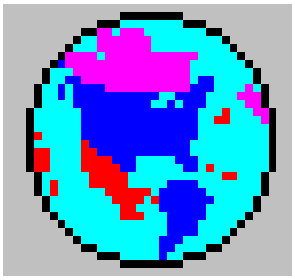
THE LAW OF REGIONAL ECONOMIC INTEGRATION IN THE AMERICAN HEMISPHERE



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Unit VI

General Exceptions

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4. *Korean Beef*

a. *In this case, the Appellate Body devised a new set of "necessity" test that can be dubbed "weighing and balancing" test. Should the Appellate Body engage in such weighing and balancing? Wouldn't such test overstretch the Appellate Body's mandate under the WTO dispute settlement system?*

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1. Legal Text

NAFTA Article 2101: General Exceptions

1. For purposes of:

(a) Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services or investment, and

(b) Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services,

GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in:

(a) Part Two (Trade in Goods), to the extent that a provision of that Part applies to services,

(b) Part Three (Technical Barriers to Trade), to the extent that a provision of that Part applies to services,

(c) Chapter Twelve (Cross-Border Trade in Services), and

(d) Chapter Thirteen (Telecommunications),

shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.

GATT 1994 Article XX: General Exceptions

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:

(*a*) necessary to protect public morals;

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

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

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

(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to nondiscrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

2. Thai Cigarette (1990)

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)
http://docsonline.wto.org/gen_search.asp (type down WT/CTE/W/203 in "document symbol")

THAILAND – CIGARETTES[1]

Parties

Complainant: United States.

Respondent: Thailand.

Third Parties: The European Communities.

Timeline of Dispute

Panel requested: 5 February 1990.

Panel established: 3 April 1990.

Panel composed: 16 May 1990.

Panel Report circulated: 5 October 1990.

Adoption: 7 November 1990.

Main Facts

Under Section 27 of the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax, a business tax and a municipal tax. The United States complained that the import restrictions were inconsistent with Article XI:1, and considered that they were not justified by Article XI:2(c)(i), nor by Article XX(b). The United States also requested the panel to find that the internal taxes were inconsistent with Article III:2.

Thailand argued, *inter alia*, that the import restrictions were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand requested the panel to consult with experts from the World Health Organization (WHO). On the basis of a memorandum of understanding between the parties, the panel asked the WHO to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption.

The WHO indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used

1 *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200.

additives and flavourings.2 Moreover, locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. However, the WHO could not provide any scientific evidence that cigarettes with additives were less or more harmful to health than cigarettes without.

Summary of Findings on Article XX

The panel found that the internal taxes were consistent with Article III:2.3 However, the import restrictions were found to be inconsistent with Article XI:1 and not justified under Article X1:2(c).4 The panel concluded further that the import restrictions were not "necessary" within the meaning of Article XX(b).5

The import restrictions imposed by Thailand could not be considered "necessary" in terms of Article XX(b) because there were alternative measures consistent with the GATT, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.6 There were various measures consistent with the GATT which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which taken together could have achieved the health policy goals pursued by Thailand.7 For instance, the panel suggested that a ban on cigarette advertising could curb the demand while meeting the requirements of Article III:4.8

(end of the summary)

* * *

5 October 1990

THAILAND - RESTRICTIONS ON IMPORTATION OF AND INTERNAL TAXES ON CIGARETTES

Report of the Panel adopted on 7 November 1990
(DS10/R - 37S/200)

(…)

II. FACTUAL ASPECTS

A. Restrictions on imports

6. Under Section 27 of the Tobacco Act, 1966, the importation or exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by licence of the Director-General of the Excise Department or a competent officer authorized by him.

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2 *Ibid.*, para. 52.
3 *Ibid.*, paras. 86, 88.
4 *Ibid.*, paras. 67-71.
5 *Ibid.*, para. 82.
6 *Ibid.*, para. 75.
7 *Ibid.*, para. 81.
8 *Ibid.*, para. 78.

Section 4 of the said Act defines tobacco as "cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing tobacco". Licences have only been granted to the Thai Tobacco Monopoly, which has imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976 and 1980.

(…)

III. MAIN ARGUMENTS

(…)

B. Article XI:1

16. The United States argued that since 1966 Thailand had implemented an import licensing régime for cigarettes which was inconsistent with Article XI. The Thai Tobacco Monopoly had imported cigarettes on only three occasions and the Government refused to consider import licence applications from any other entity. (…)

C. Exceptions to Article XI:1

(…)

(ii) Article XX(b)

21. Thailand contended that the prohibition on imports of cigarettes was justified by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to health. It was therefore covered by Article XX (b). The production and consumption of tobacco undermined the objectives set out in the Preamble of the General Agreement which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods. Instead, smoking lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural. The production of tobacco had not altogether been prohibited in Thailand because this might have led to production and consumption of narcotic drugs having effects even more harmful than tobacco, such as opium, marijuana and kratom (a plant with fragrant yellow flowers and intoxicating leaves). Historically, the manufacturing of cigarettes in Thailand had been aimed at providing a legal substitute for narcotic products which were themselves outlawed. Cigarette production in Thailand was a state-monopoly under the Tobacco Act, because the government felt the need to have total control over such a product which, even though legal, could be extremely harmful to health. A main objective of the Act was to ensure that cigarettes were produced in a quantity just sufficient to satisfy domestic demand, without increasing such demand. While a certain quantity of foreign cigarettes was smuggled into Thailand, this was unlikely to be done without the manufacturers' consent, since prior to the total ban on cigarette advertising which had been implemented on 10 February 1989, foreign cigarette manufacturers had advertised on Thai television, in mass circulation newspapers and on billboards. Indirect advertising had also taken place and the logos of cigarette manufacturers had appeared on clothing and many other non-tobacco products.

22. The United States noted the intent of the drafters of the General Agreement that measures which a contracting party seeks to justify under the provisions of Article XX(b) should reflect similar domestic safeguards. The drafting history of Article XX(b) indicated that the language in the preamble to Article XX stating that measures not be disguised restrictions on international trade had this meaning in the context of Article XX(b). The United States further noted that safeguards comparable to an import prohibition did not exist with respect to domestic cigarettes.

23. (…) The United States considered that Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes. Moreover, the United States considered that Thailand could not argue that the ban on imports was necessary to protect human life or health since domestic production, sales and exports of cigarettes and tobacco remained at high levels. (…)

24. Thailand replied that the exception contained in Article XX(b) reflected the recognition that public health protection is a basic responsibility of governments. With the support of non-governmental organizations, the Thai government had taken action to control smoking by, inter alia:

(…)

- imposing a total ban on direct and indirect advertising of cigarettes in all media, legally enforced under the authority of the Consumer Protection Act; (…)

- requiring the printing of seven rotatory health warnings on the packages of cigarettes, in accordance with the Consumer Protection Act;

- prohibiting smoking in all public transport, health establishments and other public places;

(…)

27. Thailand argued that while competition had desirable effects in international trade in goods, this did not apply to cigarettes. Governments in many countries, including the United States and Thailand, tried to discourage or control tobacco and cigarette consumption. Competition would lead to the use of better marketing techniques (including advertising), a wider availability of cigarettes, a possible reduction of their prices, and perhaps improvements in their quality. This might have the undesirable effect of leading to an increase in total consumption, especially among women and the young, which would run contrary to public health objectives. Some American cigarettes were specifically targeted at women of whom only 3.5 per cent smoked in Thailand compared to 30 per cent in Western countries. A recent report of the Council on Scientific Affairs of the American Medical Association stated that at a time when cigarette smoking is falling in developed nations, it is increasing in Africa, Latin America and Asia as tobacco companies seek new markets. According to this report, the United States leads the world in tobacco exports, and its cigarette exports to Asia had increased by 75 per cent in 1988 alone. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand deemed it necessary that the panel consult with experts from the World Health Organization (WHO) on recent experience in countries which had been made to open their markets for cigarettes. This showed that once a market was opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which

undermined public health and governments were left with no effective tool to carry out public health policies. Advertising bans were circumvented and modern marketing techniques were used to boost sales. Hence, Thailand was of the view that an import ban was the only measure which could protect public health. Any other measure which allowed imports in any amounts would not be effective.

28. Thailand also argued that cigarettes manufactured in the United States may be more harmful than Thai cigarettes because of unknown chemicals placed by the United States cigarette companies in their cigarettes, partly to compensate for lower tar and nicotine levels. United States cigarette companies also used other additives which increased the health risks of smoking. One such additive was cocoa, which according to one study increased the risk of cancer. Others included deer tongue, ethyl butyrate, linayle acetate, isoamyl acetate, 2,3,5 trimethyl and pyrazine. According to the United States Surgeon-General's 1984 report, "a characterization of the chemical composition and adverse biological potential of these additives is urgently required, but is currently impossible because cigarette companies are not required to reveal what additives they employ in the manufacture of tobacco" (USDHHS, 1984). According to Thailand, some United States cigarettes contained nicotine which was extracted from tobacco leaf, resprayed back into the leaf as part of a process called "reconstituting" the tobacco. Re-adding nicotine in chemical form to tobacco leaf may make United States cigarettes different from Thai cigarettes in the strict sense of the word and make them more addictive, since it could make inhalation easier and absorption of nicotine by the bloodstream and the brain more efficient.

29. The United States replied that the health hazards of smoking had been the subject of extensive documentation in a number of countries. The existence of such hazards was not the real issue in this dispute. The United States did not believe that Thailand had established that its import ban served the purpose of protecting public health or that such a measure was necessary to accomplish that purpose. The Thai Tobacco Monopoly produced at least 15 brands of cigarettes appealing to all types of consumers. It had consciously attempted to imitate "American blend" cigarettes, clearly in response to perceived consumer demand. These "American-style" brands were among the Monopoly's best sellers. Its distribution system was both extensive and well-established at the wholesale and retail levels. Few barriers were imposed to entry into the retail cigarette business. (…)

30. According to the United States, the reasons identified by Thailand for the increasing consumption of cigarettes, namely a switch from traditional tobacco products to manufactured cigarettes were of declining importance as the economic situation of Thailand changed. Increased availability would lead to increased consumption if there was demand that was not currently satisfied. Thus, as had happened in other Asian markets which had recently liberalized import policies, opening the Thai market would lead to a shift in consumption from the Thai Tobacco Monopoly cigarettes to imported products, rather than to an increase in total demand. If the real issue was over advertising and concern over the creation of new customers and new demand, that problem should be addressed directly and not through a GATT-inconsistent import prohibition. The United States could not accept the view that the import ban on cigarettes was justified because of the lack of an alternative tool to carry out public health policy effectively. Any measures that could be taken in pursuance of such objectives should be taken on a national treatment basis.

31. The United States denied that its cigarettes raised special health concerns. Indeed, the Thai government had recognized that United States and other foreign cigarettes were less harmful than Thai cigarettes because of their significantly lower tar and nicotine content. Cigarettes exported from the United States were the same product as the ones sold in the United States. Their ingredients had been disclosed to the Department of Health and Human Services since 1985, in

pursuance of the Federal Cigarette Labelling Act. That Department had raised no issue with any of the items on the list of ingredients that had been reported each year. None of the other countries, such as the United Kingdom, France and the Federal Republic of Germany, which also required disclosure of ingredients, had raised problems with ingredients in United States cigarettes. Thailand, however, had no regulations or restrictions on ingredients or flavourings used in cigarettes. The United States noted that the Thai Government admitted that the Thai Tobacco Monopoly used additives in its cigarettes. (…)

32. Thailand replied that it had never recognized that foreign cigarettes were less harmful than Thai cigarettes. Even though their tar and nicotine contents might be lower, they were more addictive than Thai cigarettes because smokers tended to consume a higher number of low tar and nicotine cigarettes, in order to obtain the amount of nicotine to which they were used. Artificial flavourings and other ingredients were added to low tar/nicotine cigarettes to compensate for the milder taste of such cigarettes. Thailand, like the United States, had regulations on ingredients and flavourings. The Thai Tobacco Monopoly was required by a Cabinet resolution of February 1990 to disclose the ingredients of its cigarettes to the Ministry of Public Health. This Ministry had requested the Ministry of Finance, which supervised the Thai Tobacco Monopoly to instruct it to reduce or eliminate three of the ingredients which were considered particularly dangerous to health. Some of these, such as cocoa could be harmless when eaten or drunk, but could be carcinogenic when burned.

While it was true that the list of additives to American cigarettes had been submitted to the Department of Health and Human Services since 1985, only a consolidated list of additives which was used by six manufacturers was submitted by these manufacturers, without identifying the brand (or brands) of cigarettes containing particular additives and without indicating the amount of each additive used. Thus, the nature of the information given to the Department of Health and Human Services limited the ability to conduct a thorough analysis of the potential health risks of additives. Canada had passed legislation requiring all cigarette manufacturers to disclose the additives they used, and as a result one leading United States manufacturer had withdrawn several of its brands from the Canadian market. Moreover, Thailand did not agree that cigarettes exported from the United States were the same product as those sold on the domestic market. Recent studies had shown that some foreign cigarettes sold in Asia contained a higher tar level than the same brands sold in Australia, Europe or the United States.

33. (…) Health considerations overrode any other policy objectives of the government. Thus, the Ministry of Finance had estimated that the importation of cigarettes would yield an extra revenue of baht 800 million (about US$30 million) per year which was a substantial sum for a developing country. However, the government had decided to forego this sum in deference to public health considerations.

34. Since May 1989 Thailand had resisted bilateral pressures, under Section 301 of the US Trade Act, to open its market for cigarettes, and faced the imminent threat of retaliation against Thai exports to the United States, valued at US$166 million. Even though exports were the linchpin of Thailand's economic success, such considerations had given way to health concerns. In the course of these bilateral pressures, the United States had made it clear that its objectives were not limited to market opening and national treatment on internal taxation but covered other areas, such as a unilateral reduction of Thailand's import duty on cigarettes to zero, a low specific rate of excise tax on cigarettes (which when converted to an ad valorem basis, would work to the advantage of higher-value American cigarettes) and the right for manufacturers of foreign cigarettes to advertise

and conduct point-of-sale promotion even though such a right was denied to manufacturers of domestically-produced cigarettes. (…)

35. In the view of the United States, there was a marginal benefit to be gained from smoking low tar and nicotine cigarettes, rather than high tar and nicotine cigarettes. With respect to tobacco additives, it considered that there was no evidence that these additives had any adverse effects and referred the panel to the findings of the American Health Foundation which were annexed to the WHO submission. (…)

V. Submission by the WHO

50. On the basis of the Memorandum of Understanding between the parties (see paragraph 3 above) and in pursuance of Thailand's request (paragraph 27 above), the Panel asked the World Health Organization (WHO) to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption, and on related issues for which the WHO was competent.

51. In submissions to the Panel which were generally supported by Thailand, representatives of the WHO explained that one of the best known effects of smoking was lung cancer but that pulmonary and cardiovascular diseases were also attributable to it, as were increased risks of miscarriage, still-births or reductions in birth weights. Many other health problems had also been linked with smoking. Cigarette smoking had been shown to be the leading cause of preventable death and disease in developed nations.
As far as Thailand was concerned, smoking-related cancer was not as high as in many other developing countries and was relatively low in comparison to more affluent countries. However, an increase in cigarette smoking would lead to an increase in mortality due to lung cancer and hypertension, which was already rising because of the increase in cigarette consumption which had occurred 10 to 20 years ago.

52. According to the representatives of the WHO, cigarette smoking was declining in industrialized nations at a rate of 1.1 per cent a year, but rising in developing countries by 2.1 per cent a year. Smoking prevalence was high among males in developing countries, but low among women and children. There were sharp differences between the cigarettes manufactured in developing countries such as Thailand and those available in developed countries. In Thailand like in other developing countries, the market was dominated by a state-owned monopoly which promoted smoking minimally, in the absence of competition. Locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. Locally-produced cigarettes were unlike those manufactured in western countries in that sophisticated manufacturing techniques such as the use of additives and flavourings, or the downward adjustment of tar and nicotine were not generally available, or were primitive in comparison to the techniques used by the multinational tobacco companies. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and create the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. In Thailand, half of the tobacco crop was consumed in the form of hand-rolled cigars or cigarettes which yielded large amounts of nicotine and tar and were popular among the elderly. However, their use was fading as old people died. There was no indication that young women turned to manufactured cigarettes instead of the self-made ones which their elders had smoked. Approximately half of all tobacco was used in the manufacturing of cigarettes by the government-owned monopoly which had produced 30.4 billion cigarettes in 1987. An additional 1.5 billion cigarettes had been smuggled into the country the same year, and foreign cigarette

companies had advertised these allegedly imported cigarettes on television and billboards despite the administrative ban on advertising which had been in effect prior to the legislative ban. (…)

53. The representatives of the WHO stated that the use of additives in American cigarettes had increased greatly during the 1970s with the introduction of low-yield cigarettes. They were used to restore the lost flavour of the cigarette brought about by the reduction in tar and nicotine. The US Surgeon-General reports had concluded that the lowering of tar and nicotine had only a marginal benefit in contrast to quitting. Smokers of low-yield cigarettes had been found to increase their consumption or to inhale more deeply. The health effects of cigarette additives were being analysed by the US Department of Health and Human Services which considered this task to be "enormously complex and expensive". Serious concerns about the presence in cigarettes of certain additives had been raised by the American Health Foundation which acted as a consultant to the Department of Health and Human Services on this issue. However, there was no scientific evidence that one type of cigarette was more harmful to health than another.

54. According to the WHO representatives, another major difference between manufacturers of American cigarettes and of Thai cigarettes was that the former designed special brands aimed at the female market. These cigarettes contained a much lower tar and nicotine level, thus making it easier for women to inhale the smoke. Some were also made to appeal to women by the addition of perfume or were made long and slender to suggest that smoking would result in thinness.

55. The WHO representatives stated that the experience in Latin America and Asia showed that the opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking. Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques. However, one country outside Latin America and Asia had recently taken action to ban the utilization in advertising of brand imagery linked to tobacco products. Particularly concerned by the threats posed by advertising, the member states of WHO had adopted in May 1990, resolution WHO 43.16 which urged all member states:

> "to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:
>
> ...
>
> (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco;"

56. The representatives of the WHO stated that their organization had convened in 1982 an Expert Committee on "Smoking Control Strategies in Developing Countries" which had made a number of recommendations designed to reduce smoking. In particular, this Committee, many of whose recommendations had already been adopted in Thailand, had recommended to developing countries that all advertising and promotion of tobacco products be prohibited, including through the sponsorship of sporting events, that where tobacco is a commercial crop, its rôle be reduced in the economy through alternative use of land and labour for which the assistance of organizations within the UN system, such as FAO and the World Bank, would be sought. The same Committee had recommended to developed countries, inter alia, that any action possible be taken to curb activities aimed at promoting and selling tobacco products and that any exported tobacco products conform to standards obtaining in the exporting country in terms of health warnings, emissions and product information.

(…)

58. Responding to the submission of the WHO, the United States did not take issue with its statements regarding the effect of cigarette use or consumption on human health because this was within the WHO's area of recognized expertise. However, the United States took issue with some of the conclusions drawn by the WHO on the effect of lifting the import ban on cigarettes in Thailand as well as with the factual basis for these conclusions. The United States did not consider that the WHO was specially competent to address the "health consequences of the opening of the market for cigarettes" as requested by Thailand, but urged the Panel to limit the issues presented to the WHO to those aspects referred to in the Memorandum of Understanding between the parties (see paragraph 3 above).

59. On the question of additives contained in American cigarettes, the United States noted that the American Health Foundation had stated that for the great majority of agents in the list of tobacco additives contained in the 1988 report of the Independent Scientific Committee on Smoking and Health, they had no knowledge of adverse health effects. Nevertheless, some of the agents aroused concern.

60. The United States disagreed with the assertion that Thai cigarettes were unlike western cigarettes. In the view of the United States, the Thai Tobacco Monopoly had used additives and flavourings for some time and had imitated United States cigarettes with the help of imports of United States tobacco. While the equipment presently used by the Thai Tobacco Monopoly was not very modern, some of the machinery being purchased would permit the reconstitution of tobacco and the use of other modern cigarette manufacturing techniques. (…)

61. As to the effect of the lifting of restrictions on imports in other Asian countries, the United States considered that in these countries such restrictions as may have been implemented had not been effective in decreasing the level of consumption. In one of these countries consumption had declined after the cigarette market had been opened and had been accompanied by a shift in consumption from domestic to foreign cigarettes. (…)

62. The United States also stated that the 1989 Report of the United States Surgeon General had concluded that there was no scientifically rigorous study available to the public that provided a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption and that the extent of the influence of advertising and promotion on the level of smoking was unknown and possibly unknowable. ("Surgeon General, Reducing the Health Consequences of Smoking" 512-12(1989).) Even if it were accepted that advertising had an effect on the level of consumption of cigarettes, restrictions on advertising and fiscal measures to affect the price of cigarettes were available to control the level of consumption. Such measures could be applied on the basis of national treatment and thus provide a GATT consistent measure of addressing the problem. The United States could not share the view that the Thai government and the anti-smoking lobby would not be able to resist the efforts of the foreign cigarette interests to permit the marketing practices that they opposed.

VI. FINDINGS

(…)

B. Restrictions on the Importation of Cigarettes

(i) Article XI:1

67. The Panel, noting that Thailand had not granted licences for the importation of cigarettes during the past 10 years, found that Thailand had acted inconsistently with Article XI:1, the relevant part of which reads:

> "No prohibitions or restrictions ... made effective through ... import licences ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

(…)

(iii) Article XX(b)

72. The Panel proceeded to examine whether Thai import measures affecting cigarettes, while contrary to Article XI:1, were justified by Article XX(b), which states in part:

> "... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (b) necessary to protect human ... life or health".

73. The Panel then defined the issues which arose under this provision. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be "necessary".

74. The Panel noted that a previous panel had discussed the meaning of the term "necessary" in the context of Article XX(d), which provides an exemption for measures which are "necessary to secure compliance with laws or regulations which are not inconsistent" with the provisions of the General Agreement. The panel had stated that

> "a contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."(emphasis supplied)[2]

[2]Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

The Panel could see no reason why under Article XX the meaning of the term "necessary" under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the

extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term "necessary".

75. The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. The Panel noted that contracting parties may, in accordance with Article III:4 of the General Agreement, impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to "like" products of national origin. The United States argued that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be "necessary" within the meaning of Article XX(b). The Panel proceeded to examine this issue in detail.

76. The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

77. The Panel then examined whether the Thai concerns about the quality of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

78. The Panel then considered whether Thai concerns about the quantity of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the demand for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

> "Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco".[1]

[1]Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

The resolution goes on to urge all member states of the WHO

> "to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:
>
> ...
>
> (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco"[1]

A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.[2] Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

79. The Panel then examined how Thailand might restrict the supply of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.[3] The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.[4] As to the pricing of cigarettes, the Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

> "Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco."

It accordingly urged all member states

> "to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco"[5]

For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

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[1]Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

[2]On the requirement of equal competitive opportunities, see the Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

[3]Cf. Articles III:4, XVII and XX(d).

[4]Cf. Articles III:2 and 4 and II:4.

[5]Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

80. The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

> "Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking."[1]

81. In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not "necessary" within the meaning of Article XX(b).

(…)

3. Gasoline (1996)

WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)
http://docsonline.wto.org/gen_search.asp (type down WT/CTE/W/203 in "document symbol")

UNITED STATES – GASOLINE[9]

Parties

Panel

Complainant: Brazil and Venezuela.

Respondent: United States.

Third Parties: Australia; Canada; the European Communities and Norway.

Appellate Body

Appellant: United States.

Appellees: Brazil and Venezuela.

Third Participants: the European Communities and Norway.

Timeline of Dispute

Panel requested: 25 March 1995.

Panel established: 10 April 1995.

Panel composed: 28 April 1995.

Panel Report circulated: 29 January 1996.

Notice of appeal: 21 February 1996.

Appellate Body Report circulated: 29 April 1996.

Adoption: 20 May 1996.

Main Facts

Following a 1990 amendment to the Clean Air Act, the Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States and to ensure that pollution from the combustion of

9 *United States – Standards for Reformulated and Conventional Gasoline*, Panel Report and Appellate Body Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

gasoline did not exceed 1990 levels. These rules were established to address the ozone and pollution damage experienced by large US cities, as a result, principally, of car exhaust fumes.

From 1 January 1995, the Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold.10 The Gasoline Rule applied to all US refiners, blenders and importers of gasoline.

The EPA regulation provided two different sets of baseline emissions standards.11 First, it required any domestic refiner which was in operation for at least six months in 1990 to establish an "individual baseline", which represented the quality of gasoline produced by that refiner in 1990. Second, EPA established a "statutory baseline", intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. The statutory baseline imposed a stricter burden on foreign gasoline producers.

Venezuela and Brazil claimed that the Gasoline Rule was prejudicial to their exports to the United States and that it favored domestic producers. Accordingly, the Gasoline Rule was inconsistent with Articles III and XXIII:1(b) of the GATT 1994, with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), and was not covered by Article XX.12 The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in Article XX, paragraphs (b), (g) and (d), and that the Rule was also consistent with the TBT Agreement.13 The United States appealed the panel report but limited its appeal to the panel's interpretation of Article XX of the GATT 1994.

Summary of Findings on Article XX

The panel found that imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from sales conditions as favourable as domestic gasoline were afforded by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.14 The Gasoline Rule was accordingly inconsistent with Article III.

The panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of human, animal and plant life or health mentioned in Article XX(b).15 However, the panel found that the baseline establishment methods were not “necessary” under Article XX(b) since there were other consistent or less inconsistent measures reasonably available to the US for the same policy objective.16 The panel rejected a justification of the measure under Article XX(d) as the baseline establishment methods were not an enforcement mechanism (to "secure compliance"), but were simply rules for determining the individual baselines.17 Finally, the panel considered that a

10 *Ibid.*, Panel Report, para. 2.2.
11 *Ibid.*, paras. 2.6, 2.8.
12 *Ibid.*, paras. 3.1-3.2.
13 *Ibid.*, para. 3.4.
14 *Ibid.*, para. 6.16.
15 *Ibid.*, para. 6.21.
16 *Ibid.*, para. 6.28.
17 *Ibid.*, para. 6.33.

policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).18 However, the panel found that the less favourable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources.19 In light of these findings, it was not deemed necessary by the panel to determine whether the measure met the conditions set out in the chapeau of Article XX.20 The panel concluded that the Gasoline Rule could not be justified under Article XX(b), (d) or (g). The panel finding was reversed on appeal.

The Appellate Body held that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX. It noted that the chapeau addressed not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. Accordingly, the chapeau is animated by the principle that while Members have a *legal right* to invoke the exceptions of Article XX, they should not be so *applied* as to lead to an abuse or misuse.21

It concluded that the application of the US regulation amounted to unjustifiable discrimination and to a disguised restriction on trade because of two omissions on the part of the United States.22 First, the United States had not explored adequately means, including in particular cooperation with Venezuela and Brazil, of mitigating the administrative problems that led the United States to reject individual baselines for foreign refiners. Second, the United States did not count the costs for foreign refiners that would result from the imposition of statutory baselines.

(end of the summary)

* * *

Report of the Panel

WORLD TRADE ORGANIZATION 29 January 1996

United States - Standards for Reformulated and Conventional Gasoline

http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

Report of the Panel
(WT/DS2/R)

(…)

II. FACTUAL ASPECTS

A. The Clean Air Act

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18 *Ibid.*, para. 6.37.
19 *Ibid.*, para. 6.40.
20 *Ibid.*, para. 6.41.
21 *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 21
22 *Ibid.*, pp. 25-26.

2.1 The Clean Air Act ("CAA"), originally enacted in 1963, aims at preventing and controlling air pollution in the United States. In a 1990 amendment to the CAA23, Congress directed the Environmental Protection Agency ("EPA") to promulgate new regulations on the composition and emissions effects of gasoline in order to improve air quality in the most polluted areas of the country by reducing vehicle emissions of toxic air pollutants and ozone-forming volatile organic compounds. These new regulations apply to US refiners, blenders and importers.

2.2 Section 211(k) of the CAA divides the market for sale of gasoline in the United States into two parts. The first part, which covers approximately 30 percent of gasoline marketed in the United States, consists of the nine large metropolitan areas that experienced the worst summertime ozone pollution during the period 1987-1989, plus any areas that do not meet national ozone requirements and are added at the request of the governor of the state. These areas are referred to as ozone "nonattainment areas", and in this part of the United States only "reformulated gasoline" may be sold to consumers. In the rest of the United States, "conventional gasoline" may be sold to consumers.
(…)

B. EPA's Gasoline Rule

1. Establishment of Baselines

2.5 The CAA directed EPA to determine the quality of 1990 gasoline, to which reformulated and conventional gasoline would be compared in the future: these determinations are known as "baselines". EPA set historic baselines for individual entities, and established a statutory baseline, intended to reflect average US 1990 gasoline quality, which would be used instead of the historic individual baselines for those entities who were determined to be lacking adequate and reliable data regarding the quality of the gasoline they produced in 1990.
(…)

2. Reformulated Gasoline

2.9 Regarding the implementation of the regulations for reformulated gasoline, EPA proposes a two-step approach. From 1 January 1995 to 1 January 1998, EPA enforces an interim programme called the "Simple Model". Under this programme, reformulated gasoline sold in the United States by domestic refiners will be subject to requirements established with reference to the individual baseline for certain gasoline qualities and requirements specified in the Gasoline Rule for other gasoline qualities. (…) However, importers cannot use individual 1990 baseline for sulphur, olefins and T-90, but have to comply with levels specified in the statutory baseline for these parameters. Under the Simple Model, requirements for sulphur, olefins and T-90 must be met on an annual average basis. EPA adopted the individual baseline approach for these parameters in the Simple Model because at the time it was formulating its regulation, it considered that the available data regarding sulphur, olefins and T-90 did not permit an assessment of the precise effects of these components on the emissions level of gasoline. Given this uncertainty, EPA did not want to require refiners immediately to make refinery changes which might later prove to be unnecessary, given the greater flexibility provided by the Complex Model.

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23 42 U.S.C. §7545(k).

2.10 As of 1 January 1998, EPA will enforce the "Complex Model", which will apply the same emissions reduction requirements to all producers of reformulated gasoline. The individual baselines for sulphur, olefins and T-90 will no longer apply.

3. Conventional Gasoline (or "Anti-Dumping Rules")

2.11 (…) The Gasoline Rule limits ("caps") the volume of conventional gasoline that is subject to an individual baseline to the volume of gasoline produced in 1990 by that entity; all conventional gasoline produced in excess of the specific volume cap is measured against the statutory baseline.

2.12 Domestic refiners and importers of conventional gasoline, unlike those of reformulated gasoline, will still be subject to different baselines after the entry into force of the Complex Model in 1998.

C. The May 1994 Proposal

2.13 In view of the comments made by interested parties during the rulemaking process of the final Gasoline Rule, EPA proposed, in May 1994, to amend the reformulated gasoline regulation in order to define criteria and procedures by which foreign refiners could establish individual refinery baselines in a manner similar to that required for domestic refiners[24]. Pursuant to this proposal, foreign refiners would be allowed to establish an individual baseline using Methods 1, 2 or 3. If the individual baseline was approved by EPA, importers could use it for the purpose of certifying the portion of reformulated gasoline imported from that particular refinery into the United States. However, the use of individual foreign refinery baselines would be subject to various additional strict requirements, aiming at ensuring the accuracy and respect of the foreign refinery's individual baseline with respect to gasoline shipped to the United States and verifying the refinery of origin. Furthermore, it would not apply to conventional gasoline. After a public comment period, the US Congress enacted legislation in September 1994 denying funding to EPA for implementation of the May 1994 Proposal.
(…)

III. MAIN ARGUMENTS

A. General

3.1 Venezuela and Brazil requested the Panel to find that the final rule promulgated by the United States' Environmental Protection Agency ("EPA") on 15 December 1993 and entitled "Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline" ("Gasoline Rule") was:

(a) contrary to Articles I and III of GATT 1994;
(b) not covered by any of the exceptions under Article XX of GATT 1994;
(c) contrary to Article 2 of the Agreement on Technical Barriers to Trade.

3.2 Venezuela additionally requested the Panel to find that the Gasoline Rule nullified and impaired benefits accruing to Venezuela under the General Agreement within the meaning of Article XXIII:1(b).

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[24] 40 CFR 80 (59 Fed. Reg. 22800, 3 May 1994).

3.3 Accordingly, Venezuela and Brazil asked the Panel to recommend that the United States take all necessary steps to bring the Gasoline Rule into conformity with its obligations under the General Agreement and the TBT Agreement. Venezuela requested the Panel to recommend that the United States amend the Gasoline Rule to provide treatment for gasoline imports no less favourable than that accorded to US produced gasoline.

3.4 The United States requested the Panel to find that the Gasoline Rule was:

(a) consistent with Articles I and III of the General Agreement 1994;
(b) falling within the scope of Article XX (b), (d), and (g) of GATT 1994;
(c) consistent with the Agreement on Technical Barriers to Trade.

(…)

B. The General Agreement on Tariffs and Trade

(…)

3. Article XX - General Exceptions

3.37 **The United States** argued that the Gasoline Rule fell within the scope of Article XX whether or not it was consistent with other provisions of the General Agreement. Not all measures described by Article XX were inconsistent with the General Agreement. However, if the Panel accepted that the Gasoline Rule was consistent with other provisions of the General Agreement, in particular Article III, it did not need to decide whether the measures at issue also fell under Article XX. Article XX guaranteed in any event that these measures were not inconsistent with the General Agreement.

3.38 **Venezuela and Brazil** considered that the issue at stake under Article XX was not whether the CAA or the regulations implementing it were necessary, but whether it was necessary to accord foreign gasoline less favourable treatment , which, they argued, was the situation in this case. Venezuela argued further that Article XX provided limited and conditional exceptions from obligations under other provisions of the General Agreement, and the burden was on the party invoking that provision to justify the application of any of the enumerated exceptions. The United States lacked the factual and legal support necessary to carry that burden with respect to any of its claims under Article XX.

4. Article XX(b)

a) "Protection of Human, Animal and Plant Life or Health"

3.39 **The United States** argued that it was well established that air pollution, and in particular ground-level ozone, presented health risks to humans, animal and plants. (…) Thus, its aim was to protect public health and welfare by reducing emissions of toxic pollutants, VOCs and NOx for reformulated gasoline, and to avoid degradation of air quality for emissions of NOx and toxic air pollutants for conventional gasoline. Therefore, the Gasoline Rule fell within the range of policies specified in Article XX(b).

b) "Necessary"

3.40 The United States argued that the non-degradation requirements for both reformulated and conventional gasoline were necessary to protect human, animal and plant life or health.

Using individual baselines for conventional gasoline was the quickest and fairest way to achieve the programme's environmental goal, which was to ensure the maintenance of US 1990 gasoline quality in the cleaner are as without affecting the speedy and cost-effective implementation of the reformulated gasoline programme in the most polluted areas, and without causing major disruptions in the domestic production of conventional gasoline. (…) This approach avoided requiring large segments of producers to make changes in their gasoline in order to meet a single requirement, whereas it was not clear whether and how any such change was needed to avoid emissions increases. However, all reformulated gasoline refiners must have begun to adjust their operations in order to meet the new reformulated gasoline requirements that would be in effect in 1998 under the Complex Model. All regulated gasoline qualities would then be measured against the statutory baseline. Thus, the baseline system protected air quality in the most practical and cost-effective manner, while taking the best account of the various producers' characteristics.

3.41 The United States argued that the individual baseline approach was however not possible with all producers, in particular, refiners that were only producing during part of 1990, blenders and importers. These categories of producers were in a different situation since they lacked the data necessary to use Methods 1, 2 and 3, and requiring them to establish an individual baseline, like domestic refiners, would have had the effect of precluding them from the US market. Thus, assigning importers to the statutory baseline ensured that they would not be forced out of the market while treating similarly situated parties alike. Moreover, even if in some cases importers might be able to establish individual baselines derived from foreign refiner information, giving importers a choice as to which baseline to use would inevitably have undermined the air quality objective of the regulation since business incentives would have induced them to use the cheapest and least stringent option, which would also have been the most polluting one. Taking into account these concerns over gaming, EPA had determined that no other option was feasible without having adverse effects on trade. The United States stressed that the Gasoline Rule applied to the importer and not to the foreign refiner. (…)

3.42 The United States argued that it was not feasible to give individual baselines to foreign refiners for various reasons. First, gasoline was a fungible international commodity and a shipment of gasoline arriving in a US port generally contained a mixture of gasoline that had been produced at several foreign refineries. Therefore it would be very difficult, if not impossible, to determine the refinery of origin of a shipment of gasoline for the purpose of establishing an individual baseline. Second, the difficulty of identifying the refinery of origin would also favour potential gaming of the system since the foreign refiner could be tempted to claim the refinery of origin for each shipment of imported gasoline that would present the most benefits in terms of the baseline restrictions. The third reason related to the difficulties of the United States to exercise enforcement jurisdiction over foreign refiners.
The Gasoline Rule could not be enforced simply by examining the product at the border but required EPA to audit the facilities of refineries in order to verify, *inter alia*, that the data provided to establish the individual baselines were accurate as well as to ensure future compliance. (…)

3.45 **Venezuela** argued that Article XX(b) was not applicable because the United States had not demonstrated that there were no less trade-restrictive means to achieve its health policy objectives. The Gasoline Rule's discriminatory baseline requirements were not, therefore, "necessary" within the terms of Article XX(b). Venezuela considered that there were less trade-restrictive alternatives to the Gasoline Rule discriminatory baseline requirements that would achieve the same objective. One such alternative was to authorize the use of individual baselines by foreign refiners for both reformulated and conventional gasoline. Another alternative was to require all US gasoline producers to meet the statutory baseline requirements. A third alternative,

in Venezuela's view, would have been to enforce the Complex Model as of 1995, rather than 1998, so as to treat both US and imported reformulated gasoline equally from the beginning. A fourth alternative would have been to authorize the use of foreign refiner individual baselines and, if compensating emissions reductions were necessary, to spread the burden of such compensation equally across all gasoline, US and imported alike.

3.46 Venezuela considered that, contrary to the US argument, the use of a foreign refiner baseline was feasible. It was feasible for a foreign refiner to develop an individual baseline, relying on the same types of records and data as US domestic refiners. In the case of Venezuela, PDVSA had all the records necessary to accurately determine an individual baseline in conformity with the requirements applicable to the US refiners, as had been confirmed by the firm *Turner, Mason and Co.* which served as an independent, EPA-approved auditor. The foreign refiner's individual baseline would be submitted to EPA for approval and to correct any possible mistakes before the product could be imported into the United States. EPA could then require a foreign refiner, as a requirement for establishing and maintaining its individual baseline, to appear before the agency and/or to make available to it production records and any other reasonable information aimed at ensuring the accuracy of the baseline. Then, enforcement would only be relevant in verifying the characteristics of gasoline as it entered the United States. This kind of verification was routinely performed on many types of imported products and, in the case of gasoline, compliance for each shipment could be determined at the port of entry by testing the shipment and comparing its fuel properties with the individual baseline of the foreign refiner.(…)

3.48 **Brazil** did not disagree with the purpose of the United States which was to address the problem of air pollution in order to protect human, animal and plant life and health. However, Brazil considered that the Gasoline Rule programme did not satisfy the requirements of Article XX(b), because the burden of achieving this purpose was placed disproportionately on imported gasoline. All imported gasoline had to meet the 1990 average expressed in the statutory baseline whereas half of the domestic refineries could sell gasoline which did not meet the statutory baseline. (…)

5. Article XX(d)

3.55 **The United States** considered the Gasoline Rule's baseline establishment system was necessary to enforce the non-degradation requirements aiming at preventing deterioration of air quality. The non-degradation requirements ensuring that gasoline sold in the United States did not become more polluting than in 1990 were "laws or regulations which are not inconsistent with the provisions of the General Agreement". They were measures for which, pursuant to Article XX(g) and XX(b), "nothing in [the General Agreement] shall be construed to prevent the adoption or enforcement by any contracting party". For the reasons stated under Article XX(b), the baseline establishment rules were necessary to ensure that there was no degradation in gasoline or air quality. If importers were allowed to use several baselines, depending on which foreign refiners chose to use them, "gaming" could occur, and result in a deterioration of overall air quality. Therefore, the Gasoline Rule fell within the scope of Article XX(d).

3.56 **Venezuela** considered that the United States had not clearly established which were the "laws or regulations" which were not inconsistent with the General Agreement and with which compliance was secured, and hence had failed to demonstrate such consistency. Venezuela noted that a previous panel had found that a measure was deemed to "secure compliance with" only if it was effective to "enforce obligations" under laws or regulations consistent with the General

Agreement, as opposed to ensuring the broader attainment of an objective25. When stating that "the baseline establishment rules are necessary to ensure that there is no degradation in gasoline and air quality", the United States precisely referred to an objective, instead of identifying any obligation of the non-degradation requirements that the discriminatory baseline requirements were necessary to enforce. Moreover, for the reasons expressed under Article XX(b), the Gasoline Rule was not necessary. Thus, the United States did not meet the requirements of Article XX(d).
(…)

6. Article XX(g)

3.58 The United States argued that, as a programme intended to preserve clean air, the Gasoline Rule fell within the scope of Article XX(g).

a) "Related to the conservation of exhaustible natural resources..."

3.59 **The United States** argued that clean air was an exhaustible resource within the meaning of Article XX(g) since it could be exhausted by the emissions of pollutants such as VOCs, NOx and toxics. In the most polluted areas, it could become chronically contaminated and remain so over long periods of time. Air containing pollutants could move long distances to contaminate other airsheds. Moreover, by stopping air degradation, the CAA also protected other exhaustible natural resources such as lakes, streams, parks, crops and forests, which were affected by air pollution.
Thus, the objectives underlying the reformulated and conventional gasoline programmes fell within the range of policies to preserve both clean air and, consequently, other natural resources.
(…)

3.61 **Venezuela** noted that under established GATT jurisprudence, a measure "related to" the conservation of an exhaustible natural resource only if it was "primarily aimed at" conserving that resource26. The United States had not even attempted to argue that the Gasoline Rule's discriminatory requirements, which were the measure at issue in the dispute, were "primarily aimed at" conservation, but had merely attempted to justify that the reformulated and conventional gasoline requirements fell under Article XX(g). Furthermore, the United States had identified only the protection of health as the primary objective for the reformulated and conventional gasoline requirements, which was irrelevant to an Article XX(g) analysis. Venezuela noted that it had previously demonstrated to the Panel that the Gasoline Rule methodology contained loopholes which undermined its own conservation objectives, thus confirming that the discriminatory baseline system could not be "primarily aimed at" the conservation of an exhaustible natural resource.
(…)

b) "... made effective in conjunction with restrictions on domestic production or consumption"

3.63 **The United States** considered that the Gasoline Rule restricted domestic production of gasoline by requiring manufacturers to limit their production of gasoline so that over the course

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25"EEC - Regulation on Imports of Parts and Components", BISD 37S/132, para. 5.17-5.18 (adopted on 16 May 1990).

26"Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", BISD 35S/98, para. 4.6 (adopted on 22 March 1988).

of the year the average of particular components of the gasoline did not exceed certain maximum levels. It also restricted domestic consumption by ensuring that the average of those components of gasoline sold did not exceed certain maximum levels.

3.64 **Venezuela** rejected this argument because it considered that the United States had not shown that the discriminatory baseline requirements were "primarily aimed at rendering effective" restrictions on domestic production or consumption of clean air, the "natural resource" to be conserved by the Gasoline Rule. The United States had only referred to restriction on domestic production and consumption of gasoline.
(…)

7. Preamble to Article XX

3.67 **The United States** argued that, as it had demonstrated in the discussion concerning Article III, the Gasoline Rule applied equally to similarly situated parties. Importers and blenders were required to meet the parameters of 1990 average US gasoline because they could not ascertain the refinery of origin and the quality of the gasoline they marketed in 1990. This avoided the alternatives of either "gaming" problems or excluding most imported gasoline from the market. Unlike domestic refiners, importers had the flexibility to rely on a variety of sources so as to meet an annual average quality of gasoline. (…)
But to the extent that the enforcement conditions differed between the United States and other countries, the "same conditions" did not prevail in the United States and in other supplying countries. Accordingly, any differences in treatment were neither arbitrarily nor unjustifiably discriminatory, but were based on valid, legitimate policy reasons.

3.68 The United States further argued that the Gasoline Rule did not constitute a disguised restriction on trade since its objective was to ensure no degradation from 1990 levels for emissions and air pollutants, a health objective that had nothing to do with a restriction on trade. The provisions were transparent and imposed the same overall requirements, stemming from the same objective, on imported as on domestic gasoline. (…)

3.69 Venezuela argued that the 75 % Rule which applied to only a few refineries that were historically determined did grant an advantage to gasoline imported by the United States from certain third countries, as opposed to gasoline imported from Venezuela. Thus, the Gasoline Rule constituted a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevailed. (…)

VI. FINDINGS

(…)

D. Article XX(b)

6.20 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (b) of Article XX. The relevant parts of Article XX were as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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

The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;

(2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and

(3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied.

1. Policy goal of protecting human, animal or plant life or health

6.21 The Panel noted the United States argument that air pollution, in particular ground-level ozone and toxic substances, presented health risks to humans, animals and plants. The United States argued that, since about one-half of such pollution was caused by vehicle emissions, and the Gasoline Rule reduced these, the Gasoline Rule was within the range of policy goals described in Article XX(b). Venezuela and Brazil did not disagree with this view. The Panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b).

2. Necessity of the inconsistent measures

6.22 The Panel recalled its finding in paragraph 6.16 that imported gasoline was treated less favourably than domestic gasoline, since, under the baseline establishment methods, imported gasoline was prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product. The Panel then proceeded to examine whether the aspect of the Gasoline Rule found inconsistent with the General Agreement was necessary to achieve the stated policy objectives under Article XX(b). The Panel noted that it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefitting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product. It was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX(b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement.

6.23 The Panel then turned to the arguments of the parties relating to that aspect of the Gasoline Rule found inconsistent with the General Agreement. The United States argued that not

all entities dealing in gasoline could be assigned an individual baseline and, of those who could be assigned such a baseline, not all could use the same types of secondary or tertiary evidence (Methods 2 and 3) to establish it. Certain entities including importers, blenders and refiners which did not have continuous 1990 operations, were simply not in a position to furnish this secondary or tertiary evidence. Venezuela and Brazil argued on the other hand that foreign refiners should be accorded their own individual baselines under the Gasoline Rule using the same types of evidence, as easily available to them as to domestic refiners. Alternatively, they argued that importers should be able to use individual 1990 baselines established for the foreign refiners with whom they dealt. They noted that an EPA regulatory proposal had even been made along those lines in May 1994. The United States countered that such a proposal would not be feasible because of: (1) the impossibility of determining the refinery of origin for each imported shipment; (2) the incentive to "game" the system thereby handed to exporters and importers; and (3) the difficulty for the United States to exercise an enforcement jurisdiction with respect to a foreign refinery, since the Gasoline Rule required criminal and civil sanctions in order to be effective. The United States argued further against the use of foreign refiner baselines by citing "equity concerns" of importers that their use would favour those firms that dealt with Venezuelan product, and the existence of particular competitive conditions in the international market, including the flexibility maintained by foreign refiners.

6.24 The Panel proceeded to examine whether the United States had in fact demonstrated that the inconsistent measures found to violate Article III:4 were necessary to achieve the stated policy objectives of the United States. The Panel noted that the term "necessary" had been interpreted in the context of Article XX(d) by the panel in the *Section 337* case which had stated that:

> a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.27

The same reasoning had been adopted by the 1990 *Thai Cigarette* panel in examining a measure under Article XX(b). That panel saw no reason not to adopt the same interpretation of "necessity" under Article XX(b) as under Article XX(d), stating that

> the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.28

The Panel also noted that while several past panels examining issues under Article XX had identified alternative measures that were reasonably available and fully consistent with the

27"United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.26 (adopted on 7 November 1989).

28"Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", BISD 37S/200, para. 75 (adopted on 7 November 1990).

General Agreement, they had also in other instances identified alternative measures that would be "less inconsistent" with the General Agreement.
For example, the panel in the *337* case found that, while a general exclusion order applying to imported products was not "necessary", a limited *in rem* order could be justified even though it too was inconsistent with Article III:4.29 Recalling its remarks in paragraph 6.22 above, the Panel considered that its task was thus to determine whether the United States had demonstrated whether it was necessary to maintain precisely those inconsistent measures whereby imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded to domestic gasoline by an individual baseline tied to the producer of a product. If there were consistent or less inconsistent measures reasonably available to the United States, the requirement to demonstrate necessity would not have been met.

6.25 The Panel then examined whether there were measures consistent or less inconsistent with the General Agreement that were reasonably available to the United States to further its policy objectives of protecting human, animal and plant life or health. The Panel did not consider that the manner in which imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded to domestic gasoline by an individual baseline tied to the producer of a product was necessary to achieve the stated goals of the Gasoline Rule. In the view of the Panel, baseline establishment methods could be applied to entities dealing in imported gasoline in a way that granted treatment to imported gasoline that was consistent or less inconsistent with the General Agreement. If a single statutory baseline applying to all entities — refiners, blenders and importers — was not the chosen regulatory method, then importers could for example be permitted to use a gasoline baseline applicable to imports derived, when possible, from evidence of the individual 1990 baselines of foreign refiners with whom the importer currently dealt. Although such a scheme could result in formally different regulation for imported and domestic products, the Panel noted that previous panels had accepted that this could be consistent with Article III:4.30 The requirement under Article III:4 to treat an imported product no less favourably than the like domestic product is met by granting formally different treatment to the imported product, if that treatment results in maintaining conditions of competition for the imported product no less favourable than those of the like domestic product. Further, these conditions of competition referred to those conditions that were established by government measures and would not therefore include factors such as the "flexibility of individual producers" in this case. The Panel noted finally that a regulatory scheme using foreign refiner baselines, to the extent that it did not distinguish between imported gasoline on the basis of its country of origin, would not necessarily contravene Article I or other provisions of the General Agreement, and that the United States, notwithstanding suggestions that certain importers might have equitable concerns, had not established the contrary.

6.26 The Panel noted the claims of the United States that allowing importers or foreign refiners to use individual baselines in such a way was not feasible for the reasons listed in paragraph 6.23.

The Panel was not convinced that the United States had satisfied its burden of proving that those reasons precluded the effective use of individual baselines in a manner which would allow imported products to obtain treatment that was consistent, or less inconsistent, with obligations under Article III:4. First, while the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less

29"United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.32 (adopted on 7 November 1989).

30"United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.11 (adopted on 7 November 1989).

inconsistent with the General Agreement. Indeed, the Panel noted that a determination of origin would often be feasible. The Panel examined, for instance, the case of a direct shipment to the United States. It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.

6.27 Second, the Panel did not agree that the United States had met its burden of showing that the "gaming" concern was an adequate justification for maintaining the inconsistency with Article III:4 resulting from the baseline establishment methods. It was uncertain if, or to what extent, gaming would actually occur, especially given the small market share of imported gasoline (approximately 3 percent). Moreover, the Panel noted that the Gasoline Rule did not guarantee in its regulation of US entities that gasoline characteristics subject to non-degradation requirements (i.e. those regulated by baselines), would remain at the 1990 average levels. For example, there was no volume cap on the production of reformulated gasoline by individual refineries, which meant that if producers of relatively dirtier gasoline expanded their relative share of production of reformulated gasoline, the national average level of pollutants subject to the non-degradation requirements would be greater than in 1990. Similarly, within the 1990 volume limitations, if the output of producers of relatively cleaner gasoline fell below 1990 levels, while output of others did not, national average levels of pollutants would be worse. Moreover, specific provisions of the Gasoline Rule permitted some refiners to produce dirtier gasoline than they produced in 1990 (e.g., certain producers of JP-4 jet fuel) and permitted others to request specific derogation from the Rule. The Panel stressed that it was not finding that such events would occur, only that they could under the Rule. Given that the Gasoline Rule did not therefore guarantee that gasoline characteristics subject to non-degradation requirements would remain at 1990 levels, the Panel considered that it was not consistent for the United States to insist that there could be no possible deviation from achieving those levels in respect of imports, when it had not deemed it necessary to be as exacting on its own domestic production. Moreover, slightly stricter overall requirements applied to both domestic and imported gasoline could offset any possibility of an adverse environmental effect from these causes, and allow the United States to achieve its desired level of clean air without discriminating against imported gasoline. Such requirements could be implemented by the United States at any time. The Panel concluded that the United States had not met its burden of showing that concern over gaming was an adequate justification for maintaining the inconsistency with Article III:4 resulting from the baseline establishment methods.

6.28 Third, the Panel did not accept that the United States had demonstrated that there was no other measure consistent, or less inconsistent, with Article III:4 reasonably available to enforce compliance with foreign refiner baselines, or importer baselines based thereon. The imposition of penalties on importers was in the Panel's view an effective enforcement mechanism used by the United States in other settings. In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve US purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel's view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or

deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data. In the Panel's view, because allowing for such a possibility was reasonably available to the United States and would entail a lesser degree of inconsistency with the General Agreement, the United States had failed to demonstrate the necessity of the Gasoline Rule's inconsistency with Article III:4 on this matter.

6.29 In view of the Panel's finding that the aspect of the baseline establishment methods found inconsistent with Article III:4 was not "necessary" under Article XX(b), the Panel did not proceed to examine whether it met also the conditions in the introductory clause to Article XX.

E. Article XX(d)

6.30 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (d) of Article XX. The relevant parts of Article XX were as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

6.31 The Panel recalled that the party invoking an exception under Article XX bore the burden of proving that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to demonstrate the following elements:

(1) that the measures for which the exception were being invoked - that is, the particular trade measures inconsistent with the General Agreement - *secure compliance* with laws or regulations themselves not inconsistent with the General Agreement;

(2) that the inconsistent measures for which the exception was being invoked were *necessary* to secure compliance with those laws or regulations; and

(3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(d), all the above elements had to be satisfied.

1. Securing compliance with consistent laws or regulations

6.32 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with the General Agreement secured compliance with a law or regulation not inconsistent with the General Agreement. The United States argued that the non-degradation requirements were laws and regulations not inconsistent with the General Agreement, and that the baseline establishment methods secured compliance with these. Venezuela argued that the United States had not clearly established which laws or regulations were not inconsistent with the General Agreement, and with which compliance was secured. Brazil considered that the US measures at most enforced a policy objective, not an actual obligation as required under Article XX(d).

6.33 The Panel observed that, assuming that a system of baselines by itself were consistent with Article III:4, the US scheme might constitute, for the purposes of Article XX(d), a law or regulation "not inconsistent" with the General Agreement. However, the Panel found that maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not "secure compliance" with the baseline system. These methods were not an enforcement mechanism. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned.31

2. Other conditions

6.34 The Panel observed that, in view of its finding that the less favourable treatment of imported gasoline under the baseline establishment methods accorded to importers did not "secure compliance" with the underlying baseline establishment rules, it did not need to consider also whether these methods were "necessary" to secure compliance and met the conditions in the introductory clause to Article XX.

F. Article XX(g)

6.35 The Panel proceeded to examine whether the part of the Gasoline Rule found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (g) of Article XX. The relevant parts of Article XX were as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to demonstrate the following elements:

31"European Economic Community - Regulation on Imports of Parts and Components", BISD 37S/132, paras. 5.12 - 5.18 (adopted on 16 May 1990).

(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of polices related to the conservation of exhaustible natural resources;

(2) that the measures for which the exception was being invoked - that is the particular trade measures inconsistent with the General Agreement - were *related to* the conservation of exhaustible natural resources;

(3) that the measures for which the exception was being invoked were made effective *in conjunction* with restrictions on domestic production or consumption; and

(4) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(g), all the above elements had to be satisfied.

1. Policy goal of conserving an exhaustible natural resource

6.36 The Panel noted the US argument that clean air was an exhaustible resource within the meaning of Article XX(g), since it could be exhausted by pollutants such as those emitted through the consumption of gasoline. Lakes, streams, parks, crops and forests were also natural resources that could be exhausted by air pollution. Measures to control air pollution were therefore measures to conserve exhaustible natural resources. Venezuela disagreed, considering that air was not an exhaustible natural resource within the meaning of Article XX(g); rather, its "condition" changed depending on its cleanliness. Article XX(g) was originally intended to cover exports of exhaustible goods such as petroleum and coal; to expand it to cover "conditions" of renewable resources was not justified.

6.37 The Panel then examined whether clean air could be considered an exhaustible natural resource. In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource.32 Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).

2. Measures "related to" the conservation of an exhaustible natural resource; and made effective "in conjunction" with restrictions on domestic production or consumption

6.38 The Panel proceeded to examine whether the baseline establishment methods found inconsistent with Article III:4 were "related to" the conservation of clean air. Venezuela argued that past panels had interpreted "related to" to mean "primarily aimed at" the conservation of the resource. According to Venezuela, loopholes in the establishment of the baseline undermined its

32"Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", BISD 35S/98, para 4.4 (adopted on 22 March 1988). See also the same conclusion with respect to dolphins in the Report of the Panel on "United States - Restrictions on Imports of Tuna", circulated on 16 June 1994, DS29/R, para 5.13, not adopted.

own conservation objectives, and the measure could not therefore be seen as "primarily aimed" at conservation.

6.39 The Panel noted that the words "related to" did not in isolation provide precise guidance as to the required link between the measures and the conservation objective. However, the Panel agreed with the interpretation of this term in the report of the 1987 *Herring and Salmon* case, where the panel stated that

> as the preamble of Article XX indicates, the purpose of including Article XX:(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be *primarily aimed* at the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX:(g).33 (emphasis added)

For the same reasons, the *Herring and Salmon* panel decided that

> the terms "in conjunction with" in Article XX:(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective "in conjunction with" production restrictions if it was *primarily aimed* at rendering effective these restrictions.34 (emphasis added)

6.40 The Panel then proceeded to examine whether the baseline establishment methods could be said to be "primarily aimed at" achieving the conservation objectives of the Gasoline Rule. The Panel recalled the purpose of Article XX:(g), which had been expressed by the panel in the 1987 *Herring and Salmon* case as follows:

> [T]he purpose of including Article XX:(g) in the General Agreement was not to widen the scope of measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III -- the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline -- were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources.

33"Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", BISD 35S/98, para 4.6 (adopted on 22 March 1988).

34Ibidem.

In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

6.41 With respect to whether the baseline establishment methods could be said to be primarily aimed at "rendering effective restrictions on domestic production or consumption", the Panel noted that it had not determined that the measures at issue were “restrictions”, and whether they were “on” domestic production or consumption. However, in light of its finding in paragraph 6.40, the Panel did not proceed to determine this issue or whether the measure met the conditions in the introductory clause of Article XX.

G. Article XXIII:1(b)

6.42 The Panel then noted the claim by Venezuela under Article XXIII:1(b) that benefits accruing to it under the General Agreement had been nullified and impaired by the application of the Gasoline Rule, whether or not it conflicted with provisions of the General Agreement. In view of the finding by the Panel that the Gasoline Rule violated Article III:4 of the General Agreement, and could not be justified under Article XX (b), (d) and (g), the Panel concluded that it was not necessary to examine this additional claim.

H. Applicability of the Agreement on Technical Barriers to Trade

6.43 In view of its findings under the General Agreement, the Panel concluded that it was not necessary to decide on issues raised under the TBT Agreement.

VII. CONCLUDING REMARKS

7.1 In concluding, the Panel wished to underline that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement. Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.

VIII. CONCLUSIONS

8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

8.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.

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Appellate Body Report

WORLD TRADE ORGANIZATION 20 May 1996

UNITED STATES - STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE

Appellate Body Report
(WT/DS2/9)

I. Introductory

C. The Panel Report: Its Findings and Conclusions

The Panel's overall conclusions and its recommendation are set out in the following terms:

> 8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.
>
> 8.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.35

On route to its overall conclusions, the Panel made the following principal findings:

> (ii) that imported and domestic gasoline were "like products" and that since, under the baseline establishment rules of the Gasoline Rule, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated "less favourably" than domestic gasoline. The baseline establishment rules of the Gasoline Rule were accordingly inconsistent with Article III:4 of the *General Agreement*;36

(iii) that, in view of finding (ii), it was not necessary to examine the consistency of the Gasoline Rule with Article III:1;37

(iv) that the "aspect of the baseline establishment methods" found inconsistent with Article III:4 was not justified under Article XX(b) of the *General Agreement* as "necessary to protect human, animal or plant life or health";38

35Panel Report at p. 47.

36Panel Report, para. 6.16.

37Panel Report, para. 6.17.

38Panel Report, para. 6.29.

(v) that the "maintenance of discrimination between imported and domestic gasoline" contrary to Article III:4 was not justified under Article XX(d) as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the General] Agreement";39

(vi) that clean air was an exhaustible natural resource within the meaning of Article XX(g) of the *General Agreement*;40

(vii) that the baseline establishment rules found to be inconsistent with Article III:4 could not be justified under Article XX(g) as a measure "relating to" the conservation of exhaustible natural resources;41

(viii) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption";42

(ix) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue met the conditions in the introductory clause of Article XX (sometimes referred to as the chapeau of Article XX);

II. Issues Raised In This Appeal

A. The Claims of Error by the United States

(…) In its Notice of Appeal, dated 21 February 1996, and its Appellant's Submission, dated 4 March 1996, the United States claims that the Panel erred in law, firstly, in holding that the baseline establishment rules of the Gasoline Rule are not justified under Article XX(g) of the *General Agreement* and, secondly, in its interpretation of Article XX as a whole.

More specifically, the United States assigns as error the ruling of the Panel that the baseline establishment rules do not constitute a "measure" "relating to" the conservation of clean air within the meaning of Article XX(g) of the *General Agreement*. Consequently, it is also the view of the United States that the Panel erred in failing to proceed further in its interpretation and application of Article XX(g), and in not finding that the baseline establishment rules satisfy the other requirements of Article XX(g) and the introductory provisions of Article XX.

The sharply limited scope of this appeal is underscored by noting the number of findings which the Panel had made but which have not been appealed from by the United States. Very briefly, the United States does not appeal from the findings or rulings made by the Panel on, or in respect of, the consistency of the baseline establishment rules with Article I:1, Article III:1, Article III:4, and Article XXIII:1(b) of the *General Agreement* and the applicability of Article XX(b) and Article XX(d) of the *General Agreement* and of the *TBT Agreement*. Understandably, the United States has also not appealed from the Panel's ruling that clean air is an exhaustible natural resource within the meaning of Article XX(g) of the *General Agreement*.

39Panel Report, para. 6.33.

40Panel Report, para. 6.37.

41Panel Report, para. 6.40.

42Panel Report, para. 6.41.

B. The Claims of the Appellees and the Arguments of the Third Participants

The Appellees, Venezuela and Brazil, submit that the Appellate Body should dismiss the United States' appeal and uphold the Panel's findings and conclusions concerning Article XX(g). In particular, Venezuela and Brazil support the Panel's finding that the measure at issue before the Panel was not one "relating to" the conservation of exhaustible natural resources. Venezuela also states that a measure can only be "relating to" or "primarily aimed at" conservation if the measure was both: (i) primarily intended to achieve a conservation goal; and (ii) had a positive conservation effect.

Venezuela argues that, as the United States has not met its burden with respect to the "relating to" requirement of Article XX(g) in this appeal, the Appellate Body may uphold the Panel Report on this issue alone, and it is not necessary to address the additional requirements of Article XX(g), nor the requirements in the Article XX chapeau.

If the Appellate Body overturns the Panel's findings on the "relating to" component of Article XX(g) and does proceed to examine the other requirements of Article XX(g), Venezuela and Brazil submit that the United States has also failed to demonstrate that those requirements have been satisfied. They argue that the measure in issue is not "made effective in conjunction with restrictions on domestic production or consumption" as the restrictions are not imposed as direct limits on the production or consumption of clean air, but rather upon the consumption of certain kinds of gasoline. They further submit that clean air does not qualify as an "exhaustible natural resource" within the meaning of Article XX(g).

With regard to the requirements in the chapeau to Article XX, Venezuela and Brazil submit that the measure is applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Venezuela argues that the measure constitutes a "disguised restriction on international trade" as well.

The Appellees also raise the conditional argument that, if the Appellate Body were to overturn the Panel's findings on Article XX(g), and not find in favour of Venezuela and Brazil as to the other requirements of Article XX, it would then need to examine their claims under the *TBT Agreement.*

The third participants, the European Communities and Norway, endorse the Panel's interpretation of "relating to" and the Panel's findings under Article XX(g). They find it difficult to accept the United States' arguments that the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption," as the measure in issue did not impose restrictions on clean air. With regard to the Article XX chapeau criteria, the European Communities and Norway both submit that the measure is applied in a manner constituting "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on international trade."

III. The Issue of Justification Under Article XX(g) of the General Agreement

Article XX(g) needs to be set out in full:

Article XX

General Exceptions

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

A. "Measures"

The initial issue we are asked to look at relates to the proper meaning of the term "measures" as used both in the chapeau of Article XX and in Article XX(g). The question is whether "measures" refers to the entire Gasoline Rule or, alternatively, only to the particular provisions of the Gasoline Rule which deal with the establishment of baselines for domestic refiners, blenders and importers.

Cast in the foregoing terms, the issue does not appear to be a live one. True enough the Panel Report used differing terms, or terms of shifting reference, in designating the "measures" in different parts of the Report.

The Panel Report, however, held only the baseline establishment rules of the Gasoline Rule to be inconsistent with Article III:4, to the extent that such rules provided "less favourable treatment" for imported than for domestic gasoline. (…) The Panel here was following the practice of earlier panels in applying Article XX to provisions found to be inconsistent with Article III:4: the "measures" to be analyzed under Article XX are the same provisions infringing Article III:4.43

(…) The frequent designation of those provisions by the Panel in terms of its legal conclusion in respect of Article III:4, in the Appellate Body's view, did not serve the cause of clarity in analysis when it came to evaluating the same baseline establishment rules under Article XX(g).

B. "relating to the conservation of exhaustible natural resources"

The Panel Report took the view that clean air was a "natural resource" that could be "depleted." Accordingly, as already noted earlier, the Panel concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning

43*Canada - Administration of the Foreign Investment Review Act*, BISD 30S/140, adopted 7 February 1984; *United States -Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989; *United States - Taxes on Automobiles*, DS31/R (1994), unadopted.

of Article XX(g). Shortly thereafter, however, the Panel Report also concluded that "the less favourable baseline establishments methods" were *not* primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g). (…)

It is not easy to follow the reasoning in the above paragraph of the Panel Report. In our view, there is a certain amount of opaqueness in that reasoning. The Panel starts with positing that there was "*no direct connection*" between the baseline establishment rules which it characterized as "less favourable treatment" of imported gasoline that was chemically identical to the domestic gasoline and "the US objective of improving air quality in the United States."
Shortly thereafter, the Panel went on to conclude that "*accordingly, it could not be said that* the baseline establishment rules that afforded less favourable treatment to imported gasoline *were primarily aimed at* the conservation of natural resources" (emphasis added). The Panel did not try to clarify whether the phrase "direct connection" was being used as a synonym for "primarily aimed at" or whether a new and additional element (on top of "primarily aimed at") was being demanded.

One problem with the reasoning in that paragraph is that the Panel asked itself whether the "less favourable treatment" of imported gasoline was "primarily aimed at" the conservation of natural resources, rather than whether the "measure", i.e. the baseline establishment rules, were "primarily aimed at" conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. (…)

Furthermore, the Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not "necessary" for the protection of human, animal or plant life. (…) In other words, the Panel Report appears to have applied the "necessary" test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g).

(…) All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g).44 Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).

Against this background, we turn to the specific question of whether the baseline establishment rules are appropriately regarded as "primarily aimed at" the conservation of natural resources for the purposes of Article XX(g). We consider that this question must be answered in the affirmative.

The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for

44We note that the same interpretation has been applied in two recent unadopted panel reports: *United States - Restrictions on Imports of Tuna*, DS29/R (1994); *United States - Taxes on Automobiles*, DS31/R (1994).

blenders and importers of gasoline), need to be related to the "non-degradation" requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. The relationship between the baseline establishment rules and the "non-degradation" requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).

C. "if such measures are made effective in conjunction with restrictions on domestic production or consumption"

The Panel did not find it necessary to deal with the issue of whether the baseline establishment rules "are made effective in conjunction with restrictions on domestic production or consumption", since it had earlier concluded that those rules had not even satisfied the preceding requirement of "relating to" in the sense of being "primarily aimed at" the conservation of clean air. Having been unable to concur with that earlier conclusion of the Panel, we must now address this second requirement of Article XX(g), the United States having, in effect, appealed from the failure of the Panel to proceed further with its inquiry into the availability of Article XX(g) as a justification for the baseline establishment rules.

The claim of the United States is that the second clause of Article XX(g) requires that the burdens entailed by regulating the level of pollutants in the air emitted in the course of combustion of gasoline, must not be imposed solely on, or in respect of, imported gasoline.

On the other hand, Venezuela and Brazil refer to prior panel reports which include statements to the effect that to be deemed as "made effective in conjunction with restrictions on domestic production or consumption", a measure must be "primarily aimed at" making effective certain restrictions on domestic production or consumption.45 (…)

The Appellate Body considers that the basic international law rule of treaty interpretation, discussed earlier, that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here, too. Viewed in this light, the ordinary or natural meaning of "made effective" when used in connection with a measure - a governmental act or regulation -may be seen to refer to such measure being "operative", as "in force", or as having "come into effect."46 Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with."47 Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or

45*Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, paras. 4.6-4.7; adopted 22 March 1988. Also, *United States - Restrictions on Imports of Tuna*, DS29/R (1994), unadopted; and *United States - Taxes on Automobiles*, DS31/R (1994), unadopted.

46The New Shorter Oxford English Dictionary on Historical Principles (L. Brown, ed., 1993), Vol. I, p. 786.

47Id., p. 481.

brought into effect together with restrictions on domestic production or consumption of natural resources.
Put in a slightly different manner, we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.

(…) We do not believe, finally, that the clause "if made effective in conjunction with restrictions on domestic production or consumption" was intended to establish an empirical "effects test" for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been "primarily aimed at" conservation of natural resources at all.

IV. The Introductory Provisions of Article XX of the General Agreement: Applying the Chapeau of the General Exceptions

Having concluded, in the preceding section, that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g), we come to the question of whether those rules also meet the requirements of the chapeau of Article XX. In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.

The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.[48] It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of [what was later to become] Article [XX]."[49] (…)

The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.

48This was noted in the Panel Report on *United States - Imports of Certain Automotive Spring Assemblies*, BISD 30S/107, para. 56; adopted on 26 May 1983.

49EPCT/C.11/50, p. 7; quoted in Analytical Index: Guide to GATT Law and Practice, Volume I, p. 564 (1995).

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*.
The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. (…) An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.50

The chapeau, it will be seen, prohibits such application of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute

(a) "arbitrary discrimination" (between countries where the same conditions prevail);
(b) "unjustifiable discrimination" (with the same qualifier); or
(c) "disguised restriction" on international trade.

(…) "Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners.

In explaining why individual baselines for foreign refiners had not been put in place, the United States laid heavy stress upon the difficulties which the EPA would have had to face. These difficulties related to anticipated administrative problems that individual baselines for foreign refiners would have generated. This argument was made succinctly by the United States in the following terms:

> (…) The impracticability of verification and enforcement of foreign refiner baselines in this instance shows that the "discrimination" is based on serious, not

50*E.g.*, *Corfu Channel* Case (1949) I.C.J. Reports, p.24 (International Court of Justice); Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad) (1994) I.C.J. Reports, p. 23 (International Court of Justice); 1966 Yearbook of the International Law Commission, Vol. II at 219; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è ed. (1994) para. 17.2); D. Carreau, Droit International, (1994) para. 369.

> arbitrary or unjustifiable, concerns stemming from different conditions between enforcement of its laws in the United States and abroad.51

Thus, according to the United States, imported gasoline was relegated to the more exacting statutory baseline requirement because of these difficulties of verification and enforcement. The United States stated that verification and enforcement of the Gasoline Rule's requirements for imported gasoline are "much easier when the statutory baseline is used" and that there would be a "dramatic difference" in the burden of administering requirements for imported gasoline if individual baselines were allowed.52

(…) There are, as the Panel Report found, established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade - trade between territorial sovereigns - to go on and grow.

The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. At the oral hearing, in the course of responding to an enquiry as to whether the EPA could have adapted, for purposes of establishing individual refinery baselines for foreign refiners, procedures for verification of information found in U.S. antidumping laws, the United States said that "in the absence of refinery cooperation and the possible absence of foreign government cooperation as well", it was unlikely that the EPA auditors would be able to conduct the on-site audit reviews necessary to establish even the overall quality of refineries' 1990 gasoline.53 From this statement, there arises a strong implication, it appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.54 The fact that the United States Congress might have intervened, as it did later intervene, in the process by denying funding, is beside the point: the United States, of course, carries responsibility for actions of both the executive and legislative departments of government.

51Para. 55 of the Appellant's Submission, dated 4 March 1996. The United States was in effect making the same point when, at pages 11 and 12 of its Post-Hearing Memorandum, it argued that the conditions were not the same as between the United States, on the one hand, and Venezuela and Brazil on the other.

52Supplementary responses by the United States to certain questions of the Appellate Body, dated 1 April 1996.

53Supplementary responses to the United States to certain questions of the Appellate Body, dated 1 April 1996.

54While it is not for the Appellate Body to speculate where the limits of effective international cooperation are to be found, reference may be made to a number of precedents that the United States (and other countries) have considered it prudent to use to help overcome problems confronting enforcement agencies by virtue of the fact that the relevant law and the authority of the enforcement of the agency does not hold sway beyond national borders. During the course of the oral hearing, attention was drawn to the fact that in addition to the antidumping law referred to by the Panel in the passage cited above, there were other US regulatory laws of this kind, *e.g.*, in the field of anti-trust law, securities exchange law and tax law. There are cooperative agreements entered into by the US and other governments to help enforce regulatory laws of the kind mentioned and to obtain data from abroad. There are such agreements, *inter alia*, in the anti-trust and tax areas. There are also, within the framework of the WTO, the *Agreement on the Implementation of Article VI of GATT 1994*, (the *"Antidumping Agreement*"), the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and the *Agreement on Pre-Shipment Inspection*, all of which constitute recognition of the frequency and significance of international cooperation of this sort.

Clearly, the United States did not feel it feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The United States wished to give domestic refiners time to restructure their operations and adjust to the requirements in the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. At the same time we are bound to note that, while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute "unjustifiable discrimination" and a "disguised restriction on international trade." We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.

V. FINDINGS AND CONCLUSIONS

For the reasons set out in the preceding sections of this report, the Appellate Body has reached the following conclusions:

(a) the Panel erred in law in its conclusion that the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations did not fall within the terms of Article XX(g) of the *General Agreement*;

(b) the Panel accordingly also erred in law in failing to decide whether the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fell within the ambit of the chapeau of Article XX of the *General Agreement*;

(c) the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fail to meet the requirements of the chapeau of Article XX of the *General Agreement*, and accordingly are not justified under Article XX of the *General Agreement.*

The foregoing legal conclusions modify the conclusions of the Panel as set out in paragraph 8.1 of its Report. The Appellate Body's conclusions leave intact the conclusions of the Panel that were not the subject of appeal.

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*.

It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue.

That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*,55 there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.

55Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.

4. Asbestos (2001)

WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)
http://docsonline.wto.org/gen_search.asp (type down WT/CTE/W/203 in "document symbol")

European Communities – Asbestos[56]

Parties

Panel

Complainant: Canada.

Respondent: European Communities.

Third Parties: Brazil; the United States and Zimbabwe.

Appellate Body

Appellant and Appellee: Canada.

Appellant and Appellee: European Communities.

Third Participants: Brazil and the United States.

Timeline of Dispute

Panel requested: 8 October 1998.

Panel established: 25 November 1998.

Panel composed: 29 March 1999.

Panel Report circulated: 18 September 2000.

Notice of appeal: 23 October 2000.

Appellate Body Report circulated: 12 March 2001.

Adoption: 5 April 2001.

Main Facts

Chrysotile asbestos is generally considered to be a highly toxic material, the exposure to which poses significant threats to human health such as risk of asbestosis, lung cancer or mesothelioma.[57] However, due to their special qualities (for instance, resistance to very high

56 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.
57 *EC – Asbestos*, Panel Report, para. 3.66.

temperatures and to different types of chemical attack), asbestos fibres have found wide use in industrial and other commercial applications.58

In the light of these circumstances, the French Government, which had previously imported large amounts of chrysotile asbestos, adopted a Decree which provided for a ban on asbestos fibres and products containing asbestos fibres. The Decree provided also for certain limited exceptions to the ban for chrysotile asbestos (also called white asbestos) fibres:

> "I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:
>
> - On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;
>
> - on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof (…)".59

The European Communities argued that in prohibiting the placing on the market and use of asbestos and products containing asbestos, the Decree sought to halt the spread of the risks due to asbestos, particularly for those exposed occasionally and very often unwittingly to asbestos when working on asbestos-containing products.60 France contended that it could thereby reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma.

Canada is the number two producer and number one exporter of chrysotile.61 Canada did not dispute that chrysotile asbestos caused lung cancer, but made, *inter alia*, a distinction between chrysotile fibres and chrysotile encapsulated in a cement matrix. Canada challenged the Decree insofar as it prohibited, *inter alia*, the use of chrysotile-cement products. Canada argued that the Decree altered the conditions of competition between, on the one hand, substitute fibres of French origin and, on the other hand, chrysotile fibre from Canada. Accordingly, the Decree imposed less favourable treatment to imported asbestos as compared to domestic substitutes for asbestos. However, the European Communities held that there was still a risk of accidental contamination, especially in the case of DIY enthusiasts or professionals working only occasionally in an environment where asbestos was present. Data submitted to the panel showed that such exposure could exceed the statutory limits under ISO 7337,62 which were themselves higher than those of the WHO or those applied by France before the ban.63

Canada claimed that the Decree violated Articles III:4 and XI of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 2.8 of the TBT Agreement, and also nullified or impaired benefits under Article XXIII:1(b). The European Communities argued that the Decree was not covered by the TBT Agreement. With regard to GATT 1994, the European Communities requested the panel to

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58 *Ibid.*, para. 2.2.
59 Decree No. 96-1133 of 24 December 1996 concerning the ban on asbestos, implemented pursuant to the Labour Code and the Consumer Code, *Journal Officiel* of 26 December 1996. Reproduced in Annex I to *EC – Asbestos* Panel report.
60 *EC – Asbestos*, Panel Report, para. 8.185.
61 *Ibid.*, para. 3.20.
62 See International Organization for Standardization, ISO 7337 (1984).
63 *EC – Asbestos*, Panel Report, para. 8.191.

confirm that the Decree was either compatible with Article III:4 or necessary to protect human health within the meaning of Article XX(b).

Summary of Findings on Article XX

The panel found that chrysotile-fibre products and fibro-cement products were like products with the meaning of Article III:4. The panel further found that the provisions of the Decree relating to the prohibiting of the marketing of chrysotile fibres and chrysotile-cement products violated Article III:4. Nevertheless, the panel decided that the violation of Article III:4 was justified under Article XX(b) and that the measure did not conflict with the chapeau of Article XX.64

The panel noted that the experts consulted confirmed the health risks associated with exposure to chrysotile asbestos in its various uses and, therefore, that a prohibition of chrysotile asbestos fell within the range of policies designed to protect human life or health (Article XX(b)).65 The panel also found that there was no reasonable alternative available (e.g. the controlled use of asbestos products as suggested by Canada) to the European Communities.66 Concerning the chapeau of Article XX, the panel found that the application of the Decree did not constitute arbitrary or unjustifiable discrimination,67 and that the examination of the design, architecture and revealing structure of the Decree could not lead to conclude that the Decree had protectionist objectives.68

On appeal, Canada disputed two aspects of the panel's findings: the question of whether the use of chrysotile-cement products posed a risk to human health and whether the measure at issue was "necessary" to protect human life or health.69 The Appellate Body upheld both findings. It reaffirmed the Panel's margin of discretion in assessing the value of evidence and the weight to be ascribed to that evidence,70 and found that the panel remained well within the bounds of its discretion in finding that chrysotile-cement products posed a risk to human life or health.71

The Appellate Body also rejected Canada's arguments against the necessity of the measure. It ruled that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.72 In order to evaluate whether the measure was necessary, the Appellate Body examined, *inter alia*, whether there was an alternative measure consistent with the GATT 1994, or less inconsistent with it, which a Member could reasonably be expected to employ to achieve its objectives. It ruled that one aspect of the weighing and balancing process comprehended in the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure contributes to the realization of the end pursued. In addition, the Appellate Body noted that the more vital or important the policy pursued, the easier it would be to prove that a measure was necessary to meet the objectives of the policy.73 In this case, the objective pursued (health) was characterized

64 *Ibid.*, paras. 8.240-241.
65 *Ibid.*, para. 8.194.
66 *Ibid.*, para. 8.221.
67 *Ibid.*, para. 8.230.
68 *Ibid.*, para. 8.238.
69 *EC – Asbestos*, Appellate Body Report, para. 155.
70 *Ibid.*, para. 161.
71 *Ibid.*, para. 162.
72 *Ibid.*, para. 167.
73 *Ibid.*, para. 172.

as "vital and important in the highest degree".74 It found therefore that the efficacy of the alternative proposed by Canada (the controlled use) was particularly doubtful in certain situations and that it would not allow France to achieve its chosen level of health protection.75
(end of the summary)

* * *

74 *Ibid.*
75 *Ibid.*, para. 174.

WORLD TRADE ORGANIZATION

WT/DS135/AB/R
12 March 2001

(01-1157)

Original: English

EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

AB-2000-11

Report of the Appellate Body

To download the original report, visit http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

(…)

VII. Article XX(b) of the GATT 1994 (…)

155. Under Article XX(b) of the GATT 1994, the Panel examined, first, whether the use of chrysotile-cement products poses a risk to human health and, second, whether the measure at issue is "necessary to protect human … life or health". Canada contends that the Panel erred in law in its findings on both these issues. We will examine these two issues in turn before addressing Canada's appeal that the Panel failed to make an "objective assessment", under Article 11 of the DSU, in reaching its conclusions under Article XX(b) of the GATT 1994.

156. We recall that Article XX(b) of the GATT 1994 reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of *measures*:
>
> …
>
> (*b*) *necessary to protect human*, animal or plant *life or health*; (emphasis added)
>
> …

A. "To Protect Human Life or Health"

157. On the issue of whether the use of chrysotile-cement products poses a risk to human health sufficient to enable the measure to fall within the scope of application of the phrase "to protect human … life or health" in Article XX(b), the Panel stated that it "considers that the evidence before it *tends to show* that handling chrysotile-cement products constitutes a risk to health rather than the opposite." 76 (emphasis added) On the basis of this assessment of the evidence, the Panel concluded that:

> … the EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. *The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health*. … 77 (emphasis added)

76Panel Report, para. 8.193.

77Panel Report, para. 8.194.

Thus, the Panel found that the measure falls within the category of measures embraced by Article XX(b) of the GATT 1994.

158. According to Canada, the Panel deduced that there was a risk to human life or health associated with manipulation of chrysotile-cement products from seven factors. 78 These seven factors all relate to the scientific evidence which was before the Panel, including the opinion of the scientific experts. Canada argues that the Panel erred in law by deducing from these seven factors that chrysotile-cement products pose a risk to human life or health. 79

159. Although Canada does not base its arguments about these seven factors on Article 11 of the DSU, we bear in mind the discretion that is enjoyed by panels as the trier of facts. In *United States – Wheat Gluten*, we said:

> … in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, "within the *scope of the panel's discretion as the trier of facts*". (emphasis added) (…) 80

(…)

161. The same holds true in this case. The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence.

162. (…), we will interfere with the Panel's appreciation of the evidence only when we are "satisfied that the panel has *exceeded the bounds of its discretion*, as the trier of facts, in its appreciation of the evidence." 81 (emphasis added) In this case, nothing suggests that the Panel exceeded the bounds of its lawful discretion. (…) In addition, the Panel noted that the carcinogenic nature of chrysotile asbestos fibres has been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization. 82 In these circumstances, we find that the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.

163. Accordingly, we uphold the Panel's finding, in paragraph 8.194 of the Panel Report, that the measure "protect[s] human … life or health", within the meaning of Article XX(b) of the GATT 1994.

B. "Necessary"

78Canada's appellant's submission, para. 170. The seven factors Canada relies upon are identified in para. 19 of this Report.

79Canada's appellant's submission, para. 171.

80*Supra*, footnote 48, para. 151.

81Appellate Body Report, *United States – Wheat Gluten*, *supra*, footnote 48, para. 151.

82Panel Report, para. 8.188.

164. On the issue of whether the measure at issue is "necessary" to protect public health within the meaning of Article XX(b), the Panel stated:

> In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a prima facie case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding. 83

165. Canada argues that the Panel erred in applying the "necessity" test under Article XX(b) of the GATT 1994 "by stating that there is a high enough risk associated with the manipulation of chrysotile-cement products that it could in principle justify strict measures such as the Decree." 84 Canada advances four arguments in support of this part of its appeal. (…) Second, Canada contends that the Panel had an obligation to "quantify" itself the risk associated with chrysotile-cement products and that it could not simply "rely" on the "hypotheses" of the French authorities. 85 Third, Canada asserts that the Panel erred by postulating that the level of protection of health inherent in the Decree is a halt to the spread of asbestos-related health risks. According to Canada, this "premise is false because it does not take into account the risk associated with the use of substitute products without a framework for controlled use." 86 Fourth, and finally, Canada claims that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.

(…)

167. As for Canada's second argument, relating to "quantification" of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health. 87 A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. (…) The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer. 88 Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' "hypotheses" of the risk.

168. As to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted 89, that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related

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83Panel Report, para. 8.222.

84Canada's appellant's submission, para. 187.

85*Ibid*., para. 193.

86*Ibid*., para. 195.

87Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 48, para. 186.

88*Ibid*., para. 8.188. See Panel Report, para. 5.29, for a description of mesothelioma given by Dr. Henderson.

89*Ibid*., para. 8.204.

health risks. (…) Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place. In short, we do not agree with Canada's third argument.

169. In its fourth argument, Canada asserts that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree. (…)

170. Looking at this issue now, we believe that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is "necessary" under Article XX(b):

> The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*. 90 (emphasis added)

171. In our Report in *Korea –Beef,* we addressed the issue of "necessity" under Article XX(d) of the GATT 1994. 91 In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States – Section 337 of the Tariff Act of 1930*:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. 92

172. We indicated in *Korea – Beef* that one aspect of the "weighing and balancing process … comprehended in the determination of whether a WTO-consistent alternative measure" is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued". 93 In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. 94 In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital

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90Adopted 20 February 1990, BISD 37S/200, para. 75.

91*Supra*, footnote 49, paras. 159 ff.

92Adopted 7 November 1989, BISD 36S/345, para. 5.26; we expressly affirmed this standard in our Report in *Korea – Beef, supra*, footnote 49, para. 166.

93Appellate Body Report, *Korea – Beef, supra*, footnote 49, paras. 166 and 163.

94*Ibid*., para. 162.

and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

173. Canada asserts that "controlled use" represents a "reasonably available" measure that would serve the same end. The issue is, thus, whether France could reasonably be expected to employ "controlled use" practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks.

174. In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. (…) The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos. 95 (…)

175. For these reasons, we uphold the Panel's finding, in paragraph 8.222 of the Panel Report, that the European Communities has demonstrated a *prima facie* case that there was no "reasonably available alternative" to the prohibition inherent in the Decree. As a result, we also uphold the Panel's conclusion, in paragraph 8.223 of the Panel Report, that the Decree is "necessary to protect human … life or health" within the meaning of Article XX(b) of the GATT 1994.

(…)

95*Ibid*., paras. 8.213 and 8.214.

5. Korean Beef (2000)

WORLD TRADE ORGANIZATION

WT/DS161/AB/R
WT/DS169/AB/R
11 December 2000

(00-5347)

Original: English

KOREA – MEASURES AFFECTING IMPORTS OF FRESH, CHILLED AND FROZEN BEEF

AB-2000-8

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef

Korea, *Appellant*
Australia, *Appellee*
United States, *Appellee*

Canada, *Third Participant*
New Zealand, *Third Participant*

AB-2000-8

Present:

Ehlermann, Presiding Member
Abi-Saab, Member
Feliciano, Member

I. Introduction

1. Korea appeals certain issues of law and legal interpretations in the Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (the "Panel Report").96 The Panel was established to consider a complaint by Australia and the United States with respect to Korean measures that affect the importation of certain beef products. The aspects of these measures relevant for this appeal relate to (…) the separate retail distribution channels that exist for certain imported and domestic beef products (the so-called "dual retail system") and related measures. The dual retail system is given legal effect by the *Management Guideline for Imported Beef* (the "*Management Guideline*").97 (…)

3. The Panel also considered claims by the United States that Korea's requirement that imported beef be sold only in specialized imported beef stores, and its laws and regulations restricting the

96WT/DS161/R, WT/DS169/R, 31 July 2000.

97The essential features of the Korean dual retail system for beef are found in the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, (61550-81) 29 January 1990, modified on 15 March 1994; and the *Regulations Concerning Sales of Imported Beef*, (51550-100), modified on 27 March 1993, 7 April 1994, and 29 June 1998. On 1 October 1999, these two instruments were replaced by the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system. The *Management Guideline* is an elaboration of Article 25 of the *Livestock*

resale and distribution of imported beef by SBS super-groups, retailers, customers, and end-users are inconsistent with its obligations under Article III:4 of the GATT 1994; (…)

5. The Panel concluded (…) that the dual retail system for beef (including the obligation for department stores and supermarkets authorized to sell imported beef to hold a separate display, and the obligation for foreign beef shops to bear a sign with the words "Specialized Imported Beef Store") is inconsistent with the provisions of Article III:4 of the GATT 1994 in that it treats imported beef less favourably than domestic beef, and cannot be justified pursuant to Article XX(d) of the GATT 1994; (…)

III. Issues Raised in this Appeal

75 The issues raised in this appeal are the following:

> (…)
>
> (c) whether the "dual retail system", which requires the sale of imported beef in specialized stores, was inconsistent with Article III:4 of the GATT 1994; and
>
> (d) whether the "dual retail system", if inconsistent with Article III:4 of the GATT 1994, can nevertheless be justified under Article XX(d).

(…)

VI. Dual Retail System

A. Article III:4 of the GATT 1994

130. The Panel found that Korea's dual retail system for beef accords treatment less favourable to imported beef than to like Korean beef, and is, thus, inconsistent with Article III:4 of the GATT 1994. This finding was based on the Panel's view that any measure based exclusively on criteria relating to the origin of a product is inconsistent with Article III:4.98 The finding was also based on the Panel's assessment of how the dual retail system modifies the conditions of competition between imported and like domestic beef in the Korean market.99

Act (Revised), as amended by Act No. 5720 on 29 January 1999.
98Panel Report, para. 627.
99*Ibid*., paras. 631-637.

131. Korea argues on appeal that the dual retail system does not accord treatment less favourable to imported beef than to like domestic beef. For Korea, the dual retail system does not *on its face* violate Article III:4, since there is "perfect regulatory symmetry" in the separation of imported and domestic beef at the retail level, and there is "no regulatory barrier" which prevents traders from converting from one type of retail store to another.[100] Nor, Korea argues, does the dual retail system violate Article III:4 *de facto*, and the Panel's conclusion to the contrary was not based on a proper empirical analysis of the Korean beef market.[101]

132. Article III:4 of the GATT 1994 reads in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded *treatment no less favourable* than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. (emphasis added)

133. For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are "like products"; that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and that the imported products are accorded "less favourable" treatment than that accorded to like domestic products. Only the last element – "less favourable" treatment – is disputed by the parties and is at issue in this appeal.

134. The Panel began its analysis of the phrase "treatment no less favourable" by reviewing past GATT and WTO cases. It found that "treatment no less favourable" under Article III:4 requires that a Member accord to imported products "effective equality of opportunities" with like domestic products in respect of the application of laws, regulations and requirements.[102] The Panel concluded its review of the case law by stating:

100Korea's appellant's submission, paras. 119-126.

101*Ibid*., paras. 127-156.

102Panel Report, para. 624.

> Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products.103

135. The Panel stated that "any regulatory distinction that is based exclusively on criteria relating to the nationality or origin" of products is incompatible with Article III:4. We observe, however, that Article III:4 requires only that a measure accord treatment to imported products that is "no less favourable" than that accorded to like domestic products. A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is "no less favourable". According "treatment no less favourable" means, as we have previously said, according *conditions of competition* no less favourable to the imported product than to the like domestic product. (…)

136. This interpretation, which focuses on the *conditions of competition* between imported and domestic like products, implies that a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4. In *United States – Section 337*, this point was persuasively made. In that case, the panel had to determine whether United States patent enforcement procedures, which were formally different for imported and for domestic products, violated Article III:4. That panel said:

103*Ibid*., para. 627. (footnotes omitted)

> On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4.[104] (emphasis added)

(…)

138. We conclude that the Panel erred in its general interpretation that "[a]ny regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III."[105]

139. The Panel went on, however, to examine the conditions of competition between imported and like domestic beef in the Korean market. The Panel gave several reasons why it believed that the dual retail system alters the conditions of competition in the Korean market in favour of domestic beef. First, it found that the dual retail system would "limit the possibility for consumers to compare imported and domestic products", and thereby "reduce opportunities for imported products to compete directly with domestic products".[106] Second, the Panel found that, under the dual retail system, "the only way an imported product can get on the shelves is if the retailer agrees to substitute it, not only for one but for all existing like domestic products." This disadvantage would be more serious when the market share of imports (as is the case with imported beef) is small.[107] Third, the Panel found that the dual retail system, by excluding imported beef from "the vast majority of sales outlets", limits the potential market opportunities for imported beef. This would apply particularly to products "consumed on a daily basis", like beef, where consumers may not be willing to "shop around".[108] Fourth, the Panel found that the dual retail system imposes more costs on the imported product, since the domestic product will tend to continue to be sold from existing retail stores, whereas imported beef will require new

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104*United States – Section 337*, *supra*, footnote 69, paragraph 5.11.

105Panel Report, para. 627.

106*Ibid*., para. 631.

107*Ibid*., para. 632.

108Panel Report, para. 633.

stores to be established.[109] Fifth, the Panel found that the dual retail system "encourages the perception that imported and domestic beef are different, when they are in fact like products belonging to the same market", which gives a competitive advantage to domestic beef, "based on criteria not related to the products themselves".[110] Sixth, the Panel found that the dual retail system "facilitates the maintenance of a price differential" to the advantage of domestic beef.[111]

140. On appeal, Korea argues that the Panel's analysis of the conditions of competition in the Korean market is seriously flawed, relying largely on speculation rather than on factual analysis. Korea maintains that the dual retail system does not deny consumers the possibility to make comparisons, and the numbers of outlets selling imported beef, as compared with outlets selling domestic beef, does not support the Panel's findings. Korea argues, furthermore, that the dual retail system neither adds to the costs of, nor shelters high prices for, domestic beef.[112]

141. It will be seen below that we share the ultimate conclusion of the Panel in respect of the consistency of the dual retail system for beef with Article III:4 of the GATT 1994. Portions, however, of the Panel's analysis *en route* to that conclusion appear to us problematic. For instance, while limitation of the ability to compare visually two products, local and imported, at the point of sale may have resulted from the dual retail system, such limitation does not, in our view, necessarily reduce the opportunity for the imported product to compete "directly" or on "an equal footing" with the domestic product.[113] Again, even if we were to accept that the dual retail system "encourages" the perception of consumers that imported and domestic beef are "different", we do not think it has been demonstrated that such encouragement necessarily implies a competitive advantage for domestic beef.[114] Circumstances like limitation of "side-by-side" comparison and "encouragement" of consumer perceptions of "differences" may be simply incidental effects of the dual retail system without decisive implications for the issue of consistency with Article III:4.

142. We believe that a more direct, and perhaps simpler, approach to the dual retail system of Korea may be usefully followed in the present case. In the following paragraphs, we seek to focus on what appears to us to be the fundamental thrust and effect of the measure itself.

109*Ibid*., para. 634.

110*Ibid*.

111*Ibid*.

112Korea's appellant's submission, paras. 101, 127-156.

113See Panel Report, para. 633.

114*Ibid*., para. 634.

143. Korean law in effect requires the existence of two distinct retail distribution systems so far as beef is concerned: one system for the retail sale of domestic beef and another system for the retail sale of imported beef.[115] A small retailer (that is, a non-supermarket or non-department store) which is a "Specialized Imported Beef Store" may sell any meat *except domestic beef*; any other small retailer may sell any meat *except imported beef.*[116] A large retailer (that is, a supermarket or department store) may sell both imported and domestic beef, as long as the imported beef and domestic beef are sold in separate sales areas.[117] A retailer selling imported beef is required to display a sign reading "Specialized Imported Beef Store".[118] (…)

146. We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product. (…)

148. We believe, and so hold, that the treatment accorded to imported beef, as a consequence of the dual retail system established for beef by Korean law and regulation, is less favourable than

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115The essential features of the Korean dual retail system for beef are found in the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, (61550-81) 29 January 1990, modified on 15 March 1994; and the *Regulations Concerning Sales of Imported Beef*, (51550-100), modified on 27 March 1993, 7 April 1994, and 29 June 1998. On 1 October 1999, these two instruments were replaced by the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system.

116*Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores* Art. 5(C); *Regulations Concerning Sales of Imported Beef*, Art. 14(5); *Management Guideline for Imported Beef*, Art. 15.

117*Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, Art. 3(A); *Management Guideline for Imported Beef*, Art. 9(5).

118*Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, Art. 5(A); *Regulations Concerning Sales of Imported Beef*, Art. 14(5); *Management Guideline for Imported Beef*, Art. 9(6).

the treatment given to like domestic beef and is, accordingly, not consistent with the requirements of Article III:4 of the GATT 1994. (…)

150. Finally, we note that Korea requires that imported beef be sold in a store displaying a sign declaring "Specialized Imported Beef Store". The Panel found that the sign requirement was "essentially ancillary to the dual retail system", and, since the dual retail system was inconsistent with Article III:4, the Panel found that the sign requirement was as well.[119] The Panel found also that, since the sign requirement went beyond an obligation to indicate origin, it was inconsistent with statements contained in a 1956 GATT Working Party Report.[120] On appeal, Korea claims that the Panel used "erroneous logic" in its conclusion based on the ancillary character of the sign requirement, and that the statement in the Working Party Report did not apply to the sign requirement.[121] (…)

B. Article XX(d) of the GATT 1994

152. The Panel went on to conclude that the dual retail system, which it found to be inconsistent with Article III:4, could *not* be justified pursuant to Article XX(d) of the GATT 1994. The Panel found that the dual retail system is a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices.[122]

153. The Panel began its examination of Korea's dual retail system under Article XX(d) by finding that the dual retail system was designed to "secure compliance" with the *Unfair Competition Act*, a law consistent on its face with WTO provisions.[123] The Panel then focused on whether the dual retail system is "necessary" to secure compliance with that law. It examined enforcement measures taken by Korea for related products where fraudulent misrepresentation or passing of one product for another has occurred, and found that in these areas a dual retail system was not used. Instead, in respect of such product areas, Korea uses traditional enforcement measures, consistent with WTO rules, which include record-keeping, investigations, policing and fines. The Panel next inquired into whether these alternative, WTO-consistent measures were "reasonably available" to Korea to meet Korea's desired level of enforcement of laws against

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119Panel Report, para. 641.

120Working Party Report, *Certificates of Origin, Marks of Origin, Consular Formalities*, adopted 17 November 1956, BISD 5S/102, para. 13.

121Korea's appellant's submission, paras. 206-213.

122Panel Report, para. 675.

123*Ibid*., para. 658.

fraudulent misrepresentation in the retail beef sector. The Panel concluded that these measures are "reasonably available" alternative measures, and that Korea therefore cannot justify the dual retail system as "necessary" under Article XX(d).[124]

154. Korea appeals the Panel's conclusion. Korea argues that the Panel incorrectly interpreted the term "necessary" in Article XX(d) as requiring *consistency* among enforcement measures taken in related product areas.[125] Further, according to Korea, the Panel neglected to take into account the *level of enforcement* that Korea sought with respect to preventing the fraudulent sale of imported beef.[126]

155. Article XX(d), together with the introductory clause of Article XX, reads as follows:

> *Article XX*
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> …
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(…)

161. We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to."

124*Ibid*., paras. 660-674.

125Korea's appellant's submission, paras. 166-180.

126*Ibid*., paras. 181-193.

We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[127]

162. In appraising the "necessity" of a measure in these terms, it is useful to bear in mind the context in which "necessary" is found in Article XX(d). The measure at stake has to be "necessary to ensure compliance with laws and regulations … , *including* those relating to customs enforcement, the enforcement of [lawful] monopolies … , the protection of patents, trade marks and copyrights, and the prevention of deceptive practices". (emphasis added) Clearly, Article XX(d) is susceptible of application in respect of a wide variety of "laws and regulations" to be enforced. It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

163. There are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary". One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be "necessary". Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce[128], that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*. A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.

127We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources". (emphasis added). This requirement is more flexible textually than the "necessity" requirement found in Article XX(d). We note that, under the more flexible "*relating to*" standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a "*substantial* relationship", (emphasis added) i.e., *a close and genuine* relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141.

128We recall that the last paragraph of the Preamble of the GATT of 1994 reads as follows: "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade *and to the elimination of discriminatory treatment in international commerce*". (emphasis added)

164. In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. (…)

166. (…) In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available". (…)

176. It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations. We note that this has also been recognized by the panel in *United States – Section 337*, where it said: "The Panel wished to make it clear that this [the obligation to choose a reasonably available GATT-consistent or less inconsistent measure] does not mean that a contracting party could be asked to change its substantive patent law or its desired *level of enforcement* of that law …. ". (emphasis added) The panel added, however, the caveat that "provided that such law and such *level of enforcement* are the same for imported and domestically-produced products".129

177. We recognize that, in establishing the dual retail system, Korea could well have intended to secure a higher level of enforcement of the prohibition, provided by the *Unfair Competition Act*, of acts misleading the public *about the origin of beef* (domestic or imported) *sold by retailers*, than the level of enforcement of the same prohibition of the *Unfair Competition Act* with respect to *beef served in restaurants*, or the sale by *retailers* of *other meat or food products*, such as *pork or seafood*.

178. We think it unlikely that Korea intended to establish a level of protection that *totally eliminates* fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, we assume that in effect Korea intended to *reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers. The Panel did find that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to

129Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

misrepresent foreign beef for domestic beef".[130] And we accept Korea's argument that the dual retail system *facilitates* control and permits combatting fraudulent practices *ex ante*. Nevertheless, it must be noted that the dual retail system is only an *instrument* to achieve a significant reduction of violations of the *Unfair Competition Act*. Therefore, the question remains whether other, conventional and WTO-consistent instruments can not reasonably be expected to be employed to achieve the same result.

179. Turning to investigations, the Panel found that Korea, in the past, had been able to distinguish imported beef from domestic beef, and had, in fact, published figures on the amount of imported beef fraudulently sold as domestic beef. This meant that Korea was able, in fact, to detect fraud.[131] On fines, the Panel found that these could be an effective deterrent, as long as they outweighed the potential profits from fraud.[132] On record-keeping, the Panel felt that if beef traders at all levels were required to keep records of their transactions, then effective investigations could be carried out.[133] Finally, on policing, the Panel noted that Korea had not demonstrated that the costs would be too high.[134] For all these reasons, the Panel considered "that Korea has not demonstrated to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available".[135] Thus, as already noted, the Panel found that the dual retail system was "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices".[136]

180. We share the Panel's conclusion. We are not persuaded that Korea could not achieve its desired level of enforcement of the *Unfair Competition Act* with respect to the origin of beef sold by retailers by using conventional WTO-consistent enforcement measures, if Korea would devote more resources to its enforcement efforts on the beef sector. It might also be added that Korea's argument about the lack of resources to police thousands of shops on a round-the-clock basis is, in the end, not sufficiently persuasive. Violations of laws and regulations like the Korean *Unfair Competition Act* can be expected to be routinely investigated and detected

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130Panel Report, para. 658.
131*Ibid*., para. 668.
132Panel Report, para. 669
133*Ibid*., para. 672.
134*Ibid*., para. 673.
135*Ibid*., para. 674.
136*Ibid*., para. 675.

through selective, but well-targeted, controls of potential wrongdoers. The control of records will assist in selecting the shops to which the police could pay particular attention.

181. There is still another aspect that should be noted relating to both the method actually chosen by Korea – its dual retail system for beef – and alternative traditional enforcement measures. Securing through conventional, WTO-consistent measures a higher level of enforcement of the *Unfair Competition Act* with respect to the retail sale of beef, could well entail higher enforcement costs for the national budget. It is pertinent to observe that, through its dual retail system, Korea has in effect shifted all, or the great bulk, of these potential costs of enforcement (translated into a drastic reduction of competitive access to consumers) to imported goods and retailers of imported goods, instead of evenly distributing such costs between the domestic and imported products. In contrast, the more conventional, WTO-consistent measures of enforcement do not involve such onerous shifting of enforcement costs which ordinarily are borne by the Member's public purse.

182. For these reasons, we uphold the conclusion of the Panel that Korea has not discharged its burden of demonstrating under Article XX(d) that alternative WTO-consistent measures were not "reasonably available" in order to detect and suppress deceptive practices in the beef retail sector[137], and that the dual retail system is therefore not justified by Article XX(d).[138]

(…)

VII. Findings and Conclusions

186. For the reasons set out in this Report, the Appellate Body:

> (…)
>
> (e) upholds the Panel's ultimate conclusion that Korea's dual retail system for beef is inconsistent with Article III:4 of the GATT 1994;
>
> (f) upholds the Panel's conclusion that Korea's dual retail system for beef is not justified under Article XX(d) of the GATT 1994; (…)

137Panel Report, para. 674.

138*Ibid*., para. 675.

Optional Reading

Case Note (Gasoline)

http://www.ejil.org/journal/Vol9/No1/sr1a.html

U.S. – Standards for Reformulated and Conventional Gasoline

(Appellate Body Report Adopted on May 20, 1996)

Sungjoon Cho*

Introduction

On May 20, 1996 the first Appellate Body Report (*United States – Standards for Reformulated and Conventional Gasoline*)139 was adopted under the new World Trade Organization (WTO)140 system. This case was unique and controversial in two respects. First, the case was initiated by two developing countries (Venezuela and Brazil), who filed a complaint against a developed country (the United States) in contrast to the prevailing practices under the former GATT.141 Second, the case involved environment-related issues, drawing attention from environmentalists as well as government officials handling environmental policies142.
The latter tension between trade and environment had heightened since the famous *Tuna-Dolphin* case143, and an increasing number of environmental treaties signed since the early nineties.

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139 *United States - Standards for Reformulated and Conventional Gasoline*, Panel and Appellate Body Report adopted on May 20,1996, WT/DS2/9 [hereinafter Panel Report and Appellate Body Report, respectively].

140 *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 1; 33 I.L.M. 1140, 1144 (1994) [hereinafter WTO Agreement]. For a historical background of the creation of the WTO, *see generally* WORLD TRADE: TOWARD FAIR AND FREE TRADE IN THE TWENTY-FIRST CENTURY (Marie Griesgraber & Bernhard G. Gunter eds., 1997); ASIF H. QURESHI, THE WORLD TRADE ORGANIZATION (1996) ; BRUCE E. MOON, DILEMMAS OF INTERNATIONAL TRADE (1996); PHILIP RAWORTH & LINDA C. REIF., THE LAW OF THE WORLD TRADE ORGANIZATION: FINAL TEXT OF THE GATT URUGUAY ROUND AGREEMENTS (1995).

141 General Agreement on Tariffs and Trade, Oct.30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947]. From 1948 to 1989, 73 percent of all GATT panel cases were filed by developed countries like the U.S., the EC, Canada, and Australia. Robert E. Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 29 (1993).

142 In fact, a good deal of articles approaches this case from an environmental viewpoint. Search of WESTLAW, by Terms and Connectors: “Reformulated and Conventional Gasoline” (Jan. 27,1998).

143 *United States – Restrictions on Imports of Tuna from Mexico*, not adopted, GATT, B.I.S.D.

This note focuses on the "international trade" perspective of this case in terms of both substantive law, concentrating on Article XX (General Exceptions) of the General Agreement of Tariffs and Trade 1994 (GATT 1994)144 and procedural law found in the Dispute Settlement Understanding (DSU)145. This note is divided into five parts. Part I-IV digest the factual background leading up to the case, the Panel report, the U.S. appeal, and the Appellate Body Report. Part V critiques the analysis of Appellate Body's ruling and raises questions distilled from the analysis of this case. In particular, this part argues that the Appellate Body failed to delve into an important legal issue – the applicability of Agreement on Technical Barriers to Trade (TBT)146 – in the name of judicial economy; that it replaced legal analysis by consensus (acquiescence) of the disputants; that it disregarded a conditional appeal merely on a formalistic ground; that it was not faithful to the principle of treaty interpretation by downplaying the ordinary meaning; that it conducted the necessary test in interpreting the chapeau, thereby leading to the dilution of the distinction between "necessary" and "relating to". This note concludes that the Appellate Body review should be more judicialized and that Member countries should exert more effort in regulatory cooperation in order to address the trade-off between free trade and domestic regulation.

Factual Background

Faced with a serious environmental problem caused by the toxic pollutants emitted by factories and vehicles, the U.S. Congress amended the Clean Air Act in 1990.147 Most of all, the Clean Air Act of 1990 (CAA) purported to ensure that the level of air pollution caused by gasoline combustion did not exceed 1990 levels and that pollutants be reduced in major population areas.148 To implement the CAA, the U.S. Environmental Protection Agency (EPA) enacted the

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(39th Supp.) at 155 (1993) [hereinafter *Tuna – Dolphin*].

144 General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A**,** LEGAL INSTRUMENTS —RESULTS OF THE URUGUAY ROUND vol. 2; 33 I.L.M. 29, art. III (1994) [hereinafter GATT 1994]. WTO Agreement Annex 1A incorporates a document labeled GATT 1994 which is essentially GATT 1947, as amended changed through the Uruguay Round, along with all the ancillary agreements pertaining to GATT 1947, as modified. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS- CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 290-291 (3rd ed. 1995) [hereinafter JACKSON ET AL.].

145 Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, *supra* note 1, art. 26 [hereinafter DSU].

146 Agreement on Technical Barriers to Trade, Annex 1A of the WTO Agreement, *supra* note 2 [hereinafter TBT].

147 *See* Clean Air Act Amendments of 1990, 42 U.S.C. § 7545 (k) (1994).

148 Appellate Body Report, *supra* note 1, at 4. The CAA established two gasoline programs for this purpose. The first program defines the so-called "(ozone) non-attainment areas" consisting of (i) nine large cosmopolitan areas suffering from the worst summertime ozone pollution and (ii) additional areas included at the request of the state governors concerned. In these non-attainment areas, all gasoline must be reformulated before consumption, while the sale of conventional gasoline is prohibited. The second program allows the sale of conventional gasoline in rest areas. The CAA deferred implementation of the aforementioned programs to the EPA. As a result, the EPA enacted the Gasoline Rule, relying heavily on the use of 1990 baselines as a means of determining compliance with the CAA's requirements. *Id*., at 4-6.

"*Regulation of Fuels and Fuel Additives- Standards for Reformulated and Conventional Gasoline*"149 (the so-called "Gasoline Rule"). This regulation was designed to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States.150

The most distinctive characteristic of this Gasoline Rule was that this Rule employed either individual (established by the entity itself) or statutory (established by the EPA and intended to reflect average 1990 U.S. gasoline quality) baselines, depending on the nature of the entity concerned.151 Domestic refiners, blenders, and importers were allowed to establish an individual baseline representing the quality of their 1990 gasoline before they were forced to use the statutory baseline set by the EPA, while foreign refiners were not.152 This apparent disparity in establishing the baselines induced many complaints by foreign countries like Venezuela and Brazil who exported gasoline to the U.S. because the statutory baseline was allegedly much stricter than individual baselines.153

The Panel Report: Its Main Findings and Conclusions Relating to Art. III and XX

1. Article III:4 ("like products" and "less favorably")

The Panel found that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics as well as end-users, and are perfectly substitutable. Therefore, the Panel concluded that chemically-identical imported and domestic gasoline were like products under Article III:4.154 The Panel further concluded that since, under the baseline establishment rules of the Gasoline Rule, imported gasoline was effectively prevented from enjoying the same favorable sales conditions as were afforded domestic gasoline. Because of a producer-specific individual baseline, imported gasoline was treated "less favorably" than domestic gasoline.155 Having reached this conclusion, the Panel rejected the U.S. argument that imported gasoline was treated similarly to gasoline from similarly situated domestic parties. The Panel emphasized that Art.III: 4 deals not with the producer, but the product. 156

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149 40 CFR 80, 59 Fed. Reg. 7716 (16 February 1994).
150 Appellate Body Report, *supra* note 1, at 4-6.
151 *Id*.
152 As a matter of fact, the possible use of individual baselines for foreign refiners was explored by the EPA while drafting the Gasoline Rule, ensuing the preparation of *May 1994 proposal*. However, this proposal was abandoned when the U.S. Congress passed legislation in September 1994 denying the funding necessary for its implementation. *Id*.
153 See Panel Report, *supra* note 1, paras. 3-12, 3-13.
154 In determining whether *imported* and *domestic* gasoline were *like products*, the Panel adopted the same test employed by the *1987 Japanese Alcoholic Beverage* case: a "case-by-case" test based on various factors including physical characteristics, end-uses, and tariff classification. *See Japan – Taxes on Alcoholic Beverages*, the Appellate Body Report adopted on 4 October 1996, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R [hereinafter *Alcoholic Beverages*]; Panel Report, *supra* note 1, para. 6.9.
155 Panel Report, *supra* note 1, para. 6.10.
156 *Id*. The Panel also rejected the U.S. argument that the treatment accorded to gasoline imported under a statutory baseline was *on the whole* no less favorable than that accorded to domestic gasoline under individual refiner baselines, noting that such *balancing* cannot be accepted. *Id*., para. 6.14.

2. Article XX(b): "necessary to protect human, animal or plant life or health"

The Panel found that the U.S. failed to meet the "necessary" test157 embedded in Art. XX (b) which requires proof that the measure in dispute (baseline establishment rule) is the "least-trade-restrictive" alternative. In this regard, the Panel noted that other alternatives, including a single statutory baseline applying to all entities, could have been adopted.158

3. Article XX(g): "relating to the conservation of an exhaustible natural resources; and made effective in conjunction with restrictions on domestic production or consumption

The Panel interpreted the meaning of both "relating to" and "in conjunction with" as "primarily aimed at", following the preceding interpretation from the *1987 Herring and Salmon* Panel.159 The Panel then noted that there was no direct connection between less favorable treatment of imported gasoline that was chemically identical to domestic gasoline and the U.S. objective of improving air quality in the United States.160 The Panel therefore concluded that the baseline establishment methods that afforded less favorable treatment to imported gasoline were not primarily aimed at the conservation of natural resources.161 Accordingly, the Panel did not proceed to deal with the issue of chapeau (introductory clause of Article XX).162

4. Applicability of the Agreement on Technical Barriers to Trade (the "TBT" Agreement)

The Panel did not examine the applicability of the TBT. It merely noted that in view of its findings under the GATT, it was not necessary to decide on issues raised under the TBT Agreement.163

The Appeal by the United States

Although the Panel report rejected almost all arguments that the U.S. raised, the U.S. appealed the Panel's findings only in terms of Art. XX (g) and the chapeau of Art. XX. It did not

157 *See, e.g.*, *Thailand – Restriction on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, GATT, B.I.S.D. (37th Supp.) at 224 (1991) [hereinafter *Thai Cigarette*]; *United States – Section 337 of the Tariff Act of 1930*, adopted on November 7, 1989, GATT, B.I.S.D. (36th Supp.) at 345 (1990) [hereinafter *Section 337*].
158 Panel Report, *supra* note 1, para. 6.24-6.25.
159 *Id*. Para. 6.38-6.39. *See also Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on 22 March 1988, GATT , B.I.S.D. (35th Supp.) at 98 (1989) [hereinafter *Herring and Salmon*].
160 Panel Report, *supra* note 1, para. 6.40.
161 *Id*.
162 *Id*., para. 6.41.
163 Panel Report, *supra* note 1, para. 6.43.

raise the Panel's rulings on Art.III: 4, Art. XX (b), and (d). The U.S. merely argued that the Panel erred in law by ruling that the baseline establishment rules do not constitute a measure "relating to" the conservation of clean air within the meaning of Article XX(g) of GATT, and consequently by failing to further examine the chapeau of Art. XX.164

The Report of the Appellate Body

1. The Issue of Justification under Article XX(g) of the GATT

Measures

The question here was whether "measures", as the term appears in both the chapeau of Art. XX and in Art. XX (g), refers to the Gasoline Rule as a whole or only to the particular provisions of that Rule, namely the baseline establishment rules.165
Without explicitly providing an answer to that question which the Appellate Body itself raised, the Appellate Body merely noted that no disputant had urged an interpretation of "measures" which would encompass the Gasoline Rule in its totality.166

Relating to the conservation of exhaustible natural resources

After rejecting the Panel's *obscure* use of "no direct connection" (between less favorable treatment of imported gasoline and U.S. environmental objectives) as its interpretation of the "primarily aimed at" test, the Appellate Body found that the Panel had erred in basing its legal conclusion on Art. III: 4 ("less favorable treatment") as opposed to the measures at issue ("baseline establishment rules").167

Furthermore, the Appellate Body criticized the Panel Report for applying the "necessary" test to XX (g). According to the Appellate Body, the Panel blatantly disregarded the text of Art. XX (in particular, the Article's deliberate use of "relating to" vs. "necessary"). In the Appellate Body's view, this disregard amounted to a fundamental error in treaty interpretation in light of the Vienna Convention on the Law of Treaties (the Vienna Convention).168

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164 Appellate Body Report, *supra* note 1, at 9.
165 *Id*., at 13-14.
166 *Id*. The Panel noted that :

> The Panel here was <u>following the practice of earlier panels</u> in applying Art.XX to provisions found to be inconsistent with Art.III:4: the :measures" to be analyzed under Article XX are the same provisions infringing Article III:4. (…) In the present appeal, no one has suggested in their final submissions that the Appellate Body should examine under Article XX any portion of the Gasoline Rule other than the baseline establishment rules held to be in conflict with Article III:4. <u>No one has urged an interpretation of "measures" which would encompass the Gasoline Rule in its totality.</u> (underlining added)

167 *Id*., at 15-16.
168 *Id*., at 16-17. Vienna Convention of the Law of Treaties, concluded on May 23, 1969, entered into force on January 27, 1990, U.N. Doc. A/ CONF. 39/27, 8 I.L.M. 679 (1969) [hereinafter

The Appellate Body finally concluded that the measure in issue (baseline establishment rules) was appropriately regarded as "primarily aimed at", and consequently "relating to", the conservation of natural resources for the purpose Art. XX (g). According to the Appellate Body, given that the baseline establishment rules were designed to permit scrutiny and monitoring of the level of compliance by refiners, importers, and blenders with "non-degradation" requirements. 169

If such measures are made effective in conjunction with restriction on domestic production or consumption

Although the Panel did not believe that the measure satisfied the proceeding requirement of "relating to" the conservation of clean air and hence did not address this issue, the Appellate Body did focus on the second requirement of Art. XX (g).

Focusing on the dictionary meanings of "made effective" and "in conjunction with", the Appellate Body defined these terms as "operative" ("in force", or "having come into effect") and "together with" ("jointly with"), respectively. Armed with these definitions, the Appellate Body interpreted the second clause of Art. XX (g) as a requirement of *even-handedness* in the imposition of restriction, in the name of conservation, upon the production or consumption of exhaustible natural resources.170 Therefore, the Appellate Body held that since the measure (baseline establishment rules) affected both domestic and imported gasoline, it was made effective in conjunction with restrictions on domestic production or consumption.

2. The Chapeau

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 distinguished restriction on international trade, (…)171

First, the Appellate Body underscored that the chapeau addresses the manner in which a questioned measure is applied, rather than the measure itself or its specific contents172 and, accordingly, that the purpose of the chapeau is generally the "prevention of abuse" of the exceptions in [what was later to become] Article [XX].173 Among "arbitrary discrimination",

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Vienna Convention].
169 Appellate Body Report, *supra* note 1, at 19.
170 *Id*., at 20-21.
171 GATT 1994, *supra* note 6, art. XX.
172 *United States - Imports of Certain Automotive Spring Assemblies*, the Panel Report adopted on 26 May 1983, GATT , B.I.S.D. (30th Supp.) at 107 (1984) [hereinafter *Certain Automotive Spring Assemblies*].
173 Appellate Body Report, *supra* note 1, at 22; GENERAL AGREEMENT ON TARIFFS AND TRADE, ANALYTICAL INDEX- GUIDE TO GATT LAW AND PRACTICE 564 (1994) [hereinafter ANALYTICAL

"unjustifiable discrimination" and "disguised restriction" on international trade delineated in the chapeau, the Appellate Body viewed "disguised restriction" as the broadest term which was inclusive of the other two. More fundamentally, the Appellate Body found that a "disguised restriction" might be properly interpreted as a restriction taken "under the guise of a measure formally within the terms of an exception listed in Article XX."174

Second, the Appellate Body found that the U.S. had "more than one alternative course of action" in promulgating regulations implementing the CAA, including the imposition of statutory baselines without differentiation as between domestic and imported gasoline.175 In this context, the Appellate Body also rejected the U.S. argument on administrative difficulties that individual baselines for foreign refiners would have generated, such as the impracticability of verification and enforcement of foreign refiner baselines. It upheld the Panel's view that the U.S. argument was insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners considering, in particular, the U.S. practice in other contexts, such as anti-dumping laws, in which the U.S. resorts to other information only when the information is not supplied or regarded unverifiable.176 More importantly, the Appellate Body stressed that the U.S. should have explored the possibility of entering into "cooperative arrangements" with both foreign refiners and the foreign governments by which the U.S. would have overcome the alleged administrative problems.177

Finally, the Appellate Body concluded that the foregoing two omissions — failure to explore adequate means, including cooperative arrangements for mitigating administrative problems and disregard of the costs for foreign refiners that would result from the imposition of statutory baselines, constituted "unjustifiable discrimination" and a "disguised restriction on international trade."

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174 Appellate Body Report, *supra* note 1, at 25. This interpretation, in the Appellate Body's view, is compatible with the purpose and object of avoiding abuse of illegitimate use of the exceptions to substantive rules available in Art. XX. *Id.*

175 *Id*.

176 *Id*., at 26-27.

177 The Appellate Body underscored that :

> The U.S. must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. (...) [I]t appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. (…) But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States. (underlining added). *Id*., at 27.

Critique

A. Judicial Economy: The Applicability of the TBT Agreement 178

At the oral hearing, Venezuela and Brazil raised the conditional argument that, if the Appellate Body were to reject the Panel's findings on Art. XX(g), and not find in favor of Venezuela and Brazil respecting the other requirements of Art. XX, it would then need to examine their claims under the TBT Agreement.179 Practically speaking, this issue was not of great significance since the "condition" which was posed by Venezuela and Brazil had not materialized. Nonetheless, the Appellate Body proceeded to find that "even if this condition had been fulfilled" it would not have addressed this issue (the applicability of the TBT Agreement).180 One of the reasons cited was that the issues appealed by the U.S. (the Panel's ruling on Art. XX (g)) could be decided "without at the same time necessarily resolving the applicability of the TBT Agreement."181 Here, the Appellate Body appeared to follow the long-standing GATT panel practice of "judicial economy" which generally dictates that a panel, which concludes that a measure is inconsistent with a specific provision of the GATT 1947, should not examine whether the measure in question is also inconsistent with other GATT provisions.182

This cannon of judicial decision-making carried much weight in the GATT regime of the past. The old GATT regime did not enjoy a legal system which integrated the GATT itself with other side agreements (e.g., Tokyo Round Codes183), nor was the nature of a panel fully adjudicated.184 It would be fair to say that a panel's ruling was more aimed at "settling" a dispute rather than "clarifying legal rights and obligations" of the then Contracting Parties. In such a regime, a more economical procedure might have been preferred.

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178 In this section, I do not negate the concept (and possible merit) of judicial economy. What I really argue is that judicial economy should not be exercised in those situations that we face here.
179 Appellate Body Report, *supra* note 1, at 10.
180 *Id*., at 12.
181 *Id*.
182 *See. e.g*., *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Appellate Body Report adopted on 23 May 1997, at 22 [hereinafter *Shirts and Blouses*]*; Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, Panel Report circulated on 25 November 1997, para. 6-87 [hereinafter *Footwear*]*; United States – Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil*, Panel Report adopted 19 June 1992, GATT , B.I.S.D. (39th Supp.) at 128, para.6.18 (1993); *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial marketing Agencies*, Panel Report adopted 22 March 1988, GATT , B.I.S.D. (35th Supp.) at 37, para.5.6 (1989); *EEC – Regulations on Imports of Parts and Components*, Panel Report adopted 16 May 1990, GATT , B.I.S.D. (37th Supp.) at 132, paras. 5.10,5.22, and 5.27 (1991).
183 The legal nature of these side agreements was controversial in some situations since the hierarchy of legal obligations both in the GATT and in these side agreements was not clear-cut. Moreover, these side agreements entered into force only among the states which accepted them and this optional situation led to the derogatory characterization of "GATT a la carte." Finally, there was no unified dispute settlement system across the GATT and these side agreements provided the possibility of "forum shopping". JACKSON ET AL., *supra* note 6, at 296-297. *See also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1995) [hereinafter JACKSON, THE WORLD TRADING SYSTEM].
184 JACKSON ET AL., *supra* note 6, at 296-297.

However, the newly launched WTO system has dramatically changed the legal landscape.185 Undoubtedly, the new system has become more judicial.186 Most side agreements have been incorporated into a single WTO system.187 What is crucial in this system is a "rule-orientedness" which can interpret and explain what a Member can and cannot do as well as shall and shall not do under a legal system consisting of GATT 1994 and other side agreements.188

Furthermore, according to the General Interpretive Note to Annex 1A (Multilateral Agreements on Trade in Goods) of the WTO Agreement, in the event of "conflict" between a provision of GATT 1994 and a provision of side agreements, the provision of the latter shall prevail to the extent of the conflict.189 Therefore, if the question of relationship between GATT 1994 and other side agreements is unavoidably embedded in the arguments (appeals) of the disputants, a panel (Appellate Body) must, at least, clarify whether two provisions from the GATT 1994 and other side agreements are in conflict or not, and consequently whether one is prevailing over the other.

B. Replacing *Legal* Analysis by *Consensus (Acquiescence)* of the Disputants

The Appellate Body must exercise legal analysis or legal interpretation when it is faced with an issue of law.190 This task is a duty of the Appellate Body and it is not within its discretion. The Appellate Body is not exempted from this duty simply because the disputing parties keep silent on a specific issue of law.

In the Appellate Body Report, however, the Appellate Body appeared to have overlooked the aforementioned duty. First, in analyzing arguments under Article XX (g) of the General Agreement, the Appellate Body initially raised the question whether "measures", used both in the chapeau of Article XX and Article XX (g), refers to the entire Gasoline Rule or, alternatively, only to baseline establishment rules.191
Surprisingly, however, the Appellate Body's self-response to this question was quite elusive in that the Appellate Body merely noted that no disputant *urged* this interpretation.192 Likewise, in the interpretation of "relating to the conservation of exhaustible natural resources", the Appellate

185 *Id*.
186 *Id*.
187 *See Brazil – Measures Affecting Desiccated Coconut*, Appellate Body Report circulated on 21 February 1997, WT/DS22/AB/R, at 18-19.
188 DSU Article 11, which reads as follows, also supports this position.

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the *applicability of and conformity with the relevant covered agreements*…(emphasis added). DSU, *supra* note 7, art. 11.

189 General Interpretive Note to Annex 1A (Multilateral Agreements on Trade in Goods) of the WTO Agreement, *supra* note 2.
190 *See*. *e.g*., DSU, *supra* note 7, art. 11, 17.
191 Appellate Body Report, *supra* note 1, at 13.
192 *See supra* pt. IV.

Body noted that since all the disputants accepted the same legal interpretation ("primarily aimed at") it did not need to examine the interpretation further.193

This kind of approach – omission of its own ruling in the absence of a palpable complaint – may stem from the principle of judicial economy. However, the issues the Appellate Body intentionally avoided to render its conclusion were not fact-finding issues but legal issues. Legal issues must be dealt with by the Appellate Body itself. The avoidance exhibited in this case compromises an essential legal issue with the parties' acquiescence, thereby reducing the possibility of the Appellate Body Reports guiding the future cases and undermining predictability and transparency of the WTO system.

C. Scope of the Appellate Body's Rulings: *Argument vs. Appeal*

Faced with the preliminary question of whether the issue of conditional applicability of the TBT Agreement, raised by Venezuela and Brazil, was brought before the Appellate Body as an "appeal" in accordance with the Working Procedures for Appellate Review (Working Procedures)194, the Appellate Body sided with the U.S., finding that even if the condition (the Appellate Body's ruling against Venezuela and Brazil) had been fulfilled, the Appellate Body would not have dealt with the issue. The Appellate Body held that accepting an argument as an appeal amounted to disregarding its own Working Procedures in the absence of a compelling reason.195

This interpretation seems to be too formalistic. Although Venezuela and Brazil technically failed to comply with the formal process stipulated in the Working Procedures, they did raise the conditional argument in their Appellees' Submissions.196
The only procedural flaw exhibited by Venezuela and Brazil was that they relied on Rule 22 instead of Rule 23(1) or 23(4) of the Working Procedures.197
In other words, what these countries failed to do was to wear the hat of an Appellant while they were making an argument functionally equivalent to an appeal. In this context, the Appellate Body itself acknowledged that the argument raised by Venezuela and Brazil on the TBT issue might be seen to be, in effect, a conditional appeal.198

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193 The Appellate Body noted that :

> All the participants and the third participants in this appeal accept the propriety and applicability of the view of the Herring and Salmon report and the Panel Report that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX (g). Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX (g). (underlining added) Appellate Body Report, *supra* note 1, at 18-19.

194 *See* Working Procedures for Appellate Review (visited Jan. 23, 1998) http://www.wto.org/wto/dispute/ab3.htm [hereinafter Working Procedures] ; *See also* DSU, *supra* note 7, art. 17, para. 9, Appendix.
195 Appellate Body Report, *supra* note 1, at 12.
196 *Id*., at 10.
197 See Working Procedures, *supra* note 56, Rule 22, 23 (1), and 23 (4).
198 Appellate Body Report, *supra* note 1, at 12.

Even assuming that Venezuela and Brazil's procedural flaw was serious enough for the Appellate Body to reject their conditional argument, the Appellate Body could have, at least, requested them to clarify their legal arguments. The purpose and object of Rule 22 [Appellee's Submission] is to "respond to" allegations raised in an appellant's submission filed pursuant to Rule 21. Here, it is clear from the ordinary meaning of terms used in the Rule that the drafters of the Working Procedures intended "refute or challenge" by "respond to" (an appellant's allegations). The drafters would not have imagined an argument that went beyond a mere response, and, in essence, an appeal, but clad with an Appellee's Submission. The Appellate Body should have paid due attention to this extraordinariness because it would have been *necessary* for the Appellate Body to cope with all the legal issues raised in the Appellate Process by the disputants (regardless of the formality of their claims).199 Moreover, the Appellate Body may have adopted an appropriate procedure for the purpose of this murky situation.200

Finally, the aforementioned critique should not be treated as a mere procedural issue. It does have a substantive impact. If the Appellate Body were to have taken a more active approach on this issue, and dealt with the applicability of side agreements (TBT Agreement *vis-a-vis* GATT 1994), the Appellate Body would have strengthened the WTO system through an integrated legal interpretation.201

D. Treaty Interpretation

The Appellate Body, like many other Panels before it, relied on the Vienna Convention as its basic interpretative methodology. According to Article 31 [General Rule of Interpretation] of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.202
From this principle of treaty interpretation, it is, in my view, clear that a treaty's object and purpose is merely a reference in determining the meaning of the terms of the treaty and is not as an independent basis for interpretation.203

1. "relating to the conservation of exhaustible natural resources"

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199 At the oral hearing, Venezuela and Brazil also emphasized that it would be "within the scope of authority of the Appellate Body", if it found it "necessary", to deal with the Panel's ruling on the applicability of the TBT Agreement. *Id.*, at 11.
200 Working Procedures provides a provision (Rule 16) which reads that:

> In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only…(underlying added). Working Procedures, *supra* note 56, Rule 16.

This provision also supports the Appellate Body's active role in this kind of murky situation.
201 *See* Jeffrey Waincymer, *Reformulated Gasoline under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?*, 18 MICH. J. INT'L L. 141, 152 (1996) ; Sungjoon Cho, *Non-Violation Issues as Matters of Subject: Are they the Achilles' heel of the WTO Dispute Settlement Process?*, 39 HARV. INT'L L. J. (forthcoming June 1998) (manuscript at 37-38, on file with author). *See also supra* part V, sec.1.
202 Vienna Convention, *supra* note 30, art. 31.
203 *See Alcoholic Beverages*, *supra* note 16, at 8, n. 20.

The Appellate Body firstly observed that the Panel failed to take adequate account of the words actually used by Art. XX in its several paragraphs, such as "necessary" in paragraphs (a), (b), and (d) and "relating to" in paragraphs (c), (e), and (g).204 The Appellate Body then noted that with respect to each category (a~i) having a different term, the WTO Members did not intend to require the same degree of relationship between the measure under appraisal and the state policy sought to be promoted.205

However, instead of further delving into the ordinary meaning, namely the plain dictionary meaning, of "relating to", the Appellate Body directly resorted to the interpretive sources of context as well as purpose and object.206 This interpretive approach seems to be problematic in light of the referential nature of context and purpose and object *vis-a-vis* ordinary meaning.207 The Appellate Body should have, at the very least, clarified in the initial stage of interpretation that because the ordinary meaning of "relating to" was ambiguous or likely to produce multiple interpretations it needed to progress to the next step of interpretation: an analysis of context and purpose and object.

2. "if such measures are made effective in conjunction with restrictions on domestic production or consumption"

Here, the Appellate Body appropriately started its interpretation with the dictionary meaning of "made effective" ("operative", "in force", or "come into effect") and "in conjunction with" ("together with" or "jointly with"). Then, taking those two phrases together, the Appellate Body construed the second clause of Art. XX (g) as "governmental measures being brought into effect together with restrictions on domestic production or consumption of natural resources." Hence, according to the Appellate Body, the second clause of Art. XX (g) requires the measures containing the restrictions on domestic production or consumption to be prepared or ready for implementation or enforcement. In other words, a restrictive measure, which is not valid or feasibly implemented under the laws of a country, cannot be said to fall within the ambit of the second clause of Art. XX (g). For example, if a certain restrictive measure is, on its face, unconstitutional or omits essential legislative procedures, thereby rendering that measure unenforceable or invalid, the measure fails to fall within the parameters of Art. XX (g).208

In this context, the first and second clause of Art. XX (g) represent a "means-ends" chain of the measure in question: if the first clause deals with the ends (aim) of a measure, the second clause is said to refer to the means (*modus operandi*) of that measure. In this light, the requirement of the second clause is easily satisfied.

At this point, the Appellate Body should have ended its analysis of the second clause. Nonetheless, it proceeded to examine the second clause of Art. XX (g) "in a slightly different

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204 Appellate Body Report, *supra* note 1, at 17.
205 *Id*., at 18.
206 *Id*.
207 *See e.g*., MALCOLM N. SHAW, INTERNATIONAL LAW, 584 (1991); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 628-632 (1990); J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 478-479 (1989).
208 From a contextual viewpoint, this interpretation can be supported by the use of the same term ("made effective") in other provisions of GATT 1994. *See*, *e.g*., GATT 1994, *supra* note 6, art. X.

manner" and finally concluded that the clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.209 In doing so, the Appellate Body erred in attributing this requirement (even-handedness) to Art. XX (g). A measure which, in the Appellate Body's terms, would simply be a naked discrimination for protecting locally-produced goods is likely to constitute a disguised restriction on international trade, and consequently should fall instead within the ambit of the chapeau. The Appellate Body's interpretation would render the chapeau redundant in light of its the interpretation of Art. XX (g).

E. Chapeau and Necessary Test210

The purpose and object of the chapeau of Art. XX is to avoid possible abuse or misuse of the exceptions stipulated in Art. XX.211 The Appellate Body also noted that the chapeau is not designed to address specific contents of a questioned measure, but rather the manner in which the measure is applied.212 In this sense, the chapeau may be used to screen a bad faith claim asserted by a Member country who wishes to take advantage of these exceptions for protectionist purposes.213

As is clear from the structure of Art. XX (g), the requirement stipulated in the chapeau is independent from those requirements stipulated in paragraphs (a)~(g) of Art. XX. Nonetheless, in the present case, the Appellate Body imported a legal analysis more suitable to the paragraphs of Art. XX when it dealt with the chapeau.
In the course of interpreting the chapeau, the Appellate Body noted that the U.S. had had "more than one alternative" measure whose use may have avoided any discrimination.214 Surprisingly, this test, which is often cited as "least trade-restrictive" test, is the core of "necessary" test usually reserved for an analysis of paragraphs (a), (b), and (d) of Art. XX.215 In this sense, one might

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209 Appellate Body Report, *supra* note 1, at 20-21. It further noted that:

> [I]f no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would be naked discrimination for protecting locally-produced goods. (underlining added). *Id*.

210 I owe a basic idea in this chapter to Professor Joseph H.H. Weiler of Harvard Law School.
211 *See* Analytical Index, *supra* note 35, at 563-564; Appellate Body Report, *supra* note 1, at 25.
212 Appellate Body Report, *supra* note 1, at 22. *See also Certain Automotive Spring Assemblies*, *supra* note 34.
213 In reality, it is difficult to prove bad faith on the part of a country. To prove this seemingly subjective factor, many objective features including the architecture of the questioned measure would be necessary. This task, in turn, may inevitably revisit the contents of the measure as well as the relationship between the measure and the policy goal stipulated in the paragraphs of Art. XX.
214 The Appellate Body noted that :

> There <u>was more than one alternative course of action available</u> to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, <u>could have avoided any discrimination at all</u> (underlining added). Appellate Body Report, *supra* note 1, at 25.

215 See, e.g., Thai Cigarettes, *supra* note 19; *Section 337*, *supra* note 19.

argue that the Appellate Body replaced its interpretation of "arbitrary", "unjustifiable", and "disguised" with an interpretation of "necessary".216 Furthermore, in the present case, such confusion could lead to the dilution of the distinction between "necessary" and "relating to" because even if a measure falls within the "relating to" test, it would inevitably encounter the "necessary" test later in the chapeau. Moreover, if a necessary test were applied to both paragraphs (a), (b), and (d) of Art. XX and the chapeau, the chapeau would be rendered redundant.

During the course of GATT panel history, there have been very few cases that directly involved the interpretation of the chapeau.217 Considering the importance of the chapeau as a final gateway before the application of an Art. XX exception, to find out a useful and meaningful yardstick by which a Panel or the Appellate Body can guide its interpretation of the chapeau is an important future task of the WTO dispute settlement system.

F. Importance of Transgovernmental Regulatory Cooperation218

Most domestic regulations are promulgated in response to various kinds of policy needs, such as protection of the environment or restricting the anti-competitive behavior. These regulations tend to be complicated and sophisticated because in the recent era of eye-popping technical innovation, simple and basic regulations cannot hope to be effective. However, these regulations, often clad with various "standards" or "specifications", may hinder or impede free trade even without bad faith or a hidden protectionist agenda espoused by a regulating country. For instance, producers may find it hard to be cost-effective because they may be forced to equip themselves with different production lines satisfying different regulations in different countries. Consumers may also be in a disadvantageous position because their scope of choices is limited due to these regulations.

In order to address these problems, all trading partners may be compelled to adopt uniform and common standards. However, as one could imagine, this is not an easy task; we cannot enjoy a common standard in every regulatory field. Nor would it be necessarily desirable because uniform and common standards may eliminate diversity, both cultural and political. Instead, what is called for is "regulatory cooperation" among the governments that enables them to maintain a measure of certain discretion in formulating regulations as well as enjoy the benefits of free trade. In this context, it is very significant that the Appellate Body based its ruling of the chapeau, namely an interpretation of "unjustifiable discrimination" and a "disguised restriction on international trade", on the lack of the U.S. government's efforts in exploring the possibility of entering into *cooperative* arrangements with the governments of Venezuela and Brazil.219

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216 *See* Waincymer, *supra* note 63, at 175.
217 *See* ANALYTICAL INDEX, *supra* note 35, at 563-565.
218 For more comprehensive discussion about the "transgovernmental regulatory cooperation", *see e.g.*, Scott H. Jacobson, *Regulatory Cooperation for an Interdependent World: Issues for Government*, *in* REGULATORY COOPERATION FOR AN INTERDEPENDENT WORLD (Organization for Economic Cooperation and Development, 1994); Giandomenico Majone, *Comparing Strategies of Regulatory Rapprochement*, *in* REGULATORY COOPERATION FOR AN INTERDEPENDENT WORLD (Organization for Economic Cooperation and Development, 1994); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997).
219 Appellate Body Report, *supra* note 1, at 27.

Conclusion

Interestingly, after the Appellate Body report was issued, then acting USTR Barshefsky announced that even though the U.S. lost the case, she was pleased to see that the Appellate Body overturned the Panel's ruling and found that the baseline establishment rule fell within the ambit of Art. XX (g).220 While this kind of reaction seemed to originate from Professor Hudec's "political theater" theory221, the outcome was desirable considering that this case was the first one invoking the WTO Appellate Procedure.222

From a legal perspective, however, this Appellate Body report left much to be desired. It omitted important legal analysis, instead relying on the old GATT practices of "judicial economy" or consensus (acquiescence) of the disputants. Also in the methodology of treaty interpretation, it undervalued the textual meaning ("ordinary meaning") of GATT provisions which should have taken priority over a "context" and "purpose and object" analysis. This kind of "soft" legal analysis seems to have influenced later Appellate Body reports. For instance, the invocation of judicial economy was found in *Footwear* and *Shirts and Blouses* in avoiding important legal claims including the legal relationship between GATT 1994 and side agreements.223 This softness could become more problematic in the future as Panels try to tone down their rulings lest they be struck down in the Appellate Procedure.

Nonetheless, this Appellate Body left a potentially significant legacy in its analysis: "trans-governmental regulatory cooperation". In this interdependent global economy, countries are encountering many situations in which free trade principles and regulatory goals (e.g., environment protection) conflict with one another. These situations could lead to regulatory competition or regulatory arbitration which, in turn, would result in weaker regulatory standards.224 On the other hand, they might invite the unilateralism accompanied by muscle, resulting in a *Hobbesian* tragedy. Only "inter-governmental regulatory cooperation" can solve this dilemma, and the Appellate Body report eloquently underscored this point.

In this respect, this ruling of the Appellate Body looks to the future. It is believed to guide the future regulatory behavior of Member countries toward a direction of inter-governmental regulatory cooperation since future panels are bound by precedent. This is the real virtue of this first Appellate Body Report.

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220 OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, PRESS RELEASE (Apr. 29, 1996).
221 Professor Hudec defines the "political theatre" dimension of international economic law as "the tendency of governments to adopt laws and agreements that create the appearance of legal solutions when in reality no solution has been achieved". However, Professor Hudec emphasized that this seemingly deceptive political theatre is necessary to invite countries to "a continuing process where they try to make the legal instrument work." Robert E. Hudec, *International Economic Law: The Political Theater Dimension*, 17 U. PA. J. INT'L ECON. L. 9, 10 (1996).
222 This reaction might be desirable to the newly launched WTO system in that a superpower like the U.S. backed up the first outcome of the new dispute settlement procedure. This reaction might be desirable also to the U.S. in that the U.S. would be benefited significantly from the WTO process. *See* Judith Hippler Bello and Maury D. Shenk, *WTO Dispute Settlement Body – Article XX Environmental Exceptions to GATT – National Treatment – Consistency with GATT of U.S. Rules Regarding Imports of Reformulated Gasoline*, 90 AM. J. INT'L L. 669, 674 (1996).
223 *See Shirts and Blouses*, *supra* note 44; *Footwear*, *supra* note 44.
224 See Majone, *supra* note 80, at 157.

Case Note (Shrimp-Turtle)

http://www.ejil.org/journal/Vol10/No1/sr4.html)

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WTO Appellate Body Report: ***United States--Import Prohibition of Certain Shrimp and Shrimp Products***, AB-1998-4, WT/DS58/AB/R (98-0000), adopted by Dispute Settlement Body, 6 November 1998. United States, Appellant; India, Malaysia, Pakistan and Thailand, Appellees; Australia, Ecuador, the European Communities, Hong Kong, China, Mexico and Nigeria, Third Participants. Division: Feliciano, Bacchus and Lacarte-Muró. **Major Topics Addressed by Appellate Body: evidence presented to the panel; exceptions for environmental protection under article XX of GATT.**

1. Abstract

The panel in the instant case found that the U.S. measure was unjustified within the meaning of the *chapeau* of art. XX, and therefore did not qualify for any exception from the prohibition of art. XI. Having addressed the *chapeau* of art. XX, the panel found that it did not need to address art. XX(b) or (g).[225] The panel applied a novel requirement that the measure to be excepted under art. XX must not "undermine the multilateral trading system."

The Appellate Body rejected the panel's reasoning and engaged in its own analysis. the Appellate Body reached the same conclusion to the effect that the U.S. measure does not comply with the *chapeau* after analyzing the availability of an exception under art. XX(g). The Appellate Body interestingly established a balancing test for satisfaction of the requirements of the *chapeau* and proceeded to examine the U.S. measure using means-ends analysis and a least trade restrictive alternative test analysis. The Appellate Body also found that the U.S. measure contained actual discrimination (discrimination that is not simply the necessary result of the U.S. environmental program) in the way that it was applied.

In addition to the substantive issues, this case raised the issue of whether non-governmental organizations (NGOs) may submit briefs for consideration by the panel. The panel initially answered that since it had not asked for the information submitted by the NGOs in this case, it would not consider their briefs. The Appellate Body adopted a more flexible approach, holding that the panel has complete discretion to consider submissions, even if it has not requested them.

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225 The "*chapeau*" and the relevant exceptions are as follows:

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

(b) necessary to protect human, animal or plant life or health;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . ."

2. Facts

The panel was convened to examine a prohibition imposed by the United States on the importation of certain shrimp and shrimp products under section 609 of Public Law 101-162 ("section 609") and associated regulations and judicial decisions. Section 609 prohibited importation to the U.S. of shrimp harvested with commercial fishing technology that may adversely affect sea turtles. It also provided an exception for shrimp imported from states certified thereunder. The relevant portion of this exception, applicable where sea turtles are otherwise threatened, permits certification if the exporting state adopts a regulatory program governing the incidental taking of sea turtles comparable to that of the U.S. and with an average incidental taking rate comparable to U.S. vessels. This regulatory program would require "turtle excluder devices" to be used by commercial shrimp trawling vessels operating in areas where turtles are likely to be found.

3. Analysis of the Panel Report

a. The Tuna-Dolphin Cases

This case presented an occasion for the Appellate Body to review the contentious trade and environment issues first addressed in 1991 and 1994 in the *Tuna-Dolphin* cases.[226] In both *Tuna-Dolphin* panel decisions (each unadopted) the panels found the U.S. embargoes on foreign tuna to violate, *inter alia*, art. XI of GATT, and not to be exempted under art. XX of GATT. Both the 1991 and the 1994 panels had found that the U.S. measure, as a regulation of a process rather than a product, was not exclusively covered by art. III of GATT, and so was subject to the prohibition of embargoes under art. XI. The 1991 panel found that the U.S. measures did not qualify for an exemption under art. XX because that provision did not permit the protection of animals outside the territory of the state adopting the relevant measure. Furthermore, the U.S. measures were not "necessary" within the meaning of art. XX(b) insofar as the goal sought to be protected by the U.S. might have been addressed through multilateral negotiations. The 1994 panel left open the possibilities that art. XX could permit the protection of animals extraterritorially, but found that the U.S. measures did not qualify for art. XX because they were designed not directly to achieve environmental goals, but to coerce other governments into adopting specific environmental policies.

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226 United States--Restrictions on Imports of Tuna, 39 B.I.S.D. 155, 204, para. 6.3 (1993), reprinted in 30 I.L.M. 1594 (1991) [hereinafter "First Tuna Panel Report"]; United States--Restrictions on Imports of Tuna, DS29/R (1994), reprinted in 33 I.L.M. 839 (1994) [hereinafter "Second Tuna Panel Report"].

b. The Shrimp-Turtle Panel: Art. XX

The U.S. accepted that its measure violated art. XI of GATT, turning the debate to the availability of an exception under art. XX of GATT. The panel [227] found that the U.S. measure was unjustified within the meaning of the *chapeau* of art. XX, and therefore did not qualify for any exception from the prohibition of art. XI. The panel considered art XX(b) and (g). The panel considered first the *chapeau* of article XX. The panel placed the burden of proof on the U.S., as the party asserting the affirmative defense of article XX.

Analyzing the *chapeau*, the panel first found that the countries that were certified and those that were not were "countries where the same conditions prevail," and that therefore the U.S. measure was discriminatory.[228] The panel did not even evaluate the U.S. position that different conditions prevail in these two types of countries: thus, the panel implicitly disrespected the regulatory categories established by section 609. The panel next turned to the question of whether this discrimination was arbitrary or unjustifiable. Specifically, the panel focused on the word "unjustifiable," arguing that it must be interpreted in light of the purpose of the WTO Agreement as a whole. The panel found that the purpose of the *chapeau* is to prohibit abuse of art. XX, and, unfortunately, equates "abuse" with frustration of the purposes of the WTO Agreement.[229] This approach might be acceptable if the purposes of the WTO Agreement were read to include subtleties like maintaining a degree of local regulatory autonomy. This is not the way that the panel read the purposes of the WTO Agreement. By selecting a limited "object and purpose," the Panel predetermined that measures having an environmental object and purpose could not be justified under art. XX. The Panel stated that

> While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.[230]

The Panel concluded that derogations from other provisions of GATT are permissible under art. XX only so long as they "do not undermine the multilateral trading system."[231] As the U.S. argued in connection with its appeal, this uncompromising allegiance to the international trading system--this

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227 Panel Report, *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (98-1710), 15 May 1998 [hereinafter, "Panel Report"]. The Panelists were Michael Cartland, Carlos Cozendey and Kilian Delbr_ck.

228 Panel Report, para. 7.33.

229 Panel Report, para. 7.40.

230 Panel Report, para. 7.42.

231 Panel Report, para. 7.44.

unidimensional teleological method of interpretation--contradicts the clear intent of art. XX.
The panel went further, however, to hold that its examination of whether a measure undermines the multilateral trading system may look not only at the particular measure before the panel, but at the possibility of a proliferation of measures that in the aggregate might undermine the system. Again, this seems to exceed the clear meaning of art. XX.

Importantly, the panel shores up its holding by arguing, based on the Second Tuna Panel Report and the Belgian Family Allowances Report,[232] that national measures that condition access to an import market on adoption by the exporting country of a prescribed regulatory scheme are not permitted under art. XX.

The panel carefully distinguished this case dealing with unilateral measures by the importing state from possible cases where the importing state acts pursuant to a multilateral environmental agreement. Although the panel's distinction between these circumstances under WTO law is not clear, the panel effectively reserves judgment on this issue. It stated that the "negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system."[233] One wonders why this is so clear, given that multilateral environmental agreements might well be inconsistent with trade goals. The panel did not say whether compliance with a multilateral environmental agreement may support the availability of an exception under art. XX. The panel also wisely avoided holding, with the First Tuna Panel Report, and with the present Appellate Body decision, that the purported "extraterritorial" nature of the U.S. measure affects its validity under WTO law.

c. NGO Submissions

On the procedural issue of its consideration of NGO submissions, the panel declined to consider NGO submissions on the basis that while it may seek information from any relevant source under art. 13 of the Dispute Settlement Understanding (DSU), it had not requested this information.[234] In response, the U.S., with the endorsement of the Panel, included certain portions of the NGO briefs in its own submissions.

4. Analysis of the Appellate Body Report

a. Rejection of Panel Reasoning and Conclusions under Art. XX

In its arguments to the Appellate Body, the U.S. argued that the panel had misinterpreted the *chapeau* of art. XX, thereby effectively "erasing" art. XX from the GATT in any case in which there is a "threat to the multilateral trading system." Indeed, the Appellate Body criticized

232 Adopted on 7 November 1952, B.I.S.D. 1S/59, para. 8.

233 Panel Report, para. 7.55.

234 Panel Report, para. 7.8.

the panel for departing from the text of the GATT and for not examining the ordinary meaning of the text.

> In pursuit of this approach, the Appellate Body recalled that in the *Gasoline* case,[235] it had focused on the use of the reference to the *manner* in which the measure is applied, clarifying that the *chapeau* is not concerned with the nature of the measure itself. The nature of the measure itself is addressed in the subparagraphs of art. XX. The panel, on the other hand, evaluated whether the section 609 itself satisfied the criteria of the *chapeau*.
>
> Furthermore, the Appellate Body stated that a teleological interpretation should consider the provision itself being interpreted, not the whole of the WTO Agreement:

> Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX.[236]
>
> The Appellate Body recalled that in the *Gasoline* case, it had examined the object and purpose of the *chapeau*, finding that it is intended to prevent abuse of the exceptions listed in art. XX. The panel did not examine the question of whether section 609 was applied in a manner that is arbitrary or unjustifiable discrimination or a disguised restriction within the meaning of the *chapeau*. The Appellate Body further criticized the panel for examining compliance with the *chapeau* prior to determining compliance with any of the following exceptions. It is not possible to determine whether an exception is being abused without first determining whether the exception is otherwise available.[237]
>
> In fact, the Appellate Body completely rejected the panel's line of reasoning: "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."[238] In an ideal setting, such a wholesale rejection of the panels' reasoning and conclusion would be a basis for remand to the panel for further findings; in fact, lacking the power of remand, the Appellate Body heroically made its own findings.[239]

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235 United States--Gasoline, Adopted 20 May 1996, WT/DS2/AB/R.

236 Appellate Body Report, para. 116.

237 Appellate Body Report, para. 120.

238 Appellate Body Report, para. 121.

239 "Having reversed the Panel's legal conclusion . . . we believe that it is our duty and our responsibility to complete the legal analysis . . . ." Appellate Body Report, para. 123. This is a substantial departure from the approach taken by the Appellate Body in the *Computers* report, in which the Appellate Body rejected the panel's reasoning, but then failed to continue to provide its

b. Appellate Body Findings under Art. XX

In a ringing defense of living resources, the Appellate Body found that art. XX(g), referring to "exhaustible natural resources," includes living resources such as sea turtles. Referring to the drafting history of art. XX(g), which involved discussions of mineral resources, the Appellate Body endorsed an organic approach to interpretation: the words "exhaustible natural resources" "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[240] Interestingly, the Appellate Body looked to the inclusion of sea turtles on Appendix 1 (species threatened with extinction) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") for evidence of the endangered position of these animals.

Importantly, the Appellate Body specifically declined to rule on whether there is a territorial or jurisdictional limitation in art. XX(g)--whether the "extraterritorial" nature of the U.S. measure removed it from eligibility for an exception under that provision. It was able to do so because the sea turtles at issue are migratory, migrating to and from U.S. waters.[241]

Continuing its analysis of the availability of an exception under art. XX(g), the Appellate Body examined whether section 609 "relates to" the conservation of exhaustible natural resources. This "relates to" requirement has been interpreted to require that the measure be "primarily aimed at" this goal. The Appellate Body applied a means-ends analysis, finding that the U.S. measure satisfies this test (despite the fact that it might be construed as aimed at changing exporting state policy, rather than at directly protecting turtles). The Appellate Body also found that the U.S. measure satisfies the third prong of art. XX(g): that it is made effective in conjunction with restrictions on domestic harvesting of shrimp.

The Appellate Body then turned to the *chapeau*. Here, the Appellate Body relied heavily on its analysis in the *Gasoline* case, to the effect that "the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[242] This formulation, and its use here, sets up a kind of balancing test for availability of exceptions under art. XX. The Appellate Body's application of this balancing test is colored by the language regarding sustainable development contained in the first paragraph of the preamble to the WTO Agreement.

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own legal analysis. European Communities--Customs Classification of Certain Computer Equipment, adopted 22 June 1998, WT/DS62, 67, 68/AB/R.

240 Appellate Body Report, para. 129.

241 Appellate Body Report, para. 133.

242 Appellate Body Report, para. 151, *quoting* United States--Gasoline, adopted 20 May 1996, WT/DS2/AB/R, p. 22. *See also* paras. 156 and 159.

By way of engaging in this balancing test, the Appellate Body first engaged in a means-ends analysis, finding the U.S. measure overbroad insofar as it requires foreign governments to adopt the same policies as those applied by the U.S. This approach fails to consider the different conditions that pertain in other members' territories. Furthermore, the Appellate Body questioned whether domestic measures alone can be effective--suggesting that unilateral measures are not an effective means to the desired end.[243] Second, section 609 does not permit the import of shrimp caught using turtle excluder devices but originating in a state that is not certified. The Appellate Body found this approach a kind of discrimination. Third, the failure of the U.S. to engage in international negotiations weighed against the U.S. measure. The Appellate Body pointed out that while the U.S. signed the as yet unratified Inter-American Convention for the Protection and Conservation of Sea Turtles, that convention contains a requirement to respect art. XI of GATT. [244] Thus, part of this balancing test examined whether the measure at issue is the least trade restrictive device available. The existence of the Inter-American Convention demonstrates that a less restrictive device is available (at least in terms of its consensual origins, if not in terms of its potential to restrict trade). The Appellate Body also referred to the fact that consensual negotiations in the Inter-American Convention context "marked out the equilibrium line . . . ." Perhaps the Appellate Body felt the need to support its balancing test determination with this reference to a treaty-based determination.

Finally, the Appellate Body found real discrimination in the way that the U.S. (i) negotiated multilateral agreements and (ii) applied phase-in periods to different countries, and considered this discrimination "unjustifiable" within the meaning of the *chapeau*. The rigidity of section 609 including its failure to distinguish among countries in which different conditions prevail, as well as the lack of transparency of the certification process, makes this discrimination also "arbitrary" under the *chapeau*.[245] The Appellate Body imposed a requirement of due process in connection with the application of exceptions under art. XX.[246]

c. NGO Submissions

The Appellate Body found that the panel had been too inflexible in its approach to submissions from non-parties. "In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel.

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243 Appellate Body Report, para. 168.

244 Appellate Body Report, para. 169.

245 Appellate Body Report, para. 177.

246 Appellate Body Report, paras. 182 and 183 (*citing* art. X of GATT).

> A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*."[247] On this basis, rather than on the basis actually used by the panel, the Appellate Body found that the panel properly considered the information provided by an NGO and appended by the U.S. to its submission.
>
> Interestingly, there seems to be no remedy for the exclusion of the larger portion of the NGO submissions. Perhaps in the future, the Appellate Body will develop a concept of "reversible error," and "remand," on the basis of which it may direct panels to reconsider particular information or issues.

5. Conclusions

The Appellate Body's decision is careful and conservative, in addition to being politically sensitive. The Appellate Body, very importantly, held open the possibility that unilateral measures may be crafted in such a way, and developed in particular contexts, in which they might satisfy the requirements of art. XX. While the Appellate Body declined to reach a number of important issues, and did not explicitly accept that a multilateral environmental agreement would be a sound basis for an exception under art. XX, it welcomed environmental measures, and recommended those that are not unilateral.

As the WTO addresses the problem of the intersection between international environmental law and international trade law, it will be interesting to observe the extent to which the Appellate Body determines this intersection. For now, the Appellate Body has retained jurisdiction to address these relationships, and has formulated a balancing test that gives the Appellate Body itself wide flexibility in responding to these problems. In addition, it will be worth observing the extent to which the Appellate Body must transform itself from a "trade court" to a general international court in order to deal with intersections between trade values and other values.

This decision shows a measured, analytical approach to teleological interpretation, helping to develop the jurisprudential tools of international law. The Appellate Body recognizes that the unidimensional teleology of the panel is too blunt an instrument for accurate adjudication. The Appellate Body also refines its interpretative tools by rejecting a strict "original intent" interpretation of art. XX(g) in favor of a more dynamic interpretation to fit modern circumstances.

It may be worth pointing out a contradiction in the reasoning of the Appellate Body. The Appellate Body criticized the panel for failing to evaluate whether the specific exceptions of art. XX are available before analyzing the applicability of the *chapeau*. The Appellate Body argues that it is impossible to analyze compliance with the *chapeau* without knowing how the measure qualifies for an exception, and which exception. However, the Appellate Body never addresses the potential application of art. XX(b), confining itself to art. XX(g). Under the Appellate Body's reasoning, this leaves open the possibility that if an exception were available under art. XX(b), a different analysis of the applicability of the *chapeau* might pertain.

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247 Appellate Body Report, para. 108 (emphasis in original).

Case Note (Korean Beef)

http://www.ejil.org/journal/curdevs/sr17.rtf

Decisions of the Appellate Body of the World Trade Organization

Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef

Joel P. Trachtman

WTO Appellate Body Report: **Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef,** AB-2000-8 WT/DS161, 169/AB/R (00-5347), adopted by Dispute Settlement Body, 10 January 2001, 2001. Korea, Appellant, Australia and United States, Appellees, Canada and New Zealand, Third Participants. Division: Ehlermann, Abi-Saab, and Feliciano. **Major Topics Addressed by Appellate Body: National Treatment under Article III:4 of GATT; Necessity under Article XX(d) of GATT; Articles 3, 4, 6, and 7 of Agreement on Agriculture.**

1. Abstract

This case involved two separate measures, each tending to protect the Korean beef industry from import competition. The first involved the interpretation of Korea's obligations under the Agreement on Agriculture, in connection with the reduction of domestic support. Here, the Appellate Body found that the Panel failed to examine all of the appropriate components of Korea's treaty obligations. The Appellate Body found however that the method of calculation in respect of compliance with these reductions was that specified in the relevant Annex to the Agreement on Agriculture, rather than that specified in Korea's schedule.

The second measure, broadly speaking, involved Korea's dual retail system. Here, the Appellate Body confirmed that this system constituted differential and less favourable treatment in violation of Article III:4 of GATT. The Appellate Body also confirmed that this measure was not "necessary" to secure compliance with consumer protection laws within the meaning of Article XX(d) of GATT. Along the way, the Appellate Body developed a novel balancing test, relating the degree of trade restriction to the degree of contribution to the regulatory goal. This approach, also developed in part in the recent *Asbestos* decision,248 will stimulate much discussion.

2. Facts

248 Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, adopted 5 April 2001, WT/DS135/AB/R.

In this case, Australia and the U.S. challenge two types of measures affecting imports of beef to Korea. First, Korea maintained a system of supports to the domestic beef industry, and to the agriculture sector more generally. Australia and the U.S. argued that these supports exceeded Korea's commitments under the Agreement on Agriculture. Korea's schedule to that agreement contained two sets of figures, with one set, in brackets, setting forth higher levels of permitted support. Second, Korea maintained a separate retail distribution channel for imported beef under a "dual retail system." Under the dual retail system, department stores were required to erect a separate display for foreign beef, while other stores were required to choose whether they would sell domestic or foreign beef, and if foreign beef, provide signage notifying consumers.

3. Analysis of the Appellate Body Report

Calculation of Korea's Current Aggregate Measure of Support (AMS)

Australia and the U.S. claimed that Korea provided domestic support to its beef industry, measured by "Current AMS" under the Agreement on Agriculture, which were required to be included in Korea's "Current Total AMS" for 1997 and 1998. Once so included, Korea's Current Total AMS exceeded its commitments set out in its Schedule for those years, in violation of Articles 3 and 6 of the Agreement on Agriculture.249 With regard to Korea's commitment levels, there were two sets of figures in the relevant column of Korea's Schedule, one set contained in brackets. The Panel found that the figures not in brackets constituted Korea's commitment.250 The Panel also found that the Current AMS for beef were required to be included in Korea's Current Total AMS, because the Current AMS for beef exceeded the 10% *de minimis* levels set forth in Article 6.4 of the Agreement on Agriculture. The Appellate Body examined each of these issues.

The Appellate Body reaffirmed that schedules are integral parts of the relevant treaties, capable of interpretation under customary rules of international law. The Appellate Body found that the Panel erred in failing to consider the note appended to the relevant column in Korea's Schedule.251 This note referred to the manner of calculation of Korea's commitments, and supported Korea's contention that its commitments were those in brackets. On this basis, the Appellate Body accepted Korea's arguments that the larger, bracketed figures represented its Current Total AMS commitments.

The Appellate Body next turned to the complaining parties' contention that Korea calculated its Current Total AMS improperly by failing to include Current AMS for beef. Here, the question was whether the Current AMS for beef fell below the *de minimis* threshold of 10% established under Article 6.4 of the Agreement on Agriculture. Korea argued that the Panel mistakenly looked to Annex 3 of the Agreement on Agriculture to

249 Appellate Body Report, para. 90.
250 Panel Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161, 169/R, 31 July 2000. The Panel was comprised of Lars Anell, Paul Demaret, and Alan Matthews.
251 Appellate Body Report, para. 97.

calculate Current AMS for beef, instead of taking into account the "constituent data and methodology" provided in Korea's Schedule, as required by Articles 1(a)(ii) and 1(h)(ii) of the Agreement.

Article 1(a)(ii) provides that Current AMS must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." The Panel had found that there was no constituent data and methodology for beef.252 Even if there were, the Appellate Body suggests that calculation "in accordance with" Annex 3 would take precedence over "taking into account" the constituent data and methodology. The Appellate Body thus upheld the Panel's determination that Current AMS for beef was required to be calculated in accordance with Annex 3, alone.253

On this basis, the Appellate Body agreed with the Panel that Korea had miscalculated Current AMS for beef. However, the Panel, in preparing a correct Current AMS for beef, relied on New Zealand's calculation, which, like Korea's, failed to comply in important respects with Annex 3. The Panel, aware of this, assumed that here the error could only favor Korea. The Appellate Body found no basis for this assumption, and therefore reversed the Panel's finding that Korea exceeded the 10% *de minimis* threshold. Consequently, the Appellate Body reversed the Panel's finding that, in 1997 and 1998, Korea's Current Total AMS exceeded its commitments in violation of article 3.2 of the Agreement on Agriculture.254 Because there was insufficient information in the Panel record, the Appellate Body was unable to reach a conclusion as to whether Korea acted inconsistently with articles 3.2, 6, or 7 of the Agreement on Agriculture.

Dual Retail System under Article III:4

Korea had argued that its dual retail system was "separate but equal." The Panel rejected this argument, holding that "any regulatory distinction that is based exclusively on criteria relating to the nationality or origin" of products violates Article III:4.255 The Appellate Body rejected the Panel's *per se* rule of illegality, recognizing that Article III:4 requires treatment "no less favorable," and therefore requires evaluation of the treatment. Thus, the critical question is equality of competitive opportunities. The Appellate Body referred to the *Section 337* panel decision for the proposition that mere difference of treatment is not conclusive.256

The Panel also found that this system provided treatment less favourable to imported beef, in violation of Article III:4 of GATT. The Panel based this finding on the fact that the Korean system was not origin-neutral, and modified the conditions of

252 Panel Report, para. 812.
253 Appellate Body Report, para. 114.
254 Appellate Body Report, para. 127.
255 Panel Report, para. 624.
256 Appellate Body Report, para. 136, citing United States—Section 337 of the Tariff Act of 1930, adopted 7 November 1989, BISD 36S/345, para. 5.11.

competition between imported and domestic beef.257 The main question was whether the dual retail system provided less favourable treatment within the meaning of Article III:4. The Panel referred to GATT and WTO jurisprudence for the proposition that this required "effective equality of opportunities."258 The Appellate Body stated that "A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4."259 It thus found that the Panel erred that criteria relating to nationality or origin, without more, violate Article III.

However, the Panel also found that the dual retail system alters the conditions of competition in the Korean market in favour of domestic products. For example, the fact that retailers were required to choose between carrying imported or domestic beef, when the market share of imports was small, would tend to limit market opportunities for imports.260 While the Panel cited other differences, the Appellate Body found these other differences somewhat speculative and relied principally on the fact that the dual retail system imposed "a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef."261 While this was a choice of retailers, it was a choice required by the Korean legal system: the regulatory intervention providing constrained choice is a measure capable of being evaluated under Article III:4. The Appellate Body held that the Korean dual retail system, as a legal intervention, resulted in treatment less favourable to imported beef.

Dual Retail System under Article XX(d)

The Panel found that the dual retail system was not necessary to secure compliance with the Korean law against deceptive practices, and therefore could not be justified under Article XX(d).262 The Panel found that in connection with related products, Korea enforced its law against deceptive practices such as misrepresentation or passing off of one product for another using traditional enforcement measures, including record-keeping, investigations, policing and fines. The Panel found that these less trade restrictive alternative measures were "reasonably available" to Korea.263

The Appellate Body first examined the definition of "necessity," finding that it could comprise something less than absolute indispensability. Interestingly, the Appellate Body stated that "a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect."264 This

257 Panel Report, para. 627, 631-637.
258 Panel Report, para. 624.
259 Appellate Body Report, para. 137.
260 Panel Report, para. 633.
261 Appellate Body Report, para. 145.
262 Panel Report, para.675.
263 Panel Report, paras. 660-674.
264 Appellate Body Report, para. 162, 163.

statement would involve the Appellate Body in assessing the importance of national goals to a degree not seen, at least explicitly, before. 265 Moreover, it is somewhat inconsistent with the principle, expressed in the SPS Agreement (and referenced in the *Asbestos* case) that member states are permitted to set their own appropriate level of protection. Finally, it is interesting that the Appellate Body refers to "common interests or values." Does this require, or prefer, a degree of homogeneity of purpose?

Indeed, the Appellate Body sets up, rather explicitly, a balancing test. It considers the degree to which the measure contributes to the realization of the end pursued: "the greater the contribution, the more easily a measure might be considered to be 'necessary.'"266 It would also consider the "extent to which the compliance measure produces restrictive effects on international commerce."267 It would also consider the "importance" of the value underlying the measure. The Appellate Body's statement will be breathtaking to some:

> In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.268

This statement constitutes a significant shift toward a greater role of the Appellate Body in weighing regulatory values against trade values. It appears to be intended to speak beyond the Article XX(d) context to all necessity testing, including that under Article XX(b), and presumably, the SPS Agreement and TBT Agreement. The reference to "common interests or values" raises questions about the degree to which the Appellate Body would differentiate among national values on the basis of the degree to which they are shared by other states.

The Appellate Body found that the Panel was justified in examining enforcement measures in similar circumstances, without, as Korea complained, imposing a "consistency" requirement. "Examining such enforcement measures may provide useful input in the course of determining whether an alternative measure which could 'reasonably be expected' to be utilized, is available or not."269 The application of WTO-compatible measures to the same kind of illegal behaviour suggested to the Appellate Body that a reasonably available alternative measure might exist.270 The Appellate Body confirmed the Panel's conclusion that Korea failed to demonstrate that alternative measures were not reasonably available.

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265 *See* Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1998).
266 Appellate Body Report, para. 163.
267 *Id.* (citation omitted).
268 Appellate Body Report, para. 164.
269 Appellate Body Report, para. 170.
270 Appellate Body Report, para. 172.

4. Conclusions

The balancing test for determining "necessity" under Article XX developed in this opinion will stimulate much discussion, and controversy. On the one hand, it is less deferential to national regulatory goals than a test that would simply seek to confirm whether those goals are met, rather than assessing the degree to which they are met. It actually purports to examine the importance of those national goals. These are to be balanced against the impact on trade.