

THE POLICE POWERS: A PRETEXT FOR PROTECTIONISM?

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INTRODUCTION

In response to technological change and increasing fears about the health and environmental effects of genetically modified organisms (GMOs) and hormonally-treated beef, there has been a general trend in the European Community towards the adoption of administrative and technical regulations regarding food safety.¹ As with many fears however, this fear is an irrational one. This recent and costly trend towards health and safety regulations that impair trade, is generally protectionist in nature, and such laws should be repudiated and subject to sanctions or retaliatory measures under the World Trade Organization's Dispute Settlement Body (DSB).

The first part of this note will define administrative and technical regulations and discuss recent trends toward these regulations in the European Community. The second part will concentrate on protectionism and analyze the negative effects of protectionism on consumers and producers. This part will set forth four arguments against protectionism. These four rationales can be divided into: (1) economic rationale; (2) retaliation rationale; (3) legitimacy of international law; and (4) purpose of the World Trade Organization (WTO).² Part three will examine the current legal atmosphere surrounding health and safety regulations. This part will examine the Agreement on Sanitary and Phytosanitary Measures (hereinafter SPS Agreement), and the Agreement on Technical Barriers to Trade, (hereinafter TBT Agreement). Part four will address health and safety regulations adopted by the European Union. This part will discuss four of the major directives that have been put in place. These four directives are: Council Directive 90/220/EEC, Commission Directive 97/35/EC, the Novel Foods Regulation (EC) No. 258/97 and Directive

* J.D./M.A., Candidate 2005 Syracuse University. I would like to thank Professor William M. Wiecek, LL.B, Ph.D for his superb editing support and Jesse E. McKendry for our many stimulating discussions regarding this topic.

1. Terence P. Stewart & David S. Johanson, *Policy in Flux: The European Union's Laws on Agricultural Biotechnology and Their Effects on International Trade*, 4 DRAKE J. AGRIC. L. 243, 293 (1999).

2. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114 (1986).

88/146/EEC. Part five of this note will analyze the current standards used under the SPS Agreement and then look at the standards under the TBT Agreement. Part six will review the U.S. Supreme Court's dormant commerce clause jurisprudence and articulate a new standard to be used when analyzing protectionist policies in the area of international trade. Part seven will apply the newly articulated test to the EU directives.

I. ADMINISTRATIVE AND TECHNICAL REGULATIONS

A. Definition

Administrative and technical regulations are regulations that are placed on imports or exports by certain countries, purportedly for health, safety and other reasons not related to protectionism.³ This is similar to the rationale behind the police power in American Constitutional law. The administrative and technical regulations that this note will focus on are those that are implemented by the European Community, relating to the safety of certain imported foods. Examples of these health and safety regulations include the European Community's ban on imports of hormone-treated beef and their regulations relating to foods that contain GMOs.⁴ These import restrictions particularly hurt the U.S. since the U.S. is one of the major producers and exporters of foods that contain GMOs.⁵ According to the *New York Times*, the U.S. grows three-quarters of all genetically modified crops.⁶ Furthermore, many of the patents on genetically modified crops are held by U.S. companies such as Monsanto, DuPont and Dow.⁷ In addition, U.S. dairy farmers use growth hormones to improve the quality of cow meat.⁸ Growth promoting hormones tend to reduce the fat content in cows, which results in leaner meat.⁹ A study by the U.S. Department of Agriculture concluded that the economic benefit to using growth promoters was approximately \$44.21 per

3. MORDECHAI E. KREININ, INTERNATIONAL ECONOMICS: A POLICY APPROACH 147 (8th ed. 1998).

4. *Id.* at 147; See generally Stewart, *supra* note 1.

5. Stewart, *supra* note 1, at 246.

6. Craig R. Whitney, *The World: Fear of Feeding; Europe Loses its Appetite for High Tech Food*, N.Y. TIMES, June 27, 1999, § 4, at 3.

7. *Id.*

8. See Dale McNeil, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89, 100 (1998).

9. *Id.*

animal.¹⁰

B. General Trends toward Administrative and Technical Regulations

Over the past decade there has been a general trend in the European Community towards the adoption of administrative and technical regulations regarding food safety. Much of this trend is due to environmental concerns that GMOs adversely affect the environment.¹¹ In addition to this, consumers are concerned about the health effects of consuming foods that contain GMOs or growth promoting hormones.¹² These fears over GMOs could stem from a lack of confidence in the ability of European health officials to protect the food supply.¹³ Europe has suffered from numerous instances of food contamination. After Europe's scare with mad cow disease, it was discovered that chickens, beef, pork, and veal might have been contaminated with cancer-causing agents.¹⁴ The main causes behind the contamination of meat products were probably not GMOs but rather "adulterated animal feed."¹⁵ In an attempt to produce cheaper beef for consumers, farmers would enrich their grain with ground up sheep parts, in particular sheep brain. Cows are herbivores, and when they ingested the contaminated sheep brain, they succumbed to a disease which looked similar to the human brain disorder Creutzfeldt-Jakob disease.¹⁶ However, consumer fears may not be as strong as were originally perceived. "One British retailer actually saw its sales of tomato paste rise after disclosing that its product was developed from GMO tomatoes."¹⁷ There is also evidence that a desire to protect the regional farming community from outside competition was a major goal of banning the use of growth promoting hormones.¹⁸

A European Parliament Committee, established to address quality in the meat sector, concluded that "only a total ban on the use of growth-promoters is concordant with the strategic aims now adopted for the Common Agricultural Policy, in particular the reduction of surpluses and the safeguarding of a viable regionally-diversified

10. McNiel, *supra* note 8, at 100.

11. See Stewart & Johanson, *supra* note 1, at 290.

12. *Id.* at 294.

13. See Whitney, *supra* note 6, at 3.

14. *Id.*

15. *Id.*

16. *Id.*

17. Stewart & Johanson, *supra* note 1, at 295.

18. See McNiel, *supra* note 8, at 129 (quoting Committee of Inquiry into the Problem of Quality in the Meat Sector, Draft Report on the findings of the Inquiry Committee 1 (on file with Dale McNiel)).

farming community.”¹⁹ This statement is a clear expression of protectionist policies. As further evidence of these trends, the EU is pushing for import bans on nuts, cereals and dried fruits that contain small traces of aflotoxins, which, according to some scientists, can lead to liver cancer in humans.²⁰

II. THE EVILS OF PROTECTIONISM

A. *Definition-What is protectionism*

When a law is passed that tends to impose a substantial burden on trade that benefits local industries at the expense of foreign producers, the law is said to be protectionist in nature.²¹ This is the same as saying that the law has a protectionist effect.²² Where a substantial contributing factor to a piece of legislation is to improve the economic position of domestic industries in relation to foreign competitors the law is said to have a protectionist purpose.²³ However, since protectionism is generally frowned upon, very few bills explicitly advocate protectionist policies. This makes it necessary to look at the surrounding context and the totality of the circumstances to determine whether or not a law was passed with a protectionist purpose. Protectionist effect along with legislative history and course of dealing are a few factors that should be taken into account. Generally, a protectionist effect is a strong indicator that the law was passed with a protectionist purpose in mind.²⁴

B. *Why is protectionism problematic?*

The four arguments against protectionism can be divided into: (1) economic rationale; (2) retaliation rationale; (3) legitimacy of international law; and (4) purpose of the WTO.²⁵

1. *Economic Rationale*

There are two concepts of economics that are very helpful in

19. McNeil, *supra* note 8, at 129.

20. Geoff Winestock, *Is EU's Environmental Push Protectionism? Poor Agricultural Exporters Say Europe's Proposals Would Take Heavy Toll*, WALL ST. J., Aug. 8, 2001, at A9.

21. See Regan, *supra* note 2, at 1095.

22. *Id.*

23. *Id.*

24. *Id.*

25. See Regan, *supra* note 2, at 1113-14.

analyzing the impact of protectionism on consumers and producers. The first is the concept of efficiency and the second is the concept of rent-seeking behavior. I will discuss each of these concepts in turn.

Efficiency, generally speaking, is when resources are used in the most cost-effective way.²⁶ In other words, efficiency is achieved when it is not possible to reallocate resources at a lower cost.²⁷ When economists talk of efficiency they talk of two kinds. There is Pareto optimality and Kaldor-Hicks efficiency.²⁸ In a Pareto optimal outcome “the only way to make one individual better off is to make another worse off.”²⁹ Kaldor-Hicks efficiency, however, is satisfied if, in a given situation, the gainer’s gain offsets the loser’s loss.³⁰ By reducing the supply of the foreign item into the domestic market, protectionist policies tend to increase the price of the foreign product relative to the domestic product.³¹ This leads to two market distortions.³²

The first of these is the production distortion.³³ This is where domestic producers increase production of their good because they have a relative cost advantage over foreign producers.³⁴ This is a distortion because in the absence of the restriction, the domestic producer would choose not to produce or would produce substantially less because they would be at a comparative disadvantage relative to the foreign producer.³⁵

The second distortion is the consumption distortion.³⁶ This occurs because the consumer purchases more of the domestic product because it is relatively cheaper than the foreign product.³⁷ This is a distortion because without the restriction the consumer would have been better off and would have paid a lower price by purchasing the foreign product.³⁸ These two distortions imply that trade regulations lead to inefficient outcomes because resources could be reallocated to reduce costs. In

26. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 12 (3d ed. 2000).

27. *Id.*

28. MICHAEL L. KATZ & HARVEY S. ROSEN, *MICROECONOMICS* 387 (3d ed. 1998); COOTER & ULEN, *supra* note 26, at 43-44.

29. *Id.*

30. COOTER & ULEN, *supra* note 26, at 44.

31. *See generally* PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 218-223 (5th ed. 2000).

32. *Id.* at 220.

33. *Id.* at 223.

34. *Id.*

35. *See generally* KRUGMAN & OBSTFELD, *supra* note 31, at 223.

36. *See generally id.*

37. *Id.*

38. *Id.* at 220.

other words, in a system of free trade the producer with a relative cost advantage would produce the good and the consumer could purchase the good at a lower price.

The next economic concept that needs to be looked at is the concept of rent-seeking behavior. Rent-seeking behavior is behavior whose aim is to obtain or keep the gains from certain government policies.³⁹ Generally, special interest groups play a large role in the enactment of protectionist policies.⁴⁰ The problem with rent-seeking behavior is that even if protectionist policies increase the national welfare of a country, which usually occurs only in rare theoretical scenarios, most of the benefits are extracted by the special interest groups rather than consumers.⁴¹

2. Retaliation

Regulations that impair trade tend to cause resentment and hostility towards the country implementing the policies.⁴² This generally leads the country whose exports are restricted to impose retaliatory tariffs or quotas on goods from the regulating country, hence inducing a perilous cycle which, more often than not, results in a trade war between the two countries.⁴³ The global response to the Smoot-Hawley Act in 1930 is an example of retaliation. This Act substantially raised U.S. tariffs on imported goods. In response to this, Australia, Canada, Cuba, France, Italy, Mexico, New Zealand and Spain followed suit by raising their tariffs.⁴⁴ Trade wars, such as these, tend to be inefficient because resources are frittered away in an attempt to harm other countries. This in turn harms global consumers by raising the prices of imports relative to domestic goods thereby creating a consumption distortion.

3. Legitimacy of International Law

International law has been a source of criticism by scholars as being irrelevant. Many scholars have viewed international law as a set of non-binding norms that states adhere to only when it is in their best interests to do so.⁴⁵ This statement is correct, however, many scholars

39. KATZ & ROSEN, *supra* note 28, at 459.

40. KRUGMAN & OBSTFELD, *supra* note 31, at 221.

41. *Id.*

42. Regan, *supra* note 2, at 1114.

43. *Id.*

44. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 778 (2002).

45. *See generally id.* at 909-11 (discussing the legitimacy and "relevance" of international law).

overlook the fact that it is in a state's best interest to have a set of binding international rules to ensure global stability. Since states will act in their best interests, in most instances states will adhere to international law. As Louis Henkin stated, "almost all nations observe almost all principles of international law and almost all of their obligations, almost all of the time."⁴⁶ When nations do violate their international obligations it is the job of international law to hold them accountable.

International trade law prohibits the implementation of certain policies that either expressly interfere with free trade or have the effect of interfering with free trade.⁴⁷ The SPS Agreement allows countries to enact health and safety regulations on the condition that they are not disguised barriers to trade and that they are scientifically justified.⁴⁸ The comment to § 805 of the Restatement (Third) of Foreign Relations Law notes that the General Agreement on Tariffs and Trade (GATT) "proscribes requirements of local law that have the purpose and effect of excluding imports."⁴⁹

When countries impair trade by invoking the police power, the spirit of the WTO and international trade law is violated. The spirit of the WTO calls for trade liberalization and the reduction of all trade barriers.⁵⁰ Therefore, allowing countries to implement health and safety regulations that have the purpose and effect of discriminating against foreign producers is directly contrary to international law. If such measures are in fact protectionist and are allowed to stand, the credibility of international law as a set of rules governing the international community would be substantially impaired.

4. *Purpose of the WTO*

Prior to the formation of the WTO, the General Agreement on Tariffs and Trade was the primary agreement governing trade disputes. The GATT was created to promote international trade and reduce trade barriers. In the years leading up to the great depression, many countries had very isolationist and mercantilist trade policies, characterized by high tariffs and import quotas. Following the Smoot-Hawley tariffs there was a sharp decline in international trade, which could have

46. DUNOFF ET.AL., *supra* note 44, at 972.

47. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 805 (1987).

48. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994 [hereinafter SPS Agreement], Annex 1A, art. 2, paras. 1, 3.

49. RESTATEMENT (THIRD), *supra* note 47.

50. DUNOFF ET.AL., *supra* note 44, at 778.

contributed to the severity of the great depression. The GATT was agreed to as a way of combating these isolationist tendencies and increasing the free flow of goods and services. In 1995, the WTO was created through a series of agreements known collectively as the Uruguay Round Agreement. As part of this agreement a dispute settlement body was created to resolve trade disputes and impose sanctions on violators.⁵¹

One of the stated purposes of the World Trade Organization is to substantially reduce “tariffs and other barriers to trade and to . . .” eliminate “discriminatory treatment in international trade relations.”⁵² Protectionist policies discriminate against out of state producers and therefore defy the very purpose of the WTO.

III. THE CURRENT LEGAL ATMOSPHERE SURROUNDING HEALTH AND SAFETY REGULATIONS

A. *The SPS Agreement*

The SPS Agreement was signed as part of the Uruguay Round Agreement.⁵³ The SPS Agreement allows member states to adopt certain measures that are designed to protect the health and safety of their citizens.⁵⁴ These measures are called sanitary and phytosanitary measures.⁵⁵ These measures are limited to the extent that they are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between members where the same conditions prevail, or a “disguised restriction on international trade.”⁵⁶ There were four enumerated goals of the SPS Agreement. First, the SPS Agreement was designed to establish rules and procedures for “the adoption, development and enforcement of sanitary and phytosanitary measures.”⁵⁷ The second enumerated goal was to liberalize trade by reducing the “negative effects . . . on international trade and preventing

51. See DUNOFF ET.AL., *supra* note 44, at 778-79 (discussing the evolution of the WTO and the historical atmosphere behind its creation).

52. Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments- Results of the Uruguay Round, 33 I.L.M. 1144, available at http://www.wto.org/English/docs_e/docs_e.htm (last visited Sept. 22, 2004) [hereinafter WTO Agreement].

53. See McNiel, *supra* note 8, at 95.

54. See generally SPS Agreement, *supra* note 48.

55. *Id.*

56. *Id.* at art. 2, para. 3.

57. McNiel, *supra* note 8, at 95.

the use of such measures as disguised barriers to trade.”⁵⁸ Third, the SPS Agreement was intended to harmonize safety measures to comport with prevailing international standards such as those adopted by the Codex Alimentarius Commission.⁵⁹ Finally, the fourth goal was to require sound scientific justifications for the proposed phytosanitary measures.⁶⁰

The SPS Agreement also calls for a risk assessment mechanism that requires members to assess risk in accordance with prevailing risk assessment techniques adopted by the “relevant international organizations.”⁶¹ In assessing these risks, members must look at potential economic harm caused by the entry of the altered food into the market, the spread of disease, costs of control or eradication and the relative cost differences of other alternatives.⁶² The Agreement also states that “[m]embers shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection”⁶³ If there are other measures that would achieve the same level of protection then the measure is more restrictive than necessary.⁶⁴

B. *The TBT Agreement*

This agreement provides that countries may implement technical regulations that serve “legitimate objectives” as long as the regulations are “not . . . more trade restrictive than necessary.”⁶⁵ “Legitimate objective[s]” include the “protection of human health or safety, animal or plant life or health, or the environment.”⁶⁶

IV. EU LEGISLATION

The European Union has adopted, and is in the process of adopting, many administrative and technical regulations regarding health and safety. I will discuss four of the major directives that have been put in place.

The first directive is Council Directive 90/220/EEC, adopted by

58. McNiel, *supra* note 8, at 95.

59. *Id.* at 96.

60. *Id.*

61. SPS Agreement, *supra* note 48, at art. 5.

62. *Id.*

63. *Id.*

64. *Id.* at art. 5, n.3.

65. Stewart & Johanson, *supra* note 1, at 288.

66. *Id.*

the Council of Ministers on April 23, 1990.⁶⁷ Directive 90/220/EEC is aimed primarily at raw materials that contain genetically modified organisms.⁶⁸ Under this directive, the manufacturer of a GMO is required to notify the authorities of the state in which the product will be first sold.⁶⁹ Included in the notification, must be the scientific name of the GMO, possible environmental hazards relating to the product, and potential health risks of the GMO.⁷⁰ Moreover, a risk assessment must be done evaluating the possible health risks and environmental risks associated with releasing the product into the market.⁷¹

The next directive is Commission Directive 97/35/EC, which amended 90/220/EEC. This directive amended 90/220/EEC by requiring labeling of “products that contain, or may contain, GMOs.”⁷² The “may contain” provision comes into effect when GMO products are mixed with non-GMO products.⁷³

Moreover, the Novel Foods Regulation, (EC) No. 258/97, applies to foods that are sold as final goods that contain GMOs.⁷⁴ It also covers food produced by GMOs even though the product does not contain any such organisms.⁷⁵ This regulation also requires the producer of the questionable product to notify the authorities of the state in which the product will be first sold.⁷⁶ In addition, this regulation requires the labeling of a product that may contain GMOs.⁷⁷ Furthermore, Directive 88/146/EEC banned the importation of beef treated with growth-promoting hormones.⁷⁸

V. CURRENT STANDARDS UNDER INTERNATIONAL LAW

When looking at the standards under the SPS, the dispute between the United States and the EU over the EU’s ban on hormonally treated beef is illustrative. Directive 88/146/EEC banned the importation of

67. Stewart & Johanson, *supra* note 1, at 256.

68. *Id.*

69. *Id.* at 257.

70. *Id.*

71. Stewart & Johanson, *supra* note 1, at 257.

72. *Id.* at 268.

73. *Id.* at 270.

74. *Id.* at 256

75. Stewart & Johanson, *supra* note 1, at 278.

76. *Id.* at 279.

77. *Id.* at 280.

78. WTO Dispute Settlement Report on EC Measures Concerning Meat and Meat Products (Hormones) [hereinafter Dispute Settlement Report], at 175 (Aug. 18, 1977), available at 1997 WTO DS LEXIS 28.

beef treated with any one of five different growth-promoting hormones.⁷⁹ The United States claimed that the ban was inconsistent with the SPS Agreement and the WTO agreed.⁸⁰ After hearing much testimony by scientific experts on the effects of the hormonally-treated beef, the first issue the DSB addressed was whether or not the SPS Agreement even applied.⁸¹ The DSB set forth two requirements that need to be satisfied in order for the agreement to apply.⁸² First, “the measure in dispute is a sanitary or phytosanitary measure.”⁸³ Sanitary or phytosanitary measures include “all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria” that are “directly related to food safety.”⁸⁴ In other words, the challenged measure must be designed to “protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs”⁸⁵ Second, “the measure in dispute may, directly or indirectly, affect international trade.”⁸⁶ After concluding that the SPS Agreement did apply, the DSB broke the SPS Agreement down into three parts. First, they looked at whether the EU measure in dispute was governed by international standards and if it was, whether the measure comports to or was based on such standards.⁸⁷ Second, if there were international standards, but the directive was not based on them, then the inquiry becomes whether “the European Communities can justify its measures under Article 3.3”⁸⁸ Article 3.3 requires the party imposing the regulation to demonstrate that there is a “scientific justification” for the regulation or that the measures comply with Article 5.⁸⁹ A scientific justification exists, if on the basis of available scientific information, the member determines that the existing standards are not enough to protect the health and safety of its citizens.⁹⁰ Third, if no international standards exist, the regulatory measures must comport with Article 3.1 of the SPS

79. Dispute Settlement Report, *supra* note 78, at 175.

80. *Id.* at 177.

81. *Id.* at 202.

82. *Id.*

83. Dispute Settlement Report, *supra* note 78, at 202.

84. SPS Agreement, *supra* note 48, at Annex A, ¶ 1.

85. McNeil, *supra* note 8, at 113 (quoting SPS Agreement, at Annex A, ¶ 1).

86. Dispute Settlement Report, *supra* note 78, at ¶ 8.45, at 202.

87. *Id.* at ¶ 8.45, at 208-09.

88. *Id.* at ¶ 8.46, at 209.

89. SPS Agreement, *supra* note 48, at art. 3.3.

90. *Id.* at 3 n.2.

Agreement.⁹¹

Furthermore, in a claim alleging a violation of the SPS Agreement the complainant must show a *prima facie* violation of the Agreement.⁹² Once a *prima facie* case has been established the burden shifts to the respondent, to rebut these allegations.⁹³

The DSB found that there were international standards but the regulation did not comply with those standards.⁹⁴ The DSB then looked at Article 3.3 and also Article 5 to determine whether the regulations violated the agreement.⁹⁵

Article 5 requires a risk assessment to determine the appropriate level of protection.⁹⁶ This article requires members to weigh the costs and benefits of the regulation.⁹⁷ The members must take into account the negative effects the regulation could have on trade, as well as “the potential damage in terms of loss production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.”⁹⁸ Furthermore, Article 5.6 requires members to ensure that their policies are “not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection.”⁹⁹ If there is another measure that can achieve the same level of protection, then the disputed measure is more trade-restrictive than necessary.¹⁰⁰ The DSB interprets Article 5 to require the identification of adverse effects on human health due to the hormones and the probability of occurrence of these effects.¹⁰¹ After looking at all these factors, the court concluded that the regulations were in violation of the SPS Agreement.¹⁰²

In summary, when analyzing a regulation under the SPS Agreement, the first step is to determine whether the regulation in dispute complies with current international standards.¹⁰³ If there are

91. See Dispute Settlement Report, *supra* note 78, ¶ 8.47, at 209.

92. *Id.* at ¶ 8.51.

93. *Id.* at 212.

94. *Id.* ¶ 8.89, at 245.

95. *Id.* ¶ 8.89, at 245-46.

96. See generally SPS Agreement, *supra* note 48, at art. 5.

97. *Id.*

98. *Id.* note 48, at arts. 5.3-5.4.

99. *Id.* at art. 5.6.

100. *Id.* at art. 5.6, n. 3.

101. Dispute Settlement Report, *supra* note 78, ¶ 8.89, at 251.

102. *Id.*, ¶ 8.159, at 306.

103. *Id.* at ¶ 8.45, at 208-09.

current international standards but the regulations are not based on them, the next step is to determine whether the European Community can justify its regulations under Article 3.3.¹⁰⁴ This requires either a scientific justification for the measures or that the measures comply with the risk assessment provisions of Article 5.¹⁰⁵ Lastly if no international standards exist, then the regulatory measures must comply with Article 3.1 of the Agreement.¹⁰⁶ The initial burden of proof is on the complainant to show a *prima facie* violation of the SPS Agreement.¹⁰⁷ Once the complainant carries the initial burden the burden shifts to the respondent to rebut the allegations.¹⁰⁸

There has not been much discussion about the standards under the TBT Agreement. The TBT Agreement does allow countries to impose regulations that serve “legitimate objectives” as long as the regulations are “not more trade restrictive than necessary.”¹⁰⁹ Under the TBT, legitimate objectives constitute the “protection of human health or safety, animal or plant life or health, or the environment.”¹¹⁰ Due to the absence of litigation interpreting the TBT Agreement, there will likely be further litigation on what standards apply and when the TBT Agreement is applicable to such disputes.

VI. A NEW STANDARD

A. *Review of U.S. Supreme Court dormant commerce clause jurisprudence*

A look into the Supreme Court’s decisions regarding the dormant commerce clause gives valuable insight into trade between nations. There are a number of similarities between the two areas. Both involve regulations that are purportedly designed to protect the health and welfare of their citizens. Both involve effects on trade between two sovereign or in the case of states (in the U.S. federalist structure), quasi-sovereign territories. The underlying principle that ties the two subjects together is a desire for free mobility of goods and services.

The first illustrative case is *City of Philadelphia v. New Jersey*.¹¹¹

104. Dispute Settlement Report, *supra* note 78, ¶ 8.46, at 209.

105. SPS Agreement, *supra* note 48, at art. 3.3.

106. Dispute Settlement Report, *supra* note 78, at art. 3.3.

107. *Id.* at ¶ 8.51, at 211.

108. *Id.* at ¶ 103.

109. Stewart & Johanson, *supra* note 1, at 288.

110. WTO Agreement, *supra* note 52, at art. 2.2.

111. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

In that case the Supreme Court struck down a New Jersey law that prohibited the importation of most “solid or liquid” waste which originated or was collected outside of the state.¹¹² The statute was passed in response to a legislative concern regarding the scarcity of landfill sites within New Jersey and the corresponding threat to the environment.¹¹³ The avowed purpose of the statute was to protect the environment and to safeguard the “public health, safety and welfare” of New Jersey citizens.¹¹⁴

This law affected private landfill operators in New Jersey and elsewhere by reducing the supply of out of state waste and therefore increasing the price of domestic waste.¹¹⁵ In the absence of the legislation, out of state collectors of waste would compete with in-state collectors; therefore, resulting in lower costs of disposal. Thus, the legislation benefits in-state collectors by shielding them from out of state competition, which results in a higher cost of disposal. This evidently harms private landfill operators in New Jersey because they have to pay a higher price for the waste.¹¹⁶

The Court concluded that the statute violated the dormant commerce clause because the statute discriminated against an article of commerce merely because of its origin.¹¹⁷ The Court stated that, “where simple economic protectionism is effected by state legislation a virtually *per se* rule of invalidity has been erected.”¹¹⁸ However, nondiscriminatory regulations that incidentally burden interstate commerce, and whose purpose is to safeguard the health and welfare of citizens will be upheld, “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹¹⁹

The Court reasoned that the New Jersey statute discriminated against out-of-state waste collectors, merely because of their origin, so the statute was *per se* invalid.¹²⁰ In practical effect, the Court’s holding implies that regulations that have the effect of discriminating against out-of-state producers and that benefit in state producers at the expense of out of state producers are presumed to be invalid unless the state

112. See generally *City of Philadelphia*, 437 U.S. 617.

113. *Id.* at 625.

114. *Id.*

115. *Id.* at 619.

116. *Id.* at 619, 626.

117. *City of Philadelphia*, 437 U.S. at 626-27.

118. *Id.* at 624.

119. *Id.* at 624.

120. *Id.* at 627.

imposing the restriction can offer a nondiscriminatory justification.¹²¹ The Court stated, “But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”¹²² The Court, however, dismissed the avowed purpose of the legislature of protecting the environment and the public welfare and, as a result, subjected the regulation to a *per se* rule of invalidity.

In the case of *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*,¹²³ the Court struck down a city ordinance which required those wishing to dispose of waste in Clarkstown to take the waste to a local processing plant which charged a disposal fee that was higher than the market price.¹²⁴ The city ordinance at issue was called the “flow control ordinance” and it required all local solid waste to be processed through the waste transfer station before leaving the city.¹²⁵ The town built the transfer station at a cost of \$1.4 million and entered into a contract with a private contractor who agreed to construct the facility and operate it for a five-year period.¹²⁶ After the five-year period was over the town would buy the station for a nominal fee (i.e., \$1).¹²⁷ The town sought to amortize the cost of the plant by guaranteeing a minimum waste flow and charging a fee of \$81.¹²⁸ In effect the state established a private monopoly.

The “flow control ordinance” had the effect of harming local waste processing companies who were required to bring their nonrecyclable waste to the transfer station and pay the fee. In the absence of the ordinance, the companies would have shipped the nonrecyclable waste to whichever processing station charged a lower fee.¹²⁹ Additionally, the “flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste.”¹³⁰

The town argued that the purpose of the statute was to ensure the “safe handling and proper treatment of solid waste.”¹³¹ They argued

121. *City of Philadelphia*, 437 U.S. at 626-27.

122. *Id.*

123. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1984).

124. *See generally id.*

125. *Id.* at 386.

126. *Id.* at 387.

127. *Id.*

128. *C & A Carbone*, 511 U.S. at 387.

129. *Id.* at 388.

130. *Id.* at 389.

131. *Id.* at 393.

that the ordinance was necessary to achieve this objective because of the reduction in landfill space and the escalation of environmental cleanup costs.¹³²

The Court paid little attention to the Town's argument and instead concluded that the statute was *per se* invalid because it discriminated against out-of-state processors by driving up the cost of disposal and depriving them "of access to a local market."¹³³ The Court once again reaffirmed the rule that "discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."¹³⁴ In other words, where a statute discriminates against out of state interests in favor of local interests, the law bears a heavy presumption of invalidity.¹³⁵ In analyzing whether the ordinance is protectionist the court once again looks toward the discriminatory effects of the ordinance.¹³⁶ "Our initial discussion of the effects of the ordinance on interstate commerce goes far toward refuting the town's contention that there is no discrimination in its regulatory scheme."¹³⁷ In *C & A Carbone*, as in *City of Philadelphia*, the Court looks at the discriminatory effects of the ordinance. If the ordinance benefits local producers at the expense of out of state producers, the law is *per se* invalid, unless it can be shown that a legitimate local interest is at stake and there are no other means to advance that interest.

Another case that is illustrative is *West-Lynn Creamery v. Healy*.¹³⁸ In that case the Court held a Massachusetts program unconstitutional, where it taxed all milk sales in the state and subsidized Massachusetts milk producers from the proceeds.¹³⁹ The law at issue required all milk dealers in the state to pay a "monthly premium payment" into the "Massachusetts Dairy Equalization Fund," the proceeds of which went to Massachusetts dairy farmers.¹⁴⁰

The legislation was passed in response to low milk prices, brought on by low-cost producers in states neighboring Massachusetts.¹⁴¹ The

132. *C & A Carbone*, 511 U.S. at 392-93.

133. *Id.* at 386.

134. *Id.* at 392.

135. *Id.*

136. *Id.* at 390.

137. *C & A Carbone*, 511 U.S. at 390.

138. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

139. *See generally id.*

140. *Id.* at 190-91.

141. *Id.* at 189.

avowed purpose of the legislation, as stated by the Governor of Massachusetts, was to “preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and *protect the public health* [emphasis added].”¹⁴²

The Court found the ordinance unconstitutional on the grounds that the avowed purpose and the effect of the statute were protectionist in nature and therefore *per se* invalid.¹⁴³ Once again the Court placed a heavy emphasis on the effect of the statute when determining whether or not it was protectionist and hence *per se* invalid.¹⁴⁴ In articulating this position the court relied on the case of *Baldwin v. G.A.F. Seelig, Inc.*, where the court struck down a New York statute that established a “single minimum price for all milk, whether produced in New York or elsewhere.”¹⁴⁵ Justice Cardozo, writing for the Court, stated that “neither the power to tax nor the *police power* [emphasis added] may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.”¹⁴⁶ In *West Lynn Creamery*, the court reasoned that the Massachusetts pricing order would have the effect of discriminating against out-of-state producers of milk in favor of in-state producers.¹⁴⁷ The Court further argued that “this effect renders the program unconstitutional, because it, like a tariff, ‘neutraliz[es] advantages belonging to the place of origin.’”¹⁴⁸

In *Exxon Corp. v. Governor of Maryland*, the Court upheld a Maryland law that prohibited downstream vertical integration in the petroleum products market, and which required “producers or refiners of petroleum products” to offer price reductions to independent retail stations in an attempt to reduce the harmful effects of local competition.¹⁴⁹

The Court found that there was no discriminatory effect and therefore, the law was valid.¹⁵⁰ The court distinguished *Exxon* from *City of Philadelphia*, *Carbone*, and *West Lynn*, on the grounds that the statute at issue did not create any “barriers whatsoever against interstate

142. *West Lynn Creamery*, 512 U.S. at 190.

143. *Id.* at 194.

144. *Id.*

145. *Id.* at 193.

146. *Id.* at 194.

147. *West Lynn Creamery*, 512 U.S. at 196-201.

148. *Id.* at 196.

149. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 119-20, 122-23 (1978).

150. *Id.* at 126.

independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market."¹⁵¹ *Exxon* reaffirmed the rule that laws that have protectionist effects are *per se* invalid.¹⁵² The difference was that in *Exxon*, the Court found no such discriminatory effect, and hence the Court upheld the statute.¹⁵³

The final case that deserves discussion is *Hunt v. Washington State Apple Advertising Commission*.¹⁵⁴ In that case the court struck down a North Carolina law that required all closed containers of apples sold or shipped into the state to bear "no grade . . . other than the applicable U.S. grade."¹⁵⁵

Washington State, at the time, was the nation's largest apple producer.¹⁵⁶ As such, it placed a high emphasis on quality and it created its own agency in charge of quality, advertisement and promotion of its apples.¹⁵⁷ The Commission had their own private labeling system, which identified the apples as meeting the quality requirements imposed by the State of Washington.¹⁵⁸ The North Carolina law at issue prohibited all closed containers of apples from carrying state gradings.¹⁵⁹ This law was very costly to Washington apple producers because it either required them to "obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance," or to change ". . . their marketing practices to accommodate the needs of the North Carolina market."¹⁶⁰

The stated purpose of the legislation was to protect consumers by eliminating deceptive practices and false or misleading labels.¹⁶¹ The state maintained that the law at issue was a valid exercise of the state's police powers to protect the health and welfare of its citizens.¹⁶²

The Court found that the statute clearly benefited local apple producers at the expense of Washington State apple producers, by

151. *Exxon Corp.*, 437 U.S. at 126.

152. *Id.*

153. *Id.*

154. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 335, 354 (1977).

155. *Id.* at 335, 354.

156. *Id.* at 336.

157. *Id.* at 336-37.

158. *Id.* at 336.

159. *Hunt*, 432 U.S. at 337.

160. *Id.* at 338.

161. *Id.* at 340-41.

162. *Id.* at 349.

increasing the cost of doing business in North Carolina.¹⁶³ The court reasoned that since there was a protectionist effect, North Carolina had the burden of showing that the statute served legitimate local interests and that there were other nondiscriminatory means that could have served that purpose.¹⁶⁴ According to the Court, North Carolina failed to carry that burden.¹⁶⁵

In summary, after reviewing the Supreme Court's jurisprudence in the area of state economic protectionism, there is one recurring theme: the ability of states to trade freely with one another without legislative interference. The Court has placed a special emphasis on the evils of economic protectionism. "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."¹⁶⁶ The general rule that can be extracted from the foregoing cases is this: where a state law or ordinance has the effect of discriminating against interstate commerce, by benefiting local producers at the expense of out-of-state producers, the law is *per se* invalid, unless the state can show that the law serves a legitimate local interest and there is no nondiscriminatory way to further that interest. However, in practical effect, if it can be shown that the law has a protectionist effect, it will likely be declared invalid, regardless of the avowed purpose. In most of the foregoing cases in which the law was struck down, the state legislature argued that the law was enacted to protect the health and welfare of its citizens or to protect the environment. Once the Court determined that there was a protectionist effect, the Court gave a cursory glance at the purpose and declared the statute unconstitutional. As stated in *Best & Co. v. Maxwell*, "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."¹⁶⁷

163. *Hunt*, 432 U.S. at 350-51.

164. *Id.* at 353.

165. *Id.*

166. *C & A Carbone*, 511 U.S. at 390; *see* The Federalist No. 22, pp. 143-45 (Clinton Rossiter ed., 1961) (Alexander Hamilton); JAMES MADISON, *Vices of the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON 362-363 (G. Hunt ed., 1901).

167. *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

B. Supreme Court v. International Law

Under current international law, countries are free to adopt health and safety measures as long as they comply with international standards and/or are based on sound scientific justifications or risk assessments.¹⁶⁸ Under this standard, policies that have protectionist effects, but are based on “sound science” or risk assessments are not violations of international law. The practical effect of this standard is to allow countries to protect local enterprises from foreign competition while using the “public health and welfare” as a pretext. In other words, the current standard is underprotective of international trade. Whenever countries want to protect local industries from outside competition they can merely invoke the police power as a rationale. The way the current standards apply it would be very costly to challenge the trade restrictive policy. Each side needs to gather enough scientific evidence and testimony to show the scientific validity of the regulation. Furthermore, what happens if current scientific knowledge is such that the affects of a given product or technique have not yet been ascertained? The current standard sets up a costly and complex set of rules that make it easier for countries to impose trade restrictions.

Additionally, the current international standards require judges and other legal scholars to delve into a realm of knowledge in which they are not overtly familiar and/or trained. Judges are required to analyze the scientific justifications for certain policies; something they are not well equipped to do. Furthermore, when scientists cannot agree on the health effects of GMOs, how are judges supposed to reach a consensus? The scientific community has not reached a consensus as to whether or not GMOs are harmful to human health or to plant and animal life.¹⁶⁹ Additionally, any health or environmental benefits that do accrue because of the GMO regulations will be realizable at some point in the future, whereas the costs imposed on foreign exporters occur in the present. Hence, the marginal discounted benefit of the gains from the regulations will likely be substantially less than the marginal discounted cost imposed on foreign producers and domestic consumers. The current standard under the SPS Agreement is a poor standard because it imposes high transaction costs on the parties who seek to litigate and the standard does not clearly set forth a rule that states can abide by when setting their trade policies.

A better standard would be one similar to that laid out by the U.S.

168. See generally SPS Agreement, *supra* note 48.

169. *A not-so-perfect market*, THE ECONOMIST, Mar. 25, 2000.

Supreme Court in their dormant commerce clause cases. For convenience I will call this standard the protectionist effects test. If a law has a protectionist effect (i.e., if the effect of the law is to benefit local producers at the expense of foreign producers), then there is a heavy presumption that it is invalid. The only way for this presumption to be rebutted is if the enacting state or country can show that the law serves a legitimate local concern and there are no other nonprotectionist measures to achieve the same ends. A mere stated purpose that the law is intended to protect the health and welfare of its citizens is not sufficient. Discrimination in international trade should be outlawed “whether forthright or ingenious.”¹⁷⁰

A standard such as this would reduce transaction costs by reducing the need for extensive scientific testimony and research. Additionally, it would allow judges to do what they are trained to do, apply law. Furthermore, a standard such as this would be more consistent with the purposes of the WTO. The purpose of the WTO is to reduce trade barriers and to encourage free trade among countries.¹⁷¹ What better way is there to encourage trade than to outlaw policies that have a protectionist effect? Moreover, such a clear standard gives an incentive to countries to be careful when enacting policies that may be protectionist in nature.

VII. APPLICATION OF THE PROTECTIONIST EFFECTS TEST TO EC DIRECTIVES

A. Directive 90/220/EEC

Under this directive, the manufacturer (exporter, in the case of the U.S.) or importer of a GMO is required to notify the authorities of the state in which the product will be first sold.¹⁷² Included in this notification must be a risk assessment of possible environmental or health risks and the scientific name of the GMO.¹⁷³

This law would have the effect of increasing production costs for U.S. exporters who use GMOs in their products. On its face this law is not protectionist. However, combined with the fact that many U.S. products are produced using GMOs, whereas many products produced within the European Union do not use GMOs, there is clearly a

170. *Best & Co.*, 311 U.S. at 455.

171. WTO Agreement, *supra* note 52.

172. Stewart & Johanson, *supra* note 1, at 257.

173. *Id.*

protectionist effect. The law benefits local farmers by insulating them from foreign competition. Additionally, under the Common Agricultural Policy, the EU has maintained a policy of subsidizing local farmers to protect them from outside competition.¹⁷⁴ Under the protectionist effects test this directive should constitute a barrier to trade and should be subject to WTO sanctions.

B. Commission Directive 97/35/EC, amending 90/220/EEC

This directive requires the labeling of “products that contain, or may contain, GMOs.”¹⁷⁵ For the same reasons as the previous directive this one should be considered a trade barrier and subject to sanctions. As in *Hunt*, this labeling requirement would impose substantial costs on foreign producers who would have to change their marketing practices to accommodate the wishes of the domestic market.¹⁷⁶ This labeling requirement benefits local producers by insulating them from low-cost foreign production. Therefore, the requirement has a discriminatory effect and should be a *per se* violation of international law under the protectionist effects test.

C. The Novel Foods Regulation: EC No. 258/97

As mentioned earlier, this act contains notification provisions that are similar to those that are set forth in 90/220/EEC.¹⁷⁷ The act also requires the labeling of foods that may contain GMOs.¹⁷⁸ The same reasoning applies when analyzing this directive. The law has a probable protectionist effect and is therefore a *per se* violation of international law.

D. Directive 88/146/EEC

This directive banned the importation of beef treated with growth-promoting hormones.¹⁷⁹ This directly impacts United States exporters. As earlier stated, the economic benefit to using growth promoters was approximately \$44.21 per animal.¹⁸⁰ Furthermore, U.S. exporters use growth promoters more frequently than do European dairy farmers. This imposes a discriminatory effect on U.S. beef exporters by raising

174. KREININ, *supra* note 3, at 185.

175. Stewart & Johanson, *supra* note 1, at 268.

176. *Hunt*, 432 U.S. at 338.

177. Stewart & Johanson, *supra* note 1, at 279.

178. *Id.* at 280.

179. Dispute Settlement Report, *supra* note 78.

180. McNiel, *supra* note 8, at 100.

the cost of doing business in Europe. This directive was even a more clear cut case of economic protectionism because the directive had an inherently protectionist legislative purpose. As was stated by the European Parliament when enacting this legislation, “only a total ban on the use of growth-promoters is concordant with the strategic aims now adopted for the Common Agricultural Policy, in particular the reduction of surpluses and the safeguarding of a viable regionally diversified farming community.”¹⁸¹ This is a clear-cut case of a protectionist purpose and effect. This directive was eventually held to be in violation of the SPS Agreement and hence a violation of international law.¹⁸² Instead of delving into the scientific justifications of the directive, which obviously was a costly and time-consuming procedure, a mere look at its purpose and possible effects reveal its protectionist nature.

CONCLUSION

The “health and safety” regulations enacted by the European Union have the effect of discriminating against foreign producers and exporters. Furthermore, the means adopted by the EU are more trade restrictive than necessary to achieve the desired ends. Moreover, a look into the circumstances surrounding the regulations and statements made by the parliament indicate that the regulations were passed in an attempt to protect the local farming industry against outside competition. Therefore, under the protectionist effects test the EU regulations violate international law and should be repudiated or subject to sanctions.

The European regulations raise the cost of doing business for foreign producers. This raises the price of imported products relative to domestic products. It follows that consumers will substitute away from the more expensive import into the cheaper domestic product. Furthermore, domestic producers will increase production because they have a relative cost advantage over foreign producers. Therefore, the European regulations are inefficient because they create both a production distortion and a consumption distortion.

Additionally, the EU could have imposed less trade restrictive measures to achieve the same goal. As noted earlier, many of the health-related problems associated with meat are due to the adulterated feed. If the European lawmakers were truly concerned about the welfare of their citizens they would prohibit farmers from using ground up sheep in their feed. However, using this type of feed is relatively

181. McNiel, *supra* note 8., at 129.

182. *See* Dispute Settlement Report, *supra* note 78, at 73, 74.

cheaper than unadulterated feed. Due to the strong influence of the farm lobby in the European Union, the Parliament would rather impose trade restrictions in the form of administrative regulations, than increase the cost to domestic farmers. The EU could impose strict regulations on domestic farmers that would have a minimal effect on international trade but would protect the health and safety of Europe's citizens.

Moreover, the EU has had a history of using import quotas, tariffs and export subsidies to help domestic farmers at the expense of foreign competitors. Under the Common Agricultural Policy (CAP) the EU uses price supports, import restrictions and export subsidies to insulate domestic farmers from competition.¹⁸³

From the foregoing it is clear that the EU directives arbitrarily discriminate against local producers, the means used are more trade restrictive than necessary and the history of the EU indicates a protectionist purpose behind the directives. Although, under the protectionist effects test only a protectionist effect needs to be shown, these directives clearly do not withstand scrutiny because they have a protectionist purpose and effect.

The WTO was established to reduce tariffs and to encourage free trade.¹⁸⁴ The principle behind this, being that when people and countries are free to pursue their own interest, an equilibrium will be reached whereby all people are better off. International trade is not a zero-sum game. Just because someone gains does not imply that someone necessarily loses. Imposing costly and in some cases prohibitive regulations on the ability of nations to trade does not just benefit local producers but it harms those very people that the legislation is supposedly trying to protect. It harms the nation's citizens by reducing the availability of necessities and by increasing their prices. This very fact implies that the regulations and directives imposed by the European Community are not really an attempt to improve the health and welfare of their citizens; they are merely an attempt to protect local producers from the rigors of competition.

The current standards under the SPS Agreement are inefficient because they impose high transaction costs upon the parties involved. Furthermore, the standards require judges to delve into a realm of scientific knowledge that they are not that familiar with. Moreover, given the current scientific uncertainty regarding the health and environmental effects of GMOs it will be increasingly difficult for

183. KREININ, *supra* note 3, at 185.

184. WTO Agreement, *supra* note 52.

judges to reach a consensus. Additionally, the discounted benefits due to the GMO regulations will likely be less than the present costs incurred by foreign producers. Hence, the current standard should be replaced by a standard that is more efficient, has lower transaction costs and is more judicially manageable. A better standard would be that imposed by the U.S. Supreme Court in their dormant commerce clause cases. This “protectionist effects” standard would impose a heavy presumption of invalidity on laws that have a protectionist effect. A standard such as this would reduce transaction costs and would make it easier for judges to apply the law. This standard would make it more difficult for states to enact protectionist measures using the police powers as a pretext. This would increase international trade and benefit global consumers by reducing the price of goods and services.

In conclusion, where a statute has a protectionist effect it should be declared a *per se* violation of international trade. Furthermore, many of the regulations that have been adopted by the European Community have such a protectionist effect, and should therefore, be repudiated and subject to sanctions by the WTO.