule does not differentiate between recycled paper products and virgin paper products. *See, e.g.*, U.S. Customs Ruling Ltr. NY 811441 (June 16, 1995), http://rulings.customs.gov/index.asp?ru=811441&qu=NY+811441&vw=detail (classifying stationery kit containing solely recycled paper under Heading 4817.30.0000 of the Harmonized Tariff Schedule).

207. *See* Young, supra note 178, at 2, 3.

208. *See* AMERICAN FOREST AND PAPER ASS'N, RECOVERED PAPER STATISTICAL HIGHLIGHTS 5 (2005), http://www.paperrecycles.org/news/print_materials/2005_Stat_Highlights.pdf.

209. *See* Panel Report, *Chile—Taxes on Alcoholic Beverages*, ¶ 7.24, WT/DS87/R (June 15, 1999) ("[P]anels should look at evidence of trends and changes in consumption patterns and make an assessment as to whether such trends and patterns lead to the conclusion that the products in question are . . . directly competitive or substitutable . . . .").

210. *Cf. id.* ¶ 7.43 (discussing a study showing consumers' price-dependent decision to try imported spirits instead of domestic spirits as their prices converged).

211. *See id.* ¶¶ 7.77–78.

212. *See supra* notes 181–82 and accompanying text.

213. *See, e.g.*, ARK. CODE ANN. § 19-11-260(c)(1) (Supp. 2005) ("Whenever a bid is required, a

states will simply buy virgin paper products; price drives the decision, not function.[214] Because the deciding factor in Type One laws is economic, such laws implicitly recognize that recycled paper and virgin paper products possess the same end uses.[215]

3. Type One Laws Treat Foreign Products Less Favorably Than Domestic Products

Type One laws violate CAFTA because such laws treat local recycled paper more favorably than "like" foreign paper. Type One laws not only favor recycled paper over virgin paper, but further favor products that are either made intrastate[216] or use waste materials recovered intrastate.[217] These provisions systematically favor local business over foreign competition; such favoritism is the essence of a national treatment violation.[218]

B. Type One Laws Do Not Qualify Under the Two Relevant CAFTA Environmental Exceptions

Type One laws do not qualify for protection under either the CAFTA exception for measures "necessary . . . to protect plant life"[219] or the CAFTA exception for promoting "the general environmental quality" in a state.[220] Recycled paper procurement laws are not "necessary" in the relevant sense.[221] But even if "necessary," such laws nonetheless constitute an unjustifiable restriction on international trade in violation of the chapeau to CAFTA Article 9.[222] For the same reason, Type One

---

preference for recycled paper products shall be exercised if the use of the products is technically feasible and price is competitive.").

214. *See id.* § 19-11-260; LA. REV. STAT. ANN. § 30:2415 (2000).

215. *See supra* Part VI.A.1.

216. *See* LA. REV. STAT. ANN. § 30:2415.

217. *See* ARK. CODE ANN. § 19-11-260(c)(2)(B); LA. REV. STAT. ANN. § 30:2415; N.Y. PUB. AUTH. LAW § 2878-a (McKinney 2002).

218. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.3, WT/DS8/R (July 11, 1996) ("The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures.").

219. *See* CAFTA, *supra* note 6, art. 9.14(1)(b).

220. *See* CAFTA U.S. Schedule Notes, *supra* note 12.

221. *See infra* Part VI.B.1.

222. *See infra* Part VI.B.3.

laws also cannot be justified under the "general environmental quality" exception.[223]

1. The Environmental Exception for Measures "Necessary . . . To Protect Plant Life" Does Not Apply to Type One Laws

CAFTA Article 9.14(1)(b) does not protect Type One laws, even though it explicitly includes "environmental measures necessary to protect human, animal, or plant life or health."[224] Recycled paper procurement laws are not "necessary" in the sense of Article 9.14(1)(b). By analogy to GATT Article XX(b), a measure is "necessary" only if there are no reasonably available alternative measures that are either CAFTA-consistent or less CAFTA-inconsistent.[225] For example, in *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*,[226] a panel found that an import ban on cigarettes was not "necessary" because, inter alia, Thailand could reduce cigarette usage by banning tobacco advertising, raising the price of cigarettes, or applying strict labeling requirements.[227]

Likewise, Type One laws are not "necessary" if states can meet their pro-environmental objectives by establishing maximum caps on the amount of paper bought by a state agency per year, instituting and enforcing office protocols to reduce paper use, or encouraging or requiring recycling by the public at large, among other options. Such measures are reasonably available, and are CAFTA-consistent because they would treat imported paper as favorably as domestic paper.[228]

2. The Environmental Exception for Laws that "Promote the General Environmental Quality" Does Not Protect Type One Laws

The CAFTA Annex provides the second potential source of environmental protection, but also fails to protect Type One laws. Note 3 of the Annex allows measures that promote the general environmental

---

223. *See infra* Part VI.B.2.

224. CAFTA, *supra* note 6, art. 9.14(2).

225. Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 (1990) (discussing identical WTO exception); *see also supra* Part IV.A.

226. Report of the Panel, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 (1990).

227. *See id.* ¶¶ 77–79, GATT B.I.S.D. (37th Supp.) at 200.

228. *See* GATT, *supra* note 8, art. III ¶ 4.

quality in a state.[229] Type One laws do "promote the general environmental quality" in the states at issue because removing material from the waste stream to a recycling plant benefits the environment.[230] Unlike Article 9.14, the Annex contains no requirement of necessity.[231] However, the availability of this exception remains subject to the requirement that a measure must not act as a disguised barrier to international trade.[232] While recycled paper preferences would qualify as measures that promote the general environmental quality of a state, they do act as disguised barriers to international trade.[233]

3. The Disparate Treatment of Recycled Paper and Virgin Paper Fails Under the Chapeau to Article 9.14 and the Equivalent Annex Provision

Type One recycled paper procurement laws also fail the chapeau to Article 9.14 because they constitute arbitrary and unjustifiable restrictions on international trade, and act as a disguised barrier to international trade.[234] Type One laws have an impermissibly coercive effect on the policy decisions of CAFTA members.[235] Without developing a recycled paper industry capable of export, CAFTA members find their likelihood of state procurement bidding success curtailed because their ability to export paper to Type One states depends largely on their use of recycled paper.[236] However, a CAFTA member cannot seek to achieve a policy goal by using a regulatory

229. CAFTA U.S. Schedule Notes, *supra* note 12.

230. *See* Young, *supra* note 178, at 1 (noting "crisis" of limited landfill capacity in the United States).

231. *Compare* CAFTA U.S. Schedule Notes, *supra* note 12 *with* CAFTA, *supra* note 6, art. 9.14(1)(b).

232. *See* CAFTA U.S. Schedule Notes, *supra* note 12.

233. *See infra* Part VI.B.3.

234. *See supra* Part IV.

235. *Compare*, *e.g.*, ARK. CODE ANN. § 19-11-260(c)(1) (allowing procurers to favor recycled paper when "technically feasible") *with* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 164, WT/DS58/AB/R (Oct. 12, 1998) (discussing U.S. measure that coerced WTO members to "adopt essentially the same comprehensive regulatory program").

236. For example, the Arkansas state government is allowed to purchase local recycled paper even if it costs ten to eleven percent more than virgin paper from El Salvador. *See* ARK. CODE ANN. § 19-11-260(c).

scheme that requires other members to adopt essentially the same scheme.[237]

For the same reason, Type One laws cannot be justified under the Annex. Whether a CAFTA nation can export paper to a Type One state depends on whether the nation establishes a recycled paper industry capable of meeting the target state's technical specifications.[238] An attempt to coerce other nations to adopt essentially the same scheme constitutes a disguised restriction on international trade.[239]

VII. CONCLUSION

Type One recycled paper procurement preferences violate the national treatment provisions of Article 9 of CAFTA, and fail to meet either of the limited environmental exceptions of CAFTA. In order to comply with CAFTA, the federal government, through negotiation or preemption, must ensure that state laws comply with CAFTA requirements. Creation of a Federal-State International Trade Policy Commission to coordinate communication between federal and state trade policy officials, as requested by the Washington State Senate, may prove a good place to start.

237. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 164, WT/DS58/AB/R (Oct. 12, 1998).

238. *See, e.g.*, ARK. CODE ANN. § 19-11-260(c)(1).

239. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 164, WT/DS58/AB/R (Oct. 12, 1998).