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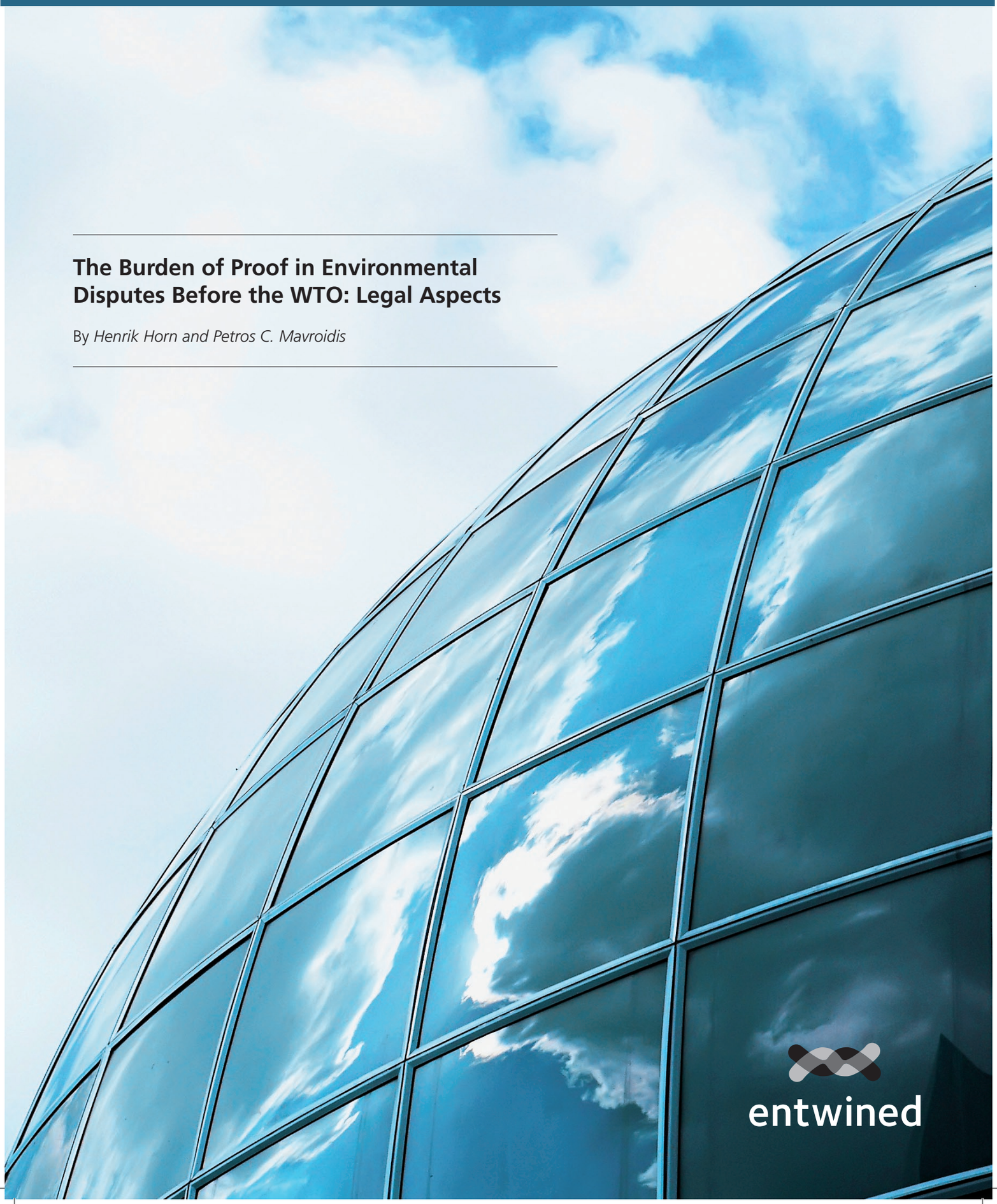

The Burden of Proof in Environmental Disputes Before the WTO: Legal Aspects

By *Henrik Horn and Petros C. Mavroidis*

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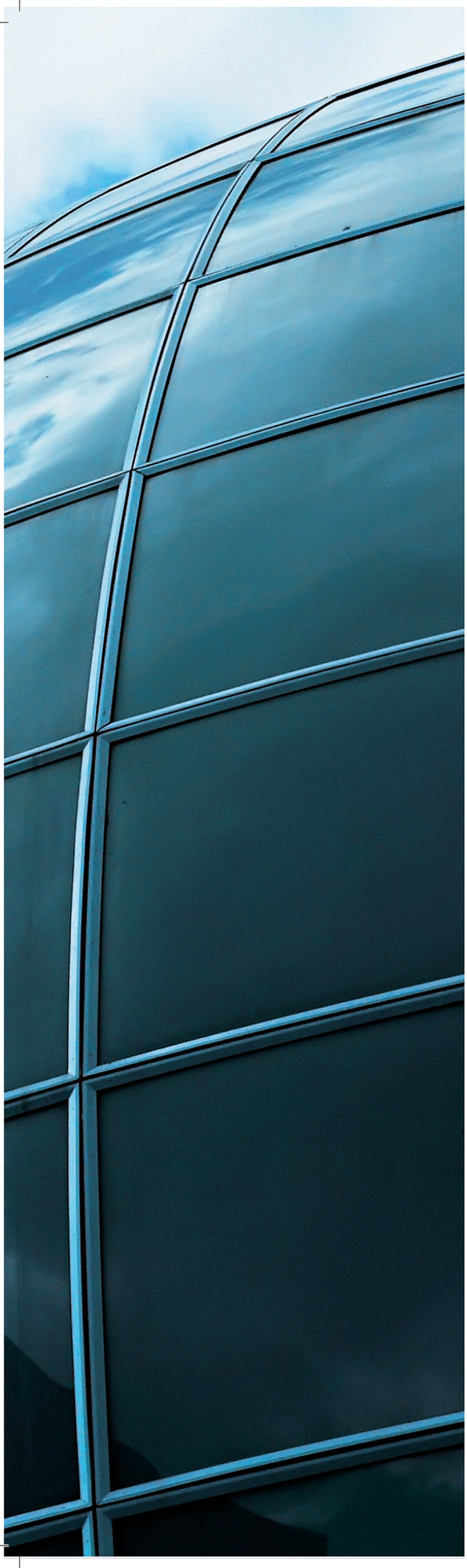

ABOUT THE AUTHORS

Henrik Horn wrote his dissertation in economics at the Institute for International Economic Studies, Stockholm University, where he stayed until his resignation in 2007, the last 13 years as Professor of International Economics. He is since 2006 Senior Research Fellow at the Research Institute of Industrial Economics (IFN) in Stockholm, Non-Resident Senior Fellow at Bruegel, a Brussles-based think tank, and Chief Reporter (jointly with Petros C. Mavroidis) for the American Law Institute project Principles of World Trade Law: The World Trade Organization. Horn is Research Fellow in the International Trade and Industrial Organization Programmes of the Centre for Economic Policy Research, London, Editorial Board member of the World Trade Review, and Associate Editor of the Journal of World Trade. He has taught at e.g. Stockholm University, Stockholm School of Economics, the University of Michigan, Princeton University, the World Trade Institute (Bern), and the Graduate Institute of International Studies (Geneva), has served as a judge in the Swedish Supreme Court for antitrust cases, and he has worked for four years in the Economic Research and Analysis Division of the WTO.

Petros C. Mavroidis earned his law degree at the University of Thessaloniki and has an LL.M. from Berkeley, and subsequently pursued a Ph.D. in the subject of international trade law at the University of Heidelberg. Since then, his work has been primarily on the WTO. He worked in the Legal Affairs Division of the WTO legal division in the 1990s, and has written extensively on the organization and its predecessor, the GATT. Mavroidis is Research Fellow in the International Trade Programme of the Centre for Economic Policy Research, London, Editorial Board member of the World Trade Review, and Associate Editor of the Journal of World Trade. Mavroidis teaches both at Columbia University in New York, NY and at the University of Neuchatel in Switzerland, where he also spends several days each month as a pro bono lawyer at the WTO, helping developing countries to settle disputes. As mentioned, Prof. Mavroidis is also Chief Reporter in the above-mentioned American Law Institute project on the principles of WTO law, which will lead eventually to a series of legal recommendations.

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ENVIRONMENTAL POLICIES MUST RESPECT THE NATIONAL TREATMENT PRINCIPLE

A constant source of controversy in the environment and trade policy debate is the World Trade Organization's (WTO) (and its predecessor, the General Agreement on Tariffs and Trade, GATT) alleged tendency to prevent its Members from pursuing national environmental policies if such policies have a negative impact on trade. Some observers see WTO disputes such as US-Tuna, EC-Hormones and EC-Biotech Products (the "GMO dispute") as indications of a trade regime that is intrinsically unfriendly toward the environment. Other observers instead maintain that the agreement leaves ample scope for members to pursue whatever policies they like, including environmental policies, as long as they do not apply these policies in protectionist manner.

What is clear is that there are a number of provisions in the WTO Agreement that, depending on interpretation, could potentially interfere with the pursuit of national environmental policies. The basic potential obstacle in this regard is the National Treatment (NT) provision in Art. III of the General Agreement on Tariffs and Trade (GATT), which broadly speaking requests WTO Members to pursue their domestic policies affecting goods trade – environmental policies included – in a non-discriminatory manner, whereby foreign products should not be treated less favourably than similar domestic products. Provisions with similar wording or spirit can also be found in several other agreements coming under the aegis of the WTO: important regulations are found in e.g. the Agreement on Sanitary and Phyto-sanitary Measures (SPS), and the Agreement on Technical Barriers to Trade (TBT).

Broadly speaking, the role of the regulation of domestic instruments in the WTO is to prevent its Members from undermining tariff concessions through the use of domestic instruments. For instance, a domestic environmental tax levied on an imported product could essentially have the same impact as an import tariff, so it would be meaningless to bind the tariff if it could simply be replaced by a domestic tax implemented under the guise of a measure protecting the environment. As a result, trade agreements cannot include constraints on the use of border instruments only, but must also restrict the use of domestic policy instruments, policies allegedly pursued to protect the environment included.

The severe complication is however, that domestic instruments can take an endless variety of forms. There are also a huge number of different circumstances in which they could be used, sometimes for what WTO Members would consider to be legitimate purposes, such as to protect the environment, and sometimes for purposes that are only unilaterally rational. Therefore, it would be prohibitively costly to directly bind all domestic instruments in an adequate fashion. Virtually all trade agreements escape the contracting problem by including a very simple NT provision requesting domestic instruments not be used to give domestic products more favourable treatment than like foreign products. At the same time, the law recognizes that it may sometimes be desirable to let WTO Members treat imports less favourably. In the WTO, this is manifested in the vague notion that Art. III GATT is concerned with measures that are "applied so as to afford protection." In addition, the general exceptions clause in Art. XX GATT allows countries to pursue e.g. environmental policies that violate e.g. Art. III GATT, provided that they are "necessary" (or relate to the protection of an exhaustible natural resource, depending on the factual circumstances) and do not constitute "disguised protection."

The general idea concerning domestic measures is to weed out protectionist policies while at the same time allowing measures that are in some sense desirable. The fundamental problem facing this sorting of wheat from chaff is the fact that adjudicators cannot directly observe the objectives that are being pursued through the contested policies; a measure may combat an environmental hazard, but the adjudicator does not know a priori whether the importing WTO Member really cares about this aspect of the policy, or whether it is only its protective effect for import-competing producers that is motivating the policy. Instead, adjudicators must rely on evidence presented by the parties concerning the nature of the contested policies. A central mechanism for controlling the evaluation of such evidence, and hence the bite of the legal text, is the distribution of the burden of proof (BoP) between complainants and respondents.

To illustrate the importance of burden of proof distribution in the context of environmental disputes, consider the case of an environmental measure that has the consequence of burdening an imported product with heavier taxation than that levied on a domestic product with which it is in competition. As a result, the exporting country launches a complaint, arguing that the measure violates Art. III GATT.

BURDEN-OF-PROOF RULES CRUCIALLY AFFECT THE AMBIT OF NT

There is a legal discussion concerning the interpretation of the ambit of this provision, and its relationship to Art. XX GATT, and depending on the interpretation, there are several ways in which such a dispute might be adjudicated. There is a general agreement that the complainant always carry the burden of production to establish a violation of Art. III GATT. That is, the complainant carries the burden to produce evidence, and will thus lose the dispute if failing to do so. According to one approach, the burden of persuasion to fulfil this burden – that is, the amount of evidence that is required – is low: all that is required is to demonstrate that the imported and the domestic products are sufficiently substitutable from a consumer point of view, and that the former are taxed heavier than the latter. In effect, in such a case the complainant will prevail in its claim under Art. III GATT and the defendant will have to argue its case under the General Exceptions clause in Art. XX GATT. In order to be granted an exception, the measure must not be disguised protection, and must also be necessary to achieve the environmental objective. Since this is an exception clause, the defendant normally carries the burden of production to show eligibility for an exception. An alternative approach is to put a significantly higher burden of persuasion on the complainant under Art. III GATT, requesting the complainant not only to demonstrate less favourable treatment of the imported product, but also that the environmental measure has been applied so as to afford protection.

It might be argued that it should not matter which interpretation is employed, since in both cases the question of whether a measure amounts to protection must be evaluated. From a burden of proof point of view, there is a very significant difference between the two approaches, however. In the first case, employed in case law, it effectively falls on the regulating country to prove that its environmental measure is not disguised protection, and that the measure is necessary. In contrast, in the latter case it falls on the complaining country to prove that the measure does amount to protection. In a world where information is highly imperfect, the implications of these two modes of adjudicating environmental disputes are likely to often differ widely.

The allocation of the burden of production and persuasion in WTO disputes has not been decided through negotiated legislation, but has been left to be determined by the WTO judge, and is thus laid down in case law. The purpose of the paper "The Burden of Proof in Environmental Disputes in the WTO: Legal Aspects" is

to take stock of the body of case-law of relevance to environmental disputes. To this end it reviews GATT/WTO disputes where the consistency of a domestic instrument with the WTO rules has been challenged, since all domestic instruments – environmental regulation included –must at least potentially obey the same legal discipline. Although the focus of the paper is on environmental disputes (that are being exhaustively discussed), the paper also discusses the leading cases in fields other than trade and environment adjudicated under Arts. III/XX GATT, since the solutions obtained there have an impact on the allocation of burden of proof on environmental cases as well.

The analysis finds that WTO adjudicating bodies have consistently assigned the burden of production of proof to the complainant: this attitude has not changed not even in cases of international standards where one might intuitively have thought that the allocation of burden of production would be different. In such cases, the text of the relevant WTO Agreements (TBT, SPS) seems to suggest that WTO Members deviating from an appropriate international standard would carry the corresponding burden to demonstrate why deviation was indeed warranted. Still, WTO adjudicating bodies have ruled that the 'traditional' allocation of the burden of proof is not affected by the mere existence of an international standard. As

a result, even in such cases it is for the complainant to show that the deviating WTO Member has run afoul its WTO obligations. As to the burden of persuasion, our analysis suggests that de facto, the complaining party does not need to show evidence of adverse trade effects or protectionist intent; de jure, the complaining party might need to show evidence of protectionist intent in cases where a fiscal instrument has been chosen and the tax differential between two "directly competitive or substitutable" (DCS) products is more than de minimis but less than substantial. Such has never been the case de facto so far. On balance we tend to conclude that adjudicating bodies have tended to put a rather light burden of persuasion on complainants.

A COHERENT CONCEPTUAL FRAMEWORK IS NEEDED

The absence of explanation regarding the allocation of the burden of proof in dispute reports makes it difficult to understand the reasons behind the commission of such errors. But a court should allocate the burden of persuasion in light, inter alia, of the objectives that a legal canon pursues; it is the response to the question 'what does this legal discipline aim to achieve?' that should inform (along with other factors) the allocation of the burden of persuasion. WTO adjudicating bodies must therefore rely on a theory for what properties that the resolution of the case should have. But this is precisely what seems to be missing in the majority of the cases.

The problem seems to be that in the eyes of adjudicating bodies, the Vienna Convention of the Law of Treaties (VCLT) – which is a general statement in international law for how treaties are to be interpreted – provides all necessary methodology. This is clearly wrong. First, the VCLT can help the judge as to the selection of interpretative elements that it can use, but it cannot help the judge to determine the extent to which a measure contributes to, or hinders, the fulfillment of the purpose of the agreement. Since the purposes of the agreement largely are economic, recourse to economics is necessary for this. Absent such expertise it is no surprise that determinations often appear dubious from an economic perspective. Moreover, the weight to be allocated to each and every factor mentioned in the VCLT is not explicitly addressed by the legislator: by treating textual elements more importantly than contextual elements, adjudicators have often missed the tree and failed to honour the objective function of the GATT which is to punish protectionist measures only and not measures that are pursued for other objectives than protectionism.

In sum, there is, in the view of the authors a tendency for complainants in environmental disputes to carry a too light burden to show that contested measures violate core provisions of the agreement. The reason seems to be the fact that the allocation of the burden of proof in is typically not done in light of the objectives of the agreement. Nor is there an explicit discussion of how these objectives are achieved through various outcomes that result from the allocation of the burden of proof. There is thus a need to ground the allocation of the burden of proof in a coherent conceptual framework that appropriately captures the role of the agreement. Economic analysis can help address this issue in meaningful manner.

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