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**Committee on Trade and Environment**

## GATT/WTO DISPUTE SETTLEMENT PRACTICE RELATING TO ARTICLE XX, PARAGRAPHS (b), (d) AND (g) OF GATT

Note by the Secretariat

Revision

## I. INTRODUCTION

1. This Note has been prepared in response to a request from the Committee on Trade and Environment for factual background information on GATT/WTO dispute settlement practice relating to the application of Article XX to environmental measures. The Note focuses on paragraphs (b), (d) and (g) of Article XX of the General Agreement, which are the three exceptions usually referred to in so-called "environmental" disputes, the latter term being understood in a broad sense, so as to cover disputes relating to the protection of the environment as such, but also to the protection of human health. It highlights the most important aspects of relevant panel reports, but is not meant to interpret them.

2. Under the GATT, six panel proceedings involving an examination of environmental measures or human health-related measures under Article XX were completed; out of the six reports, three have remained unadopted.[1] So far, two such proceedings have been completed under the WTO Dispute Settlement Understanding.[2] A brief description of the relevant facts of each case is provided in Annex 1.

3. The pertinent text of Article XX of GATT 1994 reads 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:
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> "*(b)* necessary to protect human, animal or plant life or health; ...

[1] "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", adopted on 22 February 1982, BISD 29S/108 (hereinafter *Tuna 1982*); "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted on 22 March 1988, BISD 35S/98 (hereinafter *Salmon/Herring*); "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted on 7 November 1990, BISD 36S/200 (hereinafter *Cigarettes*), "United States - Restrictions on Imports of Tuna", circulated on 3 September 1991, not adopted, BISD 39S/155 (hereinafter *Tuna I*); "United States - Restrictions on Imports of Tuna", circulated on 16 June 1994, not adopted, DS29/R, (hereinafter *Tuna II* ); "United States - Taxes on Automobiles", circulated on 11 October 1994, not adopted, DS31/R (hereinafter *Auto Taxes*).

[2] "United States - Standards for Reformulated and Conventional Gasoline", Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/9 (hereinafter *Gasoline*); "United States - Import Prohibition of Certain Shrimp and Shrimp Products", Panel Report, WT/DS58/R, circulated on 15 May 1998 and Appellate Body Report, WT/DS58/AB/R, circulated on 12 October 1998 (hereinafter *Shrimp*).

> "*(d)* necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including ...; ...
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> "*(g)* relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production of consumption; ..."

4. It is important to underline at the outset that none of these panels questioned the environmental policy choices underlying the measures at issue. In the *Gasoline* case, for instance, the Panel underlined 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".[3]

## II. APPLICATION OF ARTICLE XX

### A. RELATION BETWEEN ARTICLE XX AND OTHER PROVISIONS OF GATT

5. Dispute settlement practice has determined that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and, as opposed to the positive provisions of the General Agreement, does not establish obligations in itself.[4] It follows that (i) Panels examine Article XX only if it has expressly been invoked by a party to the dispute[5], (ii) Panels have interpreted Article XX narrowly[6], and (iii) the party invoking Article XX bears the burden of proof (for this last point, see following section).

6. Panels generally proceed to examine Article XX once they have found a violation under the substantive obligations of the General Agreement. This principle was established in the *Section 337* case, where the Panel concluded:

> "Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified under Article XX(d)".[7]

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[3] *Gasoline*, Panel Report, paragraph 7.1. See also *Tuna I*, paragraphs 6.1-4, *Tuna II*, paragraphs 5.42-43, and *Shrimp*, Appellate Body Report, paragraphs 185-186.

[4] "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.9, and *Tuna I*, paragraph 5.22.

[5] The Panel report on "United States - Imports of Sugar from Nicaragua" (adopted on 13 March 1984, BISD 31S/67, paragraph 4.4) noted that "the United States had not invoked any of the exceptions provided for in the General Agreement permitting discriminatory quantitative restrictions contrary to Article XIII. The Panel therefore did not examine whether the reduction in Nicaragua's quota could be justified under any such provision". See also "EEC - Regulation on Imports of Parts and Components", adopted on 16 May 1990, BISD 37S/132, paragraph 5.11.

[6] The *Tuna II* Panel Report recorded that "the long-standing practice of panels has ... been to interpret this provision [Article XX] narrowly, in a manner that preserves the basic objectives and principles of the General Agreement [reference is made to the Panel Reports on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, paragraph 5.20, and "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.27], DS29/R, paragraphs 5.26 and 5.38. See also the Appellate Body's discussion on the scope of Article XX (paragraph 13 below).

[7] "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.9. In an isolated case, the Panel started by examining the application of Article XX, considering that "if

7. In practice, a party to a dispute can argue that the contested measure is compatible with the substantive obligations of the GATT, and, in the alternative, that it is covered under Article XX. Hence, the fact that a party invokes Article XX does not constitute "*ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible".[8]

B. BURDEN OF PROOF

8. Panels have traditionally considered that, since Article XX is an exception, it is up to the party invoking it to demonstrate that the measure at issue meets the requirements laid down in that provision. Practically, the party must demonstrate that the measure (i) falls under at least one of the ten exceptions - paragraphs (a) to (j) - listed under Article XX, and (ii) satisfies the requirements of the preamble, i.e. is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade".

9. In the *Gasoline* case, the Panel confirmed this principle by stating 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".[9] In the same case, the Appellate Body stated that "[t]he 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, ... , encompasses the measure at issue".[10]

C. SEQUENCE OF STEPS IN THE ANALYSIS OF ARTICLE XX

10. In the *Gasoline* case, the Appellate Body noted that:

> "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

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Article XX(d) applied, then an examination of the question of the consistency of the [measure] with the other GATT provisions cited above would not be required" ("United States - Imports of Certain Automotive Spring Assemblies", BISD 30S/107, paragraph 50, adopted on 26 May 1983, on the understanding that it would not "foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement" (C/M/168, p. 10); this examination was carried out by the *Section 337* Panel).

[8] *Tuna I*, paragraph 5.22. See also the *Gasoline* case, where the United States argued that "the Gasoline Rule fell within the scope of Article XX whether or not it was inconsistent 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" (WT/DS2/9, Panel Report paragraph 3.37). This argument was not contested by the complaining parties, and the Panel did not address it in its findings.

[9] *Gasoline*, Panel Report paragraphs 6.20, 6.31 and 6.35. See also "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, paragraph 5.20, and "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.9.

[10] *Gasoline*, Appellate Body Report, p. 22-23. Note also the Appellate Body's findings on the burden of proof in the case "United States - Measures Affecting Imports of Woven Wool Shirts and Blouses From India", WT/DS33/AB/R, adopted on 23 May 1997.

> justification by reason of characterization of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX."[11]

11. In the *Shrimp* case, the Appellate Body criticized the Panel for having started its analysis with the chapeau of Article XX. The Appellate Body said:

> "The sequence of steps indicated above [reference to the *Gasoline* case, see paragraph 10] in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in the *United States - Gasoline* seems equally appropriate. We do not agree."
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> "The task of interpreting the chapeau so as to prevent the abuse of misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach ... When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies."[12]

12. In the same case, the Appellate Body noted that "it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau".[13]

## III. THE PREAMBLE OF ARTICLE XX

### A. FUNCTION AND SCOPE OF THE PREAMBLE[14]

13. Under the GATT, only the first two panels addressing Article XX made findings under the preamble (see below paragraphs 20-21). This is explained by the fact that, afterwards, panels developed the practice to examine first whether the measure at issue fell under one of the ten exceptions listed in Article XX. However, until the Appellate Body report in the *Gasoline* case, no measure passed this first step, and as a result panels considered that there was no need to proceed to the chapeau.

14. As to what required justification under the chapeau, the Panel Report on "United States - Imports of Certain Automotive Spring Assemblies" noted that "the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined".[15] This finding was confirmed by the Appellate Body in the *Gasoline* case: "[t]he 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".[16] (See also below paragraph 30).

15. In the same case, the Appellate Body considered the purpose and object of the preamble of Article XX. Referring to the negotiating history of that provision, which indicates that the preamble was meant "to prevent abuse of the exceptions of Article [XX]"[17], the Appellate Body noted:

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[11] *Gasoline*, Appellate Body Report p. 22.
[12] *Shrimp*, Appellate Body Report, paragraphs 119-120.
[13] *Shrimp*, Appellate Body Report, paragraph 149.
[14] Also referred to as "chapeau" or "introductory paragraph".
[15] Adopted on 26 May 1983, BISD 30S/107, paragraph 56.
[16] *Gasoline*, Appellate Body Report, p. 22.
[17] Quoted in Analytical Index: Guide to GATT Law and Practice, Vol. I, p. 564 (1995).

> "[t]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *Genera Agreement*. If those exceptions are not to be abused or misused, in other words, 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".[18]

16. The Appellate Body confirmed this stance in the *Shrimp* report. It recalled that, as confirmed by the negotiating history of that provision,

> "the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau".[19]

17. In fact, according to the Appellate Body, the chapeau is "but one expression of the principle of good faith".[20] Hence,

> "[t]he task of interpreting and applying the chapeau is ... essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[21]

18. In the *Gasoline* case, the Appellate Body also examined the scope of Article XX, i.e. whether Article XX can be invoked as an exception to all substantive obligations under the GATT, or only to some of them. It ruled in favour of the former approach, noting that:

> "[t]he exceptions listed in Article XX ... relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words "nothing in this Agreement", and Article XX as a whole including its chapeau more easily integrated into the remainder of the *General Agreement*, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed".[22]

19. In the *Shrimp* case, the Appellate Body examined the relation between the first preambular paragraph of the WTO Agreement and the chapeau of Article XX. It noted that language contained in the former "demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development" and that,

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[18] *Gasoline*, Appellate Body Report, p. 22.
[19] *Shrimp*, Appellate Body Report, paragraph 157.
[20] *Ibidem*, paragraph 158
[21] *Ibidem*, paragraph 159.
[22] *Gasoline*, Appellate Body Report, p. 24.

> "[p]ending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the *WTO Agreement* generally, we must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which ... gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular."[23]

## B. "AN ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION BETWEEN COUNTRIES WHERE THE SAME CONDITIONS PREVAIL, OR A DISGUISED RESTRICTION ON INTERNATIONAL TRADE"

### 1. GATT 1947 Dispute Settlement Practice

20. Under the GATT, the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" was examined in two disputes. The 1982 Panel on "United States -Prohibition of Imports of Tuna and Tuna Products from Canada" examined whether a US prohibition on imports of tuna and tuna products from Canada fell under Article XX(d) and noted that:

> "[t]he United States action ... had been taken exclusively against imports of tuna and tuna products from Canada, but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and then for similar reasons. The Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable".[24]

In the report on "United States - Imports of Certain Automotive Spring Assemblies", the Panel found that the measure under examination was "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevail" because it "was directed against imports of certain automotive spring assemblies produced in violation of a valid United States patent from all foreign sources, and not just from Canada".[25]

21. In the two aforementioned cases, the concept of "disguised restriction on international trade" was given a very literal interpretation, the two panels putting emphasis on the publicity of the measure. In *Tuna 1982*, the Panel felt that "the United States's action should not be considered to be a disguised restriction on international trade, noting that the United States's prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such".[26] In the second case, the Panel considered that:

> "[n]otice of the exclusion order [i.e. the measure at issue] was published in the Federal Register and the order was enforced by the United States Customs at the border. The Panel also noted that the ITC proceedings in this particular case were directed against the importation of automotive spring assemblies produced in violation of a valid United States patent and that, before an exclusion order could be issued under Section 337, both the validity of a patent and its infringement by a foreign manufacturer had to be clearly established.

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[23] *Shrimp*, Appellate Body Report, paragraphs 152 to 155.

[24] Adopted on 22 February 1982, BISD 29S/91, paragraph 4.8.

[25] Adopted on 26 May 1983, BISD 30S/107, paragraph 55.

[26] *Tuna 1982*, paragraph 4.8. At the Council meeting where the report was adopted, the representative of Canada said that "Canada did not consider it sufficient for a trade measure to be publicly announced as such for it to be considered not to be a disguised restriction on international trade within the meaning of Article XX of the General Agreement" (quoted in Analytical Index: Guide to GATT Law and Practice, Vol. I, p. 565 (1995)).

> Furthermore, the exclusion order would not prohibit the importation of automotive spring assemblies produced by any producer outside the United States who had a license ... to produce these goods. Consequently, the Panel found that the exclusion order had not been applied in a manner which constituted a disguised restriction on international trade".[27]

This interpretation was not confirmed by the Appellate Body.

**2. WTO Dispute Settlement Practice**

(a) The *Gasoline* case

22. In the *Gasoline* case, the Appellate Body did not attempt to define the concepts of "arbitrary discrimination", "unjustifiable discrimination" or "disguised restriction", but decided to look at them in the light of their object and purpose:

> ""[a]rbitrary 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. <u>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</u> ".[28] [emphasis added]

In that case, the Appellate Body rejected the arguments presented by the United States to justify less favourable treatment of foreign producers. The United States was reproached for two omissions: (i) not having adequately explored means to allow foreign producers to benefit from the same treatment as domestic producers; (ii) ignoring the costs resulting for foreign producers from the imposition of a more stringent standard, while these costs had been purposely avoided for domestic producers. According to the Appellate Body:

> "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".[29]

23. An important question is whether the requirement to avoid "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" contained in the chapeau of Article XX overlaps with the most-favoured-nation treatment and the national treatment, as contained in Article I and Article III respectively, or whether

[27]"United States - Imports of Certain Automotive Spring Assemblies", adopted on 26 May 1983, BISD 30S/107, paragraph 56.
[28]*Gasoline*, Appellate Body Report, p. 25.
[29]*Ibidem*, p. 28-29.

it has to be understood as a different, *sui generis*, type of non-discrimination. The Appellate Body favoured the second approach in the *Gasoline* case:

> "[t]he 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 [the measures at issue] 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. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rules existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. 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".[30]

(b) The *Shrimp* case: Panel Report

24. In the *Shrimp* case, the Panel considered it important "to determine first whether the *scope* of Article XX encompasses measures whereby a Member conditions access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s)". The Panel decided to start by examining whether the measures at issue satisfied the conditions contained in the chapeau, because "the chapeau determines to a large extent the context of the specific exceptions contained in the paragraphs of Article XX".[31]

25. The Panel then considered whether the US measure could be considered as "unjustifiable" discrimination between countries where the same conditions prevail. It noted that the term "unjustifiable" had never been subject to any precise interpretation and was susceptible to both narrow and broad interpretations. It decided, therefore, to interpret this term within its context and in the light of the object and purpose of the agreements to which it belonged. The Panel noted:

> "... as the WTO Agreement is an integrated system including GATT 1994 [footnote omitted], we shall consider as the context of the chapeau and of Article XX as a whole not only the other relevant provisions of GATT 1994 together with its preamble and annexes, but also the WTO Agreement, including its preamble and its other annexes. For the same reasons, the object and purpose to be considered is not only that of GATT 1994, but that of the WTO Agreement as a whole."[32]

26. The Panel recalled that in the *Gasoline* case, the Appellate Body had noted that Article XX "needs to be read in its context and in such a manner as to give effect to the purposes and objects of the General Agreement" and "the purpose and object of the introductory clause of Article XX is generally the prevention of 'abuse of the exceptions of ... [Article XX]'". The Panel considered this finding of the Appellate Body to be an application of the *pacta sunt servanda* principle of international law, pursuant to which international agreements must be applied in good faith. Consequently,

> "... when invoking Article XX, a Member invokes the right to derogate to certain specific substantive provisions of GATT 1994 but .... in doing so, it must not frustrate or defeat the

[30] *Ibidem*, p. 23.
[31] *Shrimp*, Panel Report, paragraphs 7.26, 7.29 and 7.33.
[32] *Ibidem*, paragraph 7.34 - 7.35.

purposes and objects of the General Agreement and the WTO Agreement or its legal obligations under the substantive rules of GATT by abusing the exception contained in Article XX."[33]

27. The Panel then turned to the examination of the preamble of the WTO Agreement in order to determine the object and purpose of that Agreement. Looking more specifically at the first paragraph of the preamble, the Panel concluded:

"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 towards liberalization of access to markets on a nondiscriminatory basis."[34]

28. The Panel also noted that "by its very nature, the WTO Agreement favours a multilateral approach to trade issues", as shown in the Preamble to the WTO Agreement and in Article 23.1 of the Dispute Settlement Understanding (DSU).[35]

29. On this basis, the Panel concluded:

"... we are of the opinion that the chapeau of Article XX, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system, thus also abusing the exceptions contained in Article XX. ... We are of the view that a type of measure adopted by a Member which, on its own, may appear to have a relatively minor impact on the multilateral trading system, may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that when considering a measure under Article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system."

"In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened. This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. If that happened, it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements. Indeed, as each of these requirements would necessitate the adoption of a policy applicable not only to export production (such as specific standards applicable only to goods exported to the country requiring them) but also to domestic production, it would be impossible for a country to adopt one of those policies without running the risk of breaching other Members' conflicting policy requirements for the same product and being refused access to these other markets. We note that, in the present case, there would not even be the possibility of adapting one's export

[33] *Ibidem*, paragraphs 7.39 - 7.41.
[34] *Ibidem*, paragraph 7.42.
[35] *Ibidem*, paragraph 7.43.

> production to the respective requirements of the different Members. Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system."[36]

(c) The *Shrimp* case: Appellate Body Report

30. The Appellate Body disagreed with the approach chosen by the Panel in its analysis of Article XX. It criticized the Panel for not expressly examining the ordinary meaning of the words of Article XX and for focusing on the design of the measure rather than on the manner in which the measure was applied. The Appellate Body considered that "the general design of a measure, as distinguished from its application is ... to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau", but not in examining the chapeau itself.

> "The Panel failed to scrutinize the *immediate* context of the chapeau: i.e. paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner. Thus, the Panel arrived at the very broad formulation that measures which 'undermine the WTO multilateral trading system' [footnote omitted] must be regarded as 'not within the scope of measures permitted under the chapeau of Article XX' [footnote omitted]. 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."[37]

31. Thus, according to the Appellate Body, the approach chosen by the Panel -i.e. examining the chapeau first- led it to formulate an inappropriately broad test (that of a measure which "undermines the WTO multilateral trading system") (see also above paragraph 11). The Appellate Body further noted that "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".[38]

32. Consequently, the Appellate Body "reverses the Panel's finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994 ...".[39]

33. The Appellate Body then carried out its own analysis of the case. After finding that the US measure qualified for "provisional justification under Article XX(g)" (see below, Section V), the Appellate Body examined whether that measure met the requirements of the chapeau. It found that various cumulative factors in the application of Section 609 constituted "unjustifiable discrimination". The Appellate Body noted that "[p]erhaps the most conspicuous flaw in this measure's application related to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO."[40] It considered *inter alia* that:

> "it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's

[36] *Ibidem*, paragraphs 7.44 and 7.45.
[37] *Shrimp*, Appellate Body Report, paragraph 116.
[38] *Ibidem*, paragraph 115-122.
[39] *Ibidem*, paragraph 187.
[40] *Ibidem*, paragraph 161.

territory, *without* taking into consideration different conditions which may occur in the territories of those other Members."[41]

34. Other elements relating to the application of the measure showed, in the view of the Appellate Body, an "unjustifiable discrimination". First, the Appellate Body noted the importance of international cooperation to protect migratory species such as sea turtles and reproached the United States for not having engaged the complaining countries "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition ...". As a result, the application of Section 609 is unilateral, which "heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability".[42] Second, the fact that countries had different periods of time for phasing in the requirements of Section 609 also constituted different treatment among various countries desiring certification.[43] Third, "[d]iffering treatment of different countries desiring certification is also observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries".[44]

35. The Appellate Body then went on to consider whether the measure at issue had been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". It first noted that the rigidity and inflexibility in the application of the measure, already noted above (see paragraph 33), "also constitutes 'arbitrary discrimination' within the meaning of the chapeau".[45] Second, other characteristics of the certification process (such as, lack of transparency and predictability, no formal opportunity for an applicant country to be heard, no procedure for review of, or appeal from, a denial of an application) tend to show that "exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification"; this is contrary "to the spirit, if not to the letter, of Article X:3 of the GATT 1994".[46]

36. On this basis, the Appellate Body concluded that the measure at issue was applied "in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX. The measure, therefore, is not entitled to the justifying protection of Article XX of the GATT 1994. Having made this finding, it is not necessary for us to examine also whether the United States measure is applied in a manner that constitutes a "disguised restriction on international trade" under the chapeau of Article XX."[47]

## IV. PARAGRAPH (B) OF ARTICLE XX

### A. BURDEN OF PROOF

37. As noted above (see paragraphs 8-9), the party invoking Article XX bears the burden of proving that the contested measure meets the requirements contained in that provision. Under paragraph (b), Panel practice has determined that this demonstration includes 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;

[41] *Ibidem*, paragraph 164.
[42] *Ibidem*, paragraph 166 to 172.
[43] *Ibidem*, paragraph 174.
[44] *Ibidem*, paragraph 175.
[45] *Ibidem*, paragraph 177.
[46] *Ibidem*, paragraphs 178 to 183.
[47] *Ibidem*, paragraph 184.

> "(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".[48]

B. THE POLICY GOAL OF PROTECTING HUMAN, ANIMAL AND PLANT LIFE OR HEALTH

38. In the case "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", the Panel found that measures by Thailand prohibiting imports of cigarettes were inconsistent with Article XI. Thailand argued that the import ban fell under Article XX(b) because the government had adopted measures to control smoking which would only be effective if cigarettes imports were prohibited and because US cigarettes contained additives which made them more harmful than Thai cigarettes. An expert from the World Health Organization (WHO) was heard by the Panel. Regarding the scope of paragraph (b), the Panel accepted, in agreement with the parties to the dispute and the expert from the WHO, 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"".[49]

39. In the two *Tuna* disputes, the Panel and the parties accepted - implicitly in the first case, explicitly in the second one - that the protection of dolphin life or health was a policy that could fall under Article XX(b).[50] In the *Gasoline* case, the Panel and the parties agreed that:

> "the 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)".[51]

C. MEASURE REQUIRING JUSTIFICATION UNDER ARTICLE XX(B)

40. According to panel practice, the measure requiring justification under Article XX(b) is not the policy goal (the protection of the environment or of public health, for instance), but the inconsistency with the General Agreement which has been previously determined by the Panel. In *Tuna I*, the Panel found that:

> "[t]he conditions set out in Article XX(b) which limit resort to this exception, namely that the measure taken must be "necessary" and not "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade" refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the contracting party".[52]

41. After finding that the imported gasoline was treated less favourably than domestic gasoline, the *Gasoline* Panel examined 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).

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[48] *Gasoline*, Panel Report, paragraph 6.20. See also *Tuna II*, paragraph 5.29.
[49] Adopted on 7 November 1990, BISD 37S/200, paragraph 73.
[50] *Tuna I*, and *Tuna II*, paragraph 5.30.
[51] *Gasoline*, Panel Report, paragraph 6.21.
[52] *Tuna I*, paragraph 5.27.

> "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."[53]

Note, however, the findings made in this regard by the Appellate Body under paragraph (g) of Article XX (see below, paragraph 59).

D. THE CONCEPT OF NECESSITY

42. The examination of whether or not a measure is "necessary" under paragraph (b), commonly referred to as the "necessity test", has proved to be a crucial step in panel practice. So far, no Panel called to apply that paragraph accepted the necessity of a measure otherwise inconsistent with other provisions of the GATT. The *Cigarettes* report provided the first application of Article XX(b), and set the benchmark for subsequent cases. In that case, the Panel concluded 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".[54]

The Panel borrowed the "least-trade restrictive" requirement from a previous panel report[55], which had applied it in relation with Article XX(d), with the following justification:

> "[t]he 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".[56]

43. In the *Cigarettes* case, the Panel concluded that the import restrictions were not "necessary" within the meaning of paragraph (b) because Thailand could implement other policy measures consistent with the General Agreement to reach the same public health objective. For instance, Thailand could regulate the *quality* of cigarettes through strict, non-discriminatory labelling and ingredient disclosure regulations, coupled with a ban on unhealthy substances; similarly, Thailand could control the *quantity* of cigarettes consumed in the country by banning advertisements of cigarettes. These measures, applied on both imported and domestic cigarettes, would be consistent

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[53] *Gasoline*, Panel Report, paragraph 6.22.

[54] *Cigarettes*, paragraph 75.

[55] The Panel Report on "United States - Section 337 of the Tariff Act of 1930" 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 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" (adopted on 7 November 1989, BISD 36S/345, paragraph 5.26).

[56] *Cigarettes*, paragraph 74.

with the General Agreement, in particular with Article III (National Treatment). Considering the WHO resolutions on smoking that had been made available to it, the Panel also noted that the health measures they recommended were non-discriminatory and concerned all, not just imported cigarettes.[57]

44. In *Tuna I*, the Panel considered that, even if an extrajurisdictional application of Article XX(b) were permitted, the United States would not have met, *in casu*, the necessity requirement for two reasons. First, the United States had not demonstrated to the Panel that "it had exhausted all options reasonably available to it to pursue dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high sea". Second, by linking the maximum incidental dolphin taking rate which Mexico had to meet during a particular period to the taking rate actually recorded for United States fishermen during the same period, the United States limited trade on the basis of unpredictable conditions that could not be regarded as necessary to protect the health and life of dolphins.[58]

45. In the *Gasoline* case, the Panel examined whether there were consistent or less inconsistent measures reasonably available to the United States to pursue its policy objectives, whereby imported gasoline would be afforded as favourable sales conditions as domestic gasoline:

> "[t]he 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".[59]

The Panel reviewed various options which it considered to be reasonably available to the United States while being consistent or less inconsistent with the General Agreement. Therefore, the Panel concluded that the United States "had failed to demonstrate the necessity of the Gasoline Rule's inconsistency with Article III:4" in this case.[60]

## E. JURISDICTIONAL APPLICATION OF ARTICLE XX(B)

46. The question to know whether Article XX(b) can be invoked to protect the life or health of animals outside the jurisdiction of the country invoking it was examined in the two *Tuna* panel reports, both of them remaining unadopted. The reasoning followed by the two Panels differs on several points.

### 1. Negotiating history

47. In *Tuna I*, the Panel, considering that the text of Article XX(b) does not clearly answer the question of the location of the living things to be protected, resorted to the drafting history of that provision and noted the following:

> "[t]he proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, "Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption

[57] *Ibidem*, paragraphs 77-81.
[58] *Tuna I*, paragraph 5.28.
[59] *Gasoline*, Panel Report, paragraph 6.25.
[60] *Ibidem*, paragraphs 6.25 to 6.28.

> or enforcement by any Member of measures: ... (b) necessary to protect human, animal or plant life or health". In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country". This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of the Preparatory Committee in Geneva agreed to drop this proviso as unnecessary [footnote referring to EPCT/A/PV/30/7-15]. Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country".[61]

48. In *Tuna II*, the Panel observed that "the text of Article XX(b) does not spell out any limitation on the location of the living things to be protected". Referring to various observations made in relation to the jurisdictional application of Article XX(g) (see below paragraphs 76-83), the Panel considered them to be equally valid for the application of Article XX(b). Regarding the negotiating history of the provision, it reached a different conclusion than *Tuna I* by noting that:

> "the statements and drafting changes made during the negotiation of the Havana Charter and the General Agreement did not clearly support any particular contention of the parties with respect to the location of the living thing to be protected under Article XX(b). The Panel did not see the need to settle the issue argued by the parties as to whether the intent of the drafters was to restrict measures justifiable under Article XX to sanitary measures. The Panel therefore found that the policy to protect the life and health of dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(b)".[62]

### 2. The concept of necessity and the extrajurisdictional application of Article XX(b)

49. In *Tuna I*, the Panel, referring to the *Cigarettes* case, recalled that Article XX(b) was intended to allow countries to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. On this basis, the Panel considered that:

> "if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations".[63]

50. In *Tuna II*, the Panel considered that neither the *intermediary* nor the *primary* nation embargo could possibly, by themselves, further the United States objectives of protecting the life and health of dolphins. Their desired effect was contingent upon exporting countries changing their polices and practices. This led the Panel to examine whether measures "necessary to protect the life and health of animals could include measures taken so as to force other countries to change their policies within their own jurisdiction, and requiring such changes in order to be effective". The Panel concluded that measures taken so as to force other countries to change their policies, and that are effective only if such changes occurred, could not be considered "necessary" within the meaning of Article XX(b). This conclusion was justified as follows:

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[61] *Tuna I*, paragraphs 5.25-26.
[62] *Tuna II*, paragraphs 5.31 to 5.33.
[63] *Tuna I*, paragraph 5.27.

> "If Article XX(b) were interpreted to permit contracting parties to deviate from the basic obligations of the General Agreement by taking trade measures to implement policies within their own jurisdiction, including policies to protect living things, the objectives of the General Agreement would be maintained. If however Article XX(b) were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which required such changes to be effective, the objectives of the General Agreement would be seriously impaired".[64]

## V. PARAGRAPH (G) OF ARTICLE XX

### A. BURDEN OF PROOF

51. Under Article XX(g), panel practice has determined that the party bearing the burden of proof must demonstrate the following elements:

> "(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies 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".[65]

### B. POLICY GOAL OF CONSERVING EXHAUSTIBLE NATURAL RESOURCES

52. In the *1982 Tuna* Panel Report, the Panel "noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management".[66] In the *Salmon/Herring* case, the Panel agreed with the parties that salmon and herring stocks are "exhaustible natural resources".[67] In *Tuna I*, the parties and the Panel seem to have implicitly agreed that dolphins are an exhaustible natural resource, whereas in *Tuna II* the parties disagreed as to whether dolphins should be considered as an "exhaustible natural resource". In the latter case, the Panel, "noting that dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource".[68]

53. In *Auto Taxes*, the Panel considered whether the CAFE regulation was a policy to conserve an exhaustible natural resource. The Panel, "noting that gasoline was produced from petroleum, an exhaustible natural resource, found that a policy to conserve gasoline was within the range of policies mentioned in Article XX(g)".[69]

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[64] *Tuna II*, paragraphs 5.37 to 5.39.
[65] *Gasoline*, Panel Report, paragraph 6.35. See also *Tuna II*, paragraph 5.12.
[66] *Tuna 1982*, BISD 29S/91, paragraph 4.9.
[67] *Salmon/Herring*, paragraph 4.4.
[68] *Tuna II*, paragraph 5.13.
[69] *Auto Taxes*, paragraph 5.57.

54. In the *Gasoline* case, the United States argued that clean air was an exhaustible natural resource since it could be exhausted by pollutants such as those emitted through the consumption of gasoline. Venezuela disagreed, considering that clean air was a "condition" of air that was renewable rather than a resource that was exhaustible. The Panel agreed with the former:

> "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 [footnote referring to "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", adopted on 22 March 1988, BISD 35S/98]. 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)".[70]

55. In the *Shrimp* case, the parties disagreed as to whether sea turtles could be considered "exhaustible nature resources" within the meaning of paragraph (g). The Appellate Body noted that, contrary to what argued the complainants, the text of Article XX (g) was *not* limited to the conservation of "mineral" or "non-living" natural resources and that living species, which are in principle "renewable", "are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities". The Appellate Body further noted that:

> "The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They 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. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges "the objective of *sustainable development*" [footnote omitted]....
>
> "From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary" [footnoted omitted]. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources....
>
> "Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. [footnote omitted] Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g) [reference to *Tuna 1982* and *Salmon/Herring*]. We hold that, in line with the principle of effectiveness in treaty interpretation [footnote omitted], measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)."

56. Considering further that all of the seven recognized species of sea turtles are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

[70] *Gasoline*, Panel Report, paragraph 6.37.

("CITES"), the Appellate Body concluded that the five species of sea turtles involved in the dispute constitute "exhaustible natural resources" within the meaning of Article XX(g) of the GATT 1994.[71]

C. MEASURE REQUIRING JUSTIFICATION UNDER ARTICLE XX(G)

57. In *Tuna I*, the Panel noted that "the conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they do not "constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade" refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party".[72]

58. In *Auto Taxes*, the Panel "recalled that the measure requiring justification under Article XX(g) was not the Motor Vehicle Information and Cost Saving Act in general, nor the establishment of the CAFE fuel consumption standard as such. The measure at issue was the discrimination against foreign cars and parts resulting from the CAFE regulations providing for the calculation of the fleet average fuel consumption".[73]

59. The practice to examine under Article XX the inconsistencies found under other GATT provision(s) was, however, modified by the Appellate Body in the *Gasoline* case. In that dispute, the Panel, following past practice, had 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".[74] The Appellate Body disagreed and found that:

> "[o]ne problem ... 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. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided "less favourable treatment" under Article III:4 before the Panel examined the "General Exception" contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the "measures" which are to be examined under Article XX(g), and not the legal finding of "less favourable treatment".[75]

D "RELATING TO ..."

**1. GATT 1947 dispute settlement practice**

60. The first application of the "relating to" concept was made in the *Salmon/Herring* case. After agreeing that salmon and herring were exhaustible natural resources and that harvest limitations imposed by Canada were restrictions on domestic production, the Panel examined whether the export prohibitions maintained by Canada on certain unprocessed salmon and herring were "relating to" the conservation of salmon and herring stocks:

> "Article XX(g) does not state how the trade measures are to be related to the conservation and how they have to be conjoined with the production restrictions. This raises the question of

[71] *Shrimp*, Appellate Body Report, paragraphs 127 to 134. The Panel did not make findings under Article XX(g).
[72] *Tuna I*, paragraph 5.32.
[73] *Auto Taxes*, paragraph 5.59.
[74] *Gasoline*, Panel Report, paragraph 6.40.
[75] *Gasoline*, Appellate Body Report, p. 16. In this dispute, the United States limited its appeal to the Panel's findings under Article XX(g).

> whether *any* relationship with conservation and *any* conjunction with production restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a *particular* relationship and conjunction are required".[76]

The Panel decided to examine the meaning of "relating to" in the light of the context in which Article XX(g) appears in the General Agreement and of the purpose of that provision. It noted that:

> "some of the subparagraphs of Article XX state that the measure must be "necessary" or "essential" to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures "relating to" the conservation of exhaustible natural resources. This suggests that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, 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 exhaustible natural resources. The Panel concluded for these reasons that, <u>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)</u>".[77] [emphasis added]

The Panel then proceeded to examine whether the export prohibitions on unprocessed salmon and herring were primarily aimed at the conservation of salmon and herring stocks and rendering effective the restrictions on the harvesting of salmon and herring. The Panel considered the various characteristics of the measures maintained by Canada, and noted in particular that unlike foreign processors and consumers, domestic processors and consumers can purchase these unprocessed fish without limit. It then concluded that "these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish." The export prohibitions were therefore not justified under Article XX(g).[78]

61. The "primarily aimed at" test was subsequently applied in *Tuna I, Tuna II* (for this case, see below paragraph 85), *Auto Taxes*, and *Gasoline*. In *Tuna I*, the Panel made the following finding regarding the terms "relating to":

> [t]he Panel did not consider that the United States measures, even if Article XX(g) could be applied extrajurisdictionally, would meet the conditions set out in that provision. ... [T]he United States linked the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the United States conservation standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins".[79]

62. In *Auto Taxes*, the Panel examined successively the separate foreign fleet accounting and the fleet averaging. It found, based on the evidence submitted, that:

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[76] *Salmon/Herring*, paragraph 4.5.
[77] *Ibidem*, paragraph 4.6.
[78] *Ibidem*, paragraph 4.7.
[79] *Tuna I*, paragraph 5.33.

> "separate foreign fleet accounting primarily served to inhibit imports of small cars. This did not contribute directly to fuel conservation in the United States. Indeed, it was likely to make it more costly, and therefore more difficult, for domestic manufacturers to meet the CAFE standard and the overall goal of conserving fuel. The Panel was of the view that a measure that did not further the objectives of conservation of an exhaustible resource could not be deemed to be primarily aimed at such conservation and therefore found that the measure found to be inconsistent with Article III:4 was not justified by Article XX(g)".[80]

In examining the fleet averaging system, the Panel recalled that:

> "the requirement under Article XX(g), unlike those related to the protection of public morals or human, animal or plant life and health (Articles XX(a) and (b)), or those relating to compliance with laws or regulations not inconsistent with the General Agreement (Article XX(d)), did not require that the measure be necessary. Subject to the requirements of the introductory clause of Article XX, the fact that other less trade restrictive measures, such as fuel tax, could be used equally and more effectively to encourage fuel efficiency did not imply that the measure could not be justified under Article XX(g)".[81]

The Panel did not make a finding on the consistency of a fleet averaging system with Article XX(g). It noted, however, the following:

> "the inconsistency of the CAFE regulation with Article III:4 arose from the fact that the treatment of imported products was dependent on factors not directly relating to the products as products: averaging was applied to a particular mix of products determined by the ownership and control relationships of producer/importers. The issue before the Panel was therefore whether the application of this form of averaging to imported cars was primarily aimed at rendering effective conservation requirements imposed on domestic production. The Panel observed that if there were no requirement placed on imported cars, the objectives of the CAFE programme would be prejudiced, as imported large cars would not be subject to any restriction on fuel consumption. Thus the application of fleet averaging to imported cars in a similar manner to its application to domestic cars clearly served the purpose of fuel conservation, and served to render effective the conservation measure. In these respects, fleet averaging met two of the key requirements of Article XX(g)".[82]

## 2. WTO Dispute Settlement Practice

63. In the *Gasoline* case, the Panel had concluded that "the less favourable baseline establishments methods at issue ... were not primarily aimed at the conservation of natural resources", in particular because the Panel had seen "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".[83]

64. Referring to the "General rule of interpretation" contained in Article 31 of the Vienna Convention on the Law of Treaties[84], which, according to the Appellate Body, applies pursuant to Article 3.2 of the DSU, the Appellate Body noted that Article XX uses different terms in "enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization". It deduced therefrom that "[i]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree

[80] *Auto Taxes*, paragraph 5.60.
[81] *Ibidem*, paragraph 5.63.
[82] *Ibidem*, paragraphs 5.63-66.
[83] *Gasoline*, Panel Report, paragraph 6.40.
[84] See Annex 2.

of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized".[85]

65. Following Article 31 of the Vienna Convention, the Appellate Body considered that Article XX(g) had to be read in context and in the light of the object and purpose of the *General Agreement*:

> "[t]he context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose".[86]

66. The Appellate Body noted 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)", but did not consider it was necessary to examine that point further since, in the appeal proceeding, the parties and third parties to the dispute had accepted the "primarily aimed at" test as developed by previous panel report. In this particular case, the Appellate Body found, contrary to the Panel, that the baseline establishment rules were "primarily aimed at" the conservation of natural resources; according to the Appellate Body, the baseline establishment rules could not be divorced from other parts of the Gasoline Rule, but had to be considered in the global context of the Gasoline Rule to which they were related. This relationship was "not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4" (see above paragraph 59).[87]

67. In the *Shrimp* case, the Appellate Body recalling the findings it had reached in *Gasoline*, noted:

> "[i]n the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles".[88]

68. In doing so, the Appellate Body found in particular that the requirement that a country adopt a regulatory programme requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles was "directly connected with the policy of conservation of sea turtles". As to the "design" of the measure, the Appellate Body considered that:

> "Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States - Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States."

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[85] Appellate Body Report, p. 17-18.
[86] *Gasoline*, Appellate Body Report, p. 18.
[87] *Ibidem*, p. 16-19.
[88] *Shrimp*, Appellate Body Report, paragraph 137. The Panel did not make findings under Article XX(g).

69. Consequently, the Appellate Body concluded that Section 609 was a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of GATT 1994.[89]

E. "IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION OR CONSUMPTION"

**1. GATT 1947 Dispute Settlement Practice**

70. In the 1982 Report on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", the Panel concluded that it was not necessary to interpret the terms "relating to" and "in conjunction with" since it had found that the party invoking Article XX(g) did not maintain restrictions on the domestic production or consumption of tuna.[90]

71. In the *Salmon/Herring* case, the Panel decided to examine the "relating to" concept in the light of the context and purpose of Article XX(g). It found that a measure had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as "relating to" conservation (see above paragraph 60). The Panel then went on to examine the terms "in conjunction with" and considered that these terms

> "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 ... only be considered to be made effective "in conjunction with" production restrictions if it was primarily aimed at rendering effective these restrictions".[91]

72. In *Tuna I*, the Panel recalled the findings of the *Salmon/Herring* Panel and noted:

> "[a] country can effectively control the production or consumption of an exhaustible natural resource only to the extent the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction".
>
> "The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they not "constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade" refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) ... were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g)".[92]

73. For *Tuna II*, see below paragraph 85, and for *Auto Taxes* see above paragraph 62.

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[89] *Shrimp*, Appellate Body Report, paragraphs 135 to 142.
[90] Adopted on 22 February 1982, BISD 29S/91.
[91] *Salmon/Herring*, paragraph 4.6.
[92] *Tuna I*, paragraphs 5.31-5.32.

## 2. WTO Dispute Settlement Practice

74. In the *Gasoline* case, the Panel found that the less favourable baseline establishment methods at issue were not "relating to" the conservation of clean air, and thus did not feel it necessary to examine whether the baseline establishment rules were "made effective in conjunction with restrictions on domestic production or consumption". The Appellate Body, having reversed the findings of the Panel on the former point (see above paragraphs 63-66), examined the latter. Its findings modified the practice established so far by Panels. The Appellate Body considered that:

> "the clause "if such measures are made effective in conjunction with restrictions on domestic production 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.
>
> "There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if *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 [footnote omitted]. The measure would simply be naked discrimination for protecting locally-produced goods.
>
> "In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for - generally speaking - individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of "dirty" gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded "less favourable treatment" than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also be noted that the second clause of Article XX(g) speaks disjunctively of "domestic production *or* consumption.
>
> "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".[93]

75. In the *Shrimp* case, the Appellate Body said it needed "to examine whether the restrictions imposed by Section 609 with respect to imported shrimp are also imposed in respect of shrimp caught

[93] *Gasoline*, Appellate Body Report, p. 20-22.

by United States shrimp trawl vessels". Considering in particular that US shrimp trawlers were required, but for a few exceptions, to use approved TEDs in areas and at times where there was a likelihood of intercepting sea turtles, the Appellate Body concluded that Section 609 was "an even-handed measure", and, accordingly, was "made effective in conjunction with the restrictions on domestic harvesting of shrimp".[94]

## F. JURISDICTIONAL APPLICATION OF ARTICLE XX(G)

76. The jurisdictional application of Article XX(g) was examined in the two *Tuna* panel reports, both of them remaining unadopted. The reasoning followed by the two panels differs.

### 1. The distinction between territory and jurisdiction

77. In *Tuna II*, the Panel examined in detail the territorial application of Article XX(g) and made a distinction between territory and jurisdiction which does not appear in *Tuna I*. The analysis focused on the following points.

78. Considering the text of Article XX(g), the Panel observed that:

> "it does not spell out any limitation on the location of the exhaustible natural resources to be conserved. ... The nature and precise scope of the *policy area* in the Article, the conservation of exhaustible natural resources, is not spelled out or specifically conditioned by the text of the Article, in particular with respect to the location of the exhaustible natural resource to be conserved. The Panel noted that two previous panels have considered Article XX(g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision [reference is made to the *Salmon/Herring* case and the *1982 Tuna* case]".[95]

79. The Panel also considered the context in which Article XX(g) is found and observed:

> "measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX(e) relating to products of prison labour. It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure".[96]

80. Referring to general international law, the Panel observed:

> "states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory. Nor are states barred, in principle, from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory. A state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fishermen on vessels, with respect to fish located in the high seas".[97]

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[94] *Shrimp*, Appellate Body Report, paragraphs 143 to 145.
[95] *Tuna II*, paragraph 5.15.
[96] *Ibidem*, paragraph 5.16.
[97] *Ibidem*, paragraph 5.17.

81. The Panel found that bilateral or plurilateral environmental and trade treaties, referred to by the parties to support their arguments on the location of exhaustible natural resources, were not relevant as a *primary* means of interpretation of the General Agreement under the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties. The Panel argued in support of that conclusion that (i) those treaties were not concluded among the contracting parties to the General Agreement and they did not apply to the interpretation of the General Agreement or the application of its provisions; (ii) practice under those treaties "could not be taken as practice under the General Agreement, and therefore could not affect the interpretation of it".[98]

82. The Panel also considered that those treaties were not relevant as a *supplementary* means of interpretation of the General Agreement pursuant to Article 32 of the Vienna Convention:

> "... those cited treaties that were concluded prior to the conclusion of the General Agreement were of little assistance in interpreting the text of Article XX(g), since it appeared to the Panel on the basis of the material presented to it that no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments. The Panel also found that the statements and drafting changes made during the negotiation of the Havana Charter and the General Agreement cited by the parties did not provide clear support for any particular contention of the parties on the question of the location of the exhaustible natural resource in Article XX(g)".

83. In view of the aforementioned considerations, the Panel

> "could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g)".[99]

**2. The concept of "relating to" and the extrajurisdictional application of Article XX(g)**

84. In *Tuna I*, the Panel rejected an extrajurisdictional application of Article XX(g) for the same reasons it rejected an extrajurisdictional application of Article XX(b) (see above paragraph 49).

85. In *Tuna II*, the Panel, recalling the conclusion reached in the *Salmon/Herring* case, decided to examine whether the embargoes imposed by the United States could be considered to be primarily aimed at the conservation of an exhaustible natural resource and primarily aimed at rendering effective restrictions on domestic production or consumption. The Panel examined in particular the relationship of the United States measures with the expressed goal of dolphin conservation. It noted in particular that both the *intermediary* and the *primary* nation embargoes could not by themselves conserve dolphins, but could achieve their conservation objectives only if they were followed by changes in policies and practices in other countries. They were then taken "so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins". The Panel then noted that Article XX(g) does not provide a clear answer as to whether "measures primarily aimed at the conservation of exhaustible natural resources, or primarily aimed at rendering effective domestic restrictions on their production or consumption, could include measures taken so as to force other countries to change their policies with respect to persons and things within their own jurisdictions, and requiring such changes in order to be effective". Examining paragraph (g)

[98] *Ibidem*, paragraph 5.19.
[99] *Ibidem*, paragraph 5.20.

in the light of the object and purpose of the General Agreement, and recalling that the long-standing practice of panels has been to interpret Article XX narrowly, the Panel found:

> "[i]f ... Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.
>
> "The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g)".[100]

## VI. PARAGRAPH (D) OF ARTICLE XX

### A. BURDEN OF PROOF

86. The *Gasoline* Panel noted that the party invoking paragraph (d) had to demonstrate the following elements:

> "(1) that the measures for which the exception was 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".[101]

### B. "NOT INCONSISTENT WITH ..."

62. In *Tuna I*, the Panel examined whether the *intermediary nations* embargo was justified under paragraph (d) and noted:

> "Article XX(d) requires that the "laws and regulations" with which compliance is being secured be themselves "not inconsistent" with the General Agreement. The Panel noted that the United States had argued that the "intermediary nations" embargo was necessary to support the direct embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo's effect by exporting to the United States indirectly through third countries. The Panel found that, given its finding that the direct embargo was inconsistent with the General Agreement, the "intermediary nations" embargo and the provisions of the MMPA under which it is imposed could not be justified under Article XX(d) as a measure to secure compliance with "laws or regulations not inconsistent with the provisions of this Agreement"."[102]

63. A similar reasoning was followed in *Tuna II*, where the Panel, "recalling its finding that the measures taken under the primary nation embargo were inconsistent with Article XI:1 of the General

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[100] *Tuna II*, paragraphs 5.21-5.27.
[101] *Gasoline*, Panel Report, paragraph 6.31.
[102] *Tuna I*, paragraph 5.40.

Agreement, concluded that the primary nation embargo could not, by the explicit terms of Article XX(d), serve as a basis for the justification of the intermediary nation embargo".[103]

64. In *Auto Taxes*, the Panel

> "recalled its finding that the CAFE measure was not a charge under Article III:2, but a requirement under Article III:4 enforceable by penalty payments. The fundamental issue before the Panel, and the object of its finding under Article III:4, was thus the consistency of the underlying CAFE requirement with the General Agreement, not that of the penalty payments as such. Even if the issue of the consistency of the penalty payments as such were examined by the Panel, such payments could not be justified under Article XX(d) since, contrary to the requirements of that provision, the underlying measure (the CAFE requirement) was itself inconsistent with the General Agreement. Accordingly, the Panel found that those aspects of the CAFE regulation found inconsistent with Article III:4 could not be justified under Article XX(d)".[104]

65. In the *Gasoline* case, the Panel examined 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 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".[105]

Note, however, the findings made in this regard by the Appellate Body under paragraph (g) of Article XX (see above, paragraph 59).

[103] *Tuna II*, paragraph 5.41.
[104] *Auto Taxes*, paragraph 5.67.
[105] *Gasoline*, Panel Report, paragraphs 6.32-33.

ANNEX 1

Main Facts[106]

## I. "UNITED STATES - PROHIBITION OF IMPORTS OF TUNA AND TUNA PRODUCTS FROM CANADA", adopted on 22 February 1982, BISD 29S/91

1. An import prohibition was introduced by the United States after Canada had seized 19 fishing vessels and arrested US fishermen fishing for albacore tuna, without authorization from the Canadian government, in waters considered by Canada to be under its jurisdiction. The United States did not recognize this jurisdiction and introduced an import prohibition as a retaliation under the Fishery Conservation and Management Act.

2. The Panel found that the import prohibition was contrary to Article XI:1, and not justified neither under Article XI:2, nor under Article XX(g) of the General Agreement.

## II. "CANADA - MEASURES AFFECTING EXPORTS OF UNPROCESSED HERRING AND SALMON", adopted on 22 March 1988, BISD 35S/98

3. Under the 1976 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The United States complained that these measures were inconsistent with GATT Article XI. Canada argued that these export restrictions were part of a system of fishery resource management destined at preserving fish stocks, and therefore were justified under Article XX(g).

4. The Panel found that the measures maintained by Canada were contrary GATT Article XI:1 and not justified neither by Article XI:2(b) nor by Article XX(g).

## III. "THAILAND - RESTRICTIONS ON IMPORTATION OF AND INTERNAL TAXES ON CIGARETTES", adopted on 7 November 1990, BISD 37S/200

5. Under 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 GATT Article XI:1, and considered that they were not justified by Article XI:2(c), nor by Article XX(b). The United States also requested the Panel to find that the internal taxes were inconsistent with GATT 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 cigarettes imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes.

6. The Panel found that the import restrictions was inconsistent with Article XI:1 and not justified under Article X1:2(c). It further concluded that the import restrictions were not "necessary" within the meaning of Article XX(b). The internal taxes were found to be consistent with Article III:2.

## IV. "UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA", not adopted, circulated on 3 September 1991, BISD 39S/155

7. The Marine Mammal Protection Act (MMPA) required a general prohibition of "taking" (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals, except with explicit authorization. It governed in particular the taking of marine

[106]The facts highlighted here are those relevant for the purpose of this Note.

mammals incidental to harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP), an area where dolphins are known to swim above schools of tuna. Under the MMPA, the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards were prohibited. In particular, the importation of yellowfin tuna harvested with purse-seine nets in the ETP was prohibited (*primary nation embargo*), unless the competent US authorities establish that (i) the government of the harvesting country has a programme regulating taking of marine mammals that is comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by US vessels. The average incidental taking rate (in terms of dolphins killed each time in the purse-seine nets are set) for that country's tuna fleet must not exceed 1.25 times the average taking rate of United States vessels in the same period. Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo are also prohibited (*intermediary nation embargo* ).

8. Mexico claimed that the import prohibition on yellowfin tuna and tuna products was inconsistent with Articles XI, XIII and III of GATT. The United States requested the Panel to find that the *direct embargo* was consistent with Article III and, in the alternative, was covered by Articles XX(b) and XX(g). The United States also argued that the *intermediary nation* embargo was consistent with Article III and, in the alternative, was justified by Article XX, paragraphs (b), (d) and (g).

9. The Panel found that the import prohibition under the *direct* and the *intermediary* embargoes did not constitute internal regulations within the meaning of Article III, was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g). Moreover, the *intermediary* embargo was not justified under Article XX(d).

## V. "UNITED STATES - RESTRICTIONS ON IMPORTS OF TUNA", not adopted, circulated on 16 June 1994, DS29/R

10. The EEC and Netherlands complained that both the *primary* and the *intermediary* nation embargoes, enforced pursuant to the MMPA (see above paragraph 7), did not fall under Article III, were inconsistent with Article XI:1 and were not covered by any of the exceptions of Article XX. The United States considered that the *intermediary* nation embargo was consistent with GATT since it was covered by Article XX, paragraphs (g), (b) and (d), and that the *primary* nation embargo did not nullify or impair any benefits accruing to the EEC or the Netherlands since it did not apply to these countries.

11. The Panel found that neither the *primary* nor the *intermediary* nation embargo was covered under Article III, that both were contrary to Article XI:1 and not covered by the exceptions in Article XX (b), (g) or (d) of the GATT.

## VI. "UNITED STATES - TAXES ON AUTOMOBILES", not adopted, circulated on 11 October 1994, DS31/R

12. Three US measures on automobiles were under examination: the luxury tax on automobiles ("luxury tax"), the gas guzzler tax on automobiles ("gas guzzler"), and the Corporate Average Fuel Economy regulation ("CAFE"). The European Community complained that these measures were inconsistent with GATT Article III and could not be justified under Article XX(g) or (d). The United States considered that these measures were consistent with the General Agreement.

13. The Panel found that both the luxury tax -which applied to cars sold for over $30,000 - and the gas guzzler tax - which applied to the sale of automobiles attaining less than 22.5 miles per gallon (mpg) - were consistent with Article III:2 of GATT.

14. The CAFE regulation required the average fuel economy for passenger cars manufactured in the United States or sold by any importer not to fall below 27.5 mpg. Companies that are both importers and domestic manufacturers must calculate average fuel economy separately for imported passenger automobiles and for those manufactured domestically. The Panel found the CAFE regulation to be inconsistent with GATT Article III:4 because the separate foreign fleet accounting discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers, rather than on the basis of factors directly related to the products as such. Similarly, the Panel found that the separate foreign fleet accounting was not justified under Article XX(g); it did not make a finding on the consistency of the fleet averaging method with Article XX(g). The Panel found that the CAFE regulation could not be justified under Article XX(d).

## VII. "UNITED STATES - STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE", adopted on 20 May 1996, WT/DS2/9 (Appellate Body Report and Panel Report)

15. 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. 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. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It required any domestic refiner which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990. EPA also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not a operation for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

16. Venezuela and Brazil claimed that the Gasoline Rule was inconsistent, *inter alia*, with GATT Article III, and was not covered by Article XX. The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in GATT Article XX, paragraphs (b), (g) and (d).

17. The Panel found that the Gasoline Rule was inconsistent with Article III, and could not be justified under paragraphs (b), (d) or (g). On appeal of the Panel's findings on Article XX(g), the Appellate Body found 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.

## VIII. "UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS", adopted on XXX, WT/DS59/XXX (Appellate Body Report and Panel Report)

18. Seven species of sea turtles are currently recognized. Most of them are distributed around the globe, in subtropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and their nesting grounds. Sea turtles have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans).

19. The US Endangered Species Act of 1973 ("ESA") lists as endangered or threatened the five species of sea turtles occurring in US waters and prohibits their take within the United States, within the US territorial sea and the high seas. Pursuant to the ESA, the United States requires that shrimp

trawlers use "turtle excluder devices"[107] (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of Public law 101-102, enacted in 1989 by the United States, provides, *inter alia*, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the harvesting nation is certified to have a regulatory programme and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles. In practice, countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp with mechanical means must impose on their fishermen requirements comparable to those borne by US shrimpers, essentially the use of TEDs at all times, if they want to be certified and export shrimp products to the United States.

20. The Panel considered that the ban imposed by the United States was inconsistent with GATT Article XI (General elimination of quantitative restrictions) and could not be justified under GATT Article XX (General exceptions). The Appellate Body found that the measure at stake qualified for provisional justification under Article XX(g), but failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of GATT 1994.

[107]A TED is a grip trapdoor installed inside a trawling net which allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

ANNEX 2

Excerpts from the Vienna Convention on the Law of Treaties

*Article 31*

*General rule of interpretation*

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32*

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.