INTERNATIONAL AND REGIONAL TRADE LAW: THE LAW OF THE WORLD TRADE ORGANIZATION

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Unit VIII: General Exceptions

International and Regional Trade Law:
The Law of the World Trade Organization

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Supplementary Reading

Note that several AB and panel reports which develop the law of Article XX GATT or are relevant for its interpretation – such as Gambling – are reproduced in other units of the teaching materials.

The below supplementary excerpts also include readings on the national security exception in Article XXI GATT.

Peter van den Bossche and Werner Zdouc, The Law and Policy of the World Trade Organization, 2013, 543-583.

Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, Vol. 2, 2nd ed., 2013, 1-363.

Michael J. Trebilcock, Robert Howse, and Antonia Eliasson, The Regulation of International Trade, 4th ed. 2013, 507-548, 656-691.

John H. Jackson, William J. Davey, Alan O. Sykes, International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations, 6th ed. 2013, 635-697.

John H. Jackson, The World Trading System, 2nd ed. 1997, 229-238.

1. Treaty Text: GATT 1994, Article XX

Article XX: General Exceptions

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

(*a*) necessary to protect public morals;

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

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

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

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

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

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

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

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

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

2. Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (2000)

2-1. Summary of Facts

This dispute concerns -- among other measures – measures applied by Korea to the retail sale of imported beef. These are described in para. 26 of the Panel Report:

> "The Government of Korea regulates retail outlets through the *Management Guidelines for Imported Beef* which came into effect on 1 October 1999 and prior to that date through the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores.* The *Management Guideline for Imported Beef* specifies that imported beef (except for pre-packed imported beef) may only be sold in specialized imported-beef shops.[*] It also specifies that large-scale distributors (department stores, supermarkets, etc.) must provide a separate sales area for imported beef.[**] Stores selling imported beef must display a "Specialized Imported Beef Store" sign to distinguish them from domestic meat sellers."

2-2. Appellate Body Report, WT/DS161, 169/AB/R, 11 December 2000

Present: Ehlermann, Presiding Member; Abi-Saab, Member; Feliciano, Member

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds169_e.htm

I. INTRODUCTION

1. Korea appeals certain issues of law and legal interpretations in the Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (the "Panel Report").[1] The Panel was established to consider a complaint by Australia and the United States with respect to Korean measures that affect the importation of certain beef products. The aspects of these measures relevant for this appeal relate to, first, domestic support provided to the beef industry and to the Korean agriculture sector more generally, and, second, the separate retail distribution channels that exist for certain imported and domestic beef products (the so-called "dual retail system") and related measures. The dual retail system is given legal effect by the *Management Guideline for Imported Beef* (the "*Management Guideline*").[2] …

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[*] Management Guideline for Imported Beef, Article 15.

[**] *Ibid,* Article 9.5.

[1] WT/DS161/R, WT/DS169/R, 31 July 2000.

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

(…)

3. The Panel also considered claims by the United States that Korea's requirement that imported beef be sold only in specialized imported beef stores, and its laws and regulations restricting the resale and distribution of imported beef by SBS super-groups, retailers, customers, and end-users are inconsistent with its obligations under Article III:4 of the GATT 1994 …

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

6. The Panel recommended that the Dispute Settlement Body ("DSB") request Korea to bring its measures into conformity with its obligations under the *WTO Agreement*.

(…)

III. ISSUES RAISED IN THIS APPEAL

75. The issues raised in this appeal are the following:

(…)

(c) whether the "dual retail system", which requires the sale of imported beef in specialized stores, was inconsistent with Article III:4 of the GATT 1994; and

(d) whether the "dual retail system", if inconsistent with Article III:4 of the GATT 1994, can nevertheless be justified under Article XX(d).

(…)

VI. DUAL RETAIL SYSTEM

A. Article III:4 of the GATT 1994

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

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the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system. The *Management Guideline* is an elaboration of Article 25 of the *Livestock Act (Revised)*, as amended by Act No. 5720 on 29 January 1999.

based on the Panel's assessment of how the dual retail system modifies the conditions of competition between imported and like domestic beef in the Korean market.

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

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

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

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

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

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

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

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products. "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[69] (emphasis added)

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

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

[69] Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 16-17. …

137. A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.

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

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

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

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

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

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

144. Thus, the Korean measure formally separates the selling of imported beef and domestic beef. However, that formal separation, *in and of itself*, does not necessarily compel the conclusion that the treatment thus accorded to imported beef is less favourable than the treatment accorded to domestic beef.[85] To determine whether the treatment given to imported beef is less favourable than that given to domestic beef, we must, as earlier indicated, inquire into whether or not the Korean dual retail system for beef modifies the *conditions of competition* in the Korean beef market to the disadvantage of the imported product.

145. When beef was first imported into Korea in 1988, the new product simply entered into the pre-existing distribution system that had been handling domestic beef. The beef retail system was a unitary one, and the conditions of competition affecting the sale of beef were the same for both the domestic and the imported product. In 1990, Korea promulgated its dual retail system for beef. Accordingly, the existing small retailers had to choose between, on the one hand, continuing to sell domestic beef and renouncing the sale of imported beef or, on the other hand, ceasing to sell domestic beef in order to be allowed to sell the imported product. Apparently, the vast majority of the small meat retailers chose the first option. The result was the virtual exclusion of imported beef from the retail distribution channels through which domestic beef (and until then, imported beef, too) was distributed to Korean households and other consumers throughout the country. Accordingly, a new and separate retail system had to be established and gradually built from the ground up for bringing the imported product to the same households and other consumers if the imported product was to compete at all with the domestic product. Put in slightly different terms, the putting into legal effect of the dual retail system for beef meant, in direct practical effect, so far as imported beef was concerned, the sudden cutting off of access to the normal, that is, the previously existing, distribution outlets through which the domestic product continued to flow to consumers in the urban centers and countryside that make up the Korean national territory. The central consequence of the dual retail system can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef. In 1998, when this case began, eight years after the dual retail system was first prescribed, the consequent reduction of commercial opportunity was reflected in the much smaller number of specialized imported beef shops (approximately 5,000 shops) as compared with the number of retailers (approximately 45,000 shops) selling domestic beef.

[85] Apart from the display sign requirement, dealt with in para. 151.

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

147. We also note that the reduction of competitive opportunity through the restriction of access to consumers results from the imposition of the dual retail system for beef, notwithstanding the "perfect regulatory symmetry" of that system, and is not a function of the limited volume of foreign beef actually imported into Korea. The fact that the WTO-consistent quota for beef has, save for two years, been fully utilized does not detract from the lack of equality of competitive conditions entailed by the dual retail system.

148. We believe, and so hold, that the treatment accorded to imported beef, as a consequence of the dual retail system established for beef by Korean law and regulation, is less favourable than the treatment given to like domestic beef and is, accordingly, not consistent with the requirements of Article III:4 of the GATT 1994.

(…)

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

151. Without a system of specialized imported beef stores, the sign requirement would have no meaning and would not be required. When considered independently from a dual retail system, a sign requirement might or might not be characterized legally as consistent with Article III:4 of the GATT 1994. On the other hand, when considered simply as a detail of the dual retail system, the sign requirement partakes of the legal characterization given to that system itself. We believe it unnecessary to pass upon separately the consistency of the display sign requirement with Article III:4 of the GATT 1994.

B. Article XX(d) of the GATT 1994

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

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

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

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

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

156. We note that in examining the Korean dual retail system under Article XX, the Panel followed the appropriate sequence of steps outlined in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"). There we said:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*[98] (emphasis added)

The Panel concentrated its analysis on paragraph (d), that is, the first-tier analysis. Having found that the dual retail system did not fulfill the requirements of paragraph (d), the Panel correctly considered that it did not need to proceed to the second-tier analysis, that is, to examine the application in this case of the requirements of the introductory clause of Article XX.

157. For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.

158. The Panel examined these two aspects one after the other. The Panel found, "despite … troublesome aspects, … that the dual retail system was put in place, at least in part, in order to secure compliance with the Korean legislation against deceptive practices to the extent that it serves to prevent acts inconsistent with the *Unfair Competition Act*." It recognized that the system was established at a time when acts of misrepresentation of origin were widespread in the beef sector. It also acknowledged that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to misrepresent [less expensive] foreign beef for [more expensive] domestic beef ". The parties did not appeal these findings of the Panel.

159. We turn, therefore, to the question of whether the dual retail system is "necessary" to secure compliance with the *Unfair Competition Act*. Once again, we look first to the ordinary meaning of the word "necessary", in its context and in the light of the object and purpose of Article XX, in accordance with Article 31(1) of the *Vienna Convention.*

160. The word "necessary" normally denotes something "that cannot be dispensed with or done without, requisite, essential, needful".[102] We note, however, that a standard law dictionary cautions that:

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[98] Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, p. 22. See also, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, paras. 119-121.

[102] *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 1895.

> [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity".[103]

161. We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[104]

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

163. There are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary". One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be "necessary". Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce[105], that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*. A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.

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[103] *Black's Law Dictionary*, (West Publishing, 1995), p. 1029.

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

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

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

165. The panel in *United States – Section 337* described the applicable standard for evaluating whether a measure is "necessary" under Article XX(d) in the following terms:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[106]

166. The standard described by the panel in *United States – Section 337* encapsulates the general considerations we have adverted to above. In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".

167. The Panel followed the standard identified by the panel in *United States – Section 337*. It started scrutinizing whether the dual retail system is "necessary" under paragraph (d) of Article XX by stating:

> Korea has to convince the Panel that, contrary to what was alleged by Australia and the United States, no alternative measure consistent with the WTO Agreement is reasonably available at present in order to deal with misrepresentation in the retail market as to the origin of beef.

168. The Panel first considered a range of possible alternative measures, by examining measures taken by Korea with respect to situations involving, or which could involve, deceptive practices similar to those which in 1989-1990 had affected the retail sale of foreign beef. The Panel found that Korea does not require a dual retail system in *related product areas*, but relies instead on traditional enforcement procedures. There is no requirement, for example, for a dual retail system separating domestic Hanwoo beef from domestic dairy cattle beef.[108] Nor is there a requirement for a dual retail system for any other meat or food product, such as pork or seafood. Finally, there is no requirement for a system of separate restaurants, depending on whether they serve domestic or imported beef, even though approximately 45 per cent of the beef imported into Korea is sold in restaurants. Yet, in all of these cases, the Panel found that there were numerous

[106] Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

[108] In 1998, domestic dairy cattle beef amounted to 12 percent of total beef consumption in Korea. Panel Report, para. 661.

cases of fraudulent misrepresentation.[111] For the Panel, these examples indicated that misrepresentation of origin could, in principle, be dealt with "on the basis of basic methods … such as normal policing under the Korean *Unfair Competition Act*."

169. Korea argues, on appeal, that the Panel, by drawing conclusions from the absence of any requirement for a dual retail system in related product areas, introduces an illegitimate "consistency test" into Article XX(d). For Korea, the proper test for "necessary" under Article XX(d):

> … is to see whether another means exists which is less restrictive than the one used and which can reach the objective sought. Whether such means will be applied *consistently* to other products or not is not a matter of concern for the necessity requirement under Article XX(d).

170. Examining enforcement measures applicable to the same illegal behaviour relating to like, or at least similar, products does not necessarily imply the introduction of a "consistency" requirement into the "necessary" concept of Article XX(d). Examining such enforcement measures may provide useful input in the course of determining whether an alternative measure which could "reasonably be expected" to be utilized, is available or not.

171. The enforcement measures that the Panel examined were measures taken to enforce the same law, the *Unfair Competition Act*.[114] This law provides for penal and other sanctions against any "unfair competitive act", which includes any:

> *Act misleading the public to understand the place of origin of any goods* either by falsely marking that place on any commercial document or communication, in said goods or any advertisement thereof *or in any manner of misleading the general public*, or by selling, distributing, importing or exporting goods bearing such mark;[116] (emphasis added)

The language used in this law to define an "unfair competitive act" – "any manner of misleading the general public" – is broad. It applies to all the examples raised by the Panel – domestic dairy

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[111] *Ibid*., paras. 661-663, including footnote 366, in which the Panel noted "that the Livestock Times reported that the deceptive beef marketing practice was widespread in restaurants (where price differential was 58 per cent)".

[114] In GATT case law, comparisons have been made between enforcement measures taken in different *jurisdictions*. In the *United States – Measures Affecting Alcoholic and Malt Beverages* case, the panel said that "[t]he fact that not all fifty states maintain discriminatory distribution systems indicates to the Panel that alternative measure for enforcement of state excise tax laws do indeed exist." Adopted 19 June 1992, BISD 39S/206, para. 5.43. In the *United States – Section 337* case, the panel "did not consider that a different scheme for imports alleged to infringe process patents is necessary, since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country". *Supra*, footnote 69, para. 5.28.

[116] *Unfair Competition Prevention and Business Secret Protection Act*, Article 2(1)(c) (from translation provided by Korea as Exhibit 28 of its second submission to the Panel.

beef sold as Hanwoo beef, foreign pork or seafood sold as domestic product, as well as to imported beef served as domestic beef in restaurants.

172. The application by a Member of WTO-*compatible* enforcement measures to the same kind of illegal behaviour – the passing off of one product for another – for like or at least similar products, provides a suggestive indication that an alternative measure which could "reasonably be expected" to be employed may well be available. The application of such measures for the control of the same illegal behaviour for like, or at least similar, products raises doubts with respect to the objective *necessity* of a different, much stricter, and WTO-inconsistent enforcement measure. The Panel was, in our opinion, entitled to consider that the "examples taken from outside as well as within the beef sector indicate that misrepresentation of origin can indeed be dealt with on the basis of basic methods, consistent with the *WTO Agreement*, and thus less trade restrictive and less market intrusive, such as normal policing under the Korean *Unfair Competition Act*."

173. Having found that possible alternative enforcement measures, consistent with the *WTO Agreement*, existed in other related product areas, the Panel went on to state that:

> … it is for Korea to demonstrate that such an alternative measure is not reasonably available or is unreasonably burdensome, financially or technically, taking into account a variety of factors including the domestic costs of such alternative measure, to ensure that consumers are not misled as to the origin of beef.

174. The Panel proceeded to examine whether the alternative measures or "basic methods" – investigations, prosecutions, fines, and record-keeping – which were used in related product areas, were "reasonably available" to Korea to secure compliance with the *Unfair Competition Act.* The Panel concluded "that Korea has not demonstrated to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available". Thus, as noted at the outset, the Panel found that the dual retail system was "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices". The dual retail system was, therefore, not justified under Article XX(d).

175. Korea also argues on appeal that the Panel erred in applying Article XX(d) because it did not "pay due attention to the level of enforcement sought." For Korea, under Article XX(d), a panel must:

> … examine whether a means reasonably available to the WTO Member could have been used in order to reach the objective sought without putting into question the level of enforcement sought.

For Korea, alternative measures must not only be reasonably available, but must also *guarantee* the level of enforcement sought which, in the case of the dual retail system, is the *elimination* of fraud in the beef retail market. With respect to investigations, Korea argues that this tool can only reveal fraud *ex post*, whereas the dual retail system can combat fraudulent practices *ex ante.* Korea contends that *ex post* investigations do not *guarantee* the level of enforcement that Korea has chosen, and therefore should not be considered. With respect to policing, Korea believes that this option is not "reasonably available", because Korea lacks the resources to police thousands of shops on a round-the-clock basis.

176. It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations. We note that this has also been recognized by the panel in *United States – Section 337*, where it said: "The Panel wished to make it clear that this [the obligation to choose a reasonably available GATT-consistent or less inconsistent measure] does not mean that a contracting party could be asked to change its substantive patent law or its desired *level of enforcement* of that law …. ". (emphasis added) The panel added, however, the caveat that "provided that such law and such *level of enforcement* are the same for imported and domestically-produced products".[126]

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

178. We think it unlikely that Korea intended to establish a level of protection that *totally eliminates* fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, we assume that in effect Korea intended to *reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers. The Panel did find that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef for domestic beef ". And we accept Korea's argument that the dual retail system *facilitates* control and permits combatting fraudulent practices *ex ante*. Nevertheless, it must be noted that the dual retail system is only an *instrument* to achieve a significant reduction of violations of the *Unfair Competition Act*. Therefore, the question remains whether other, conventional and WTO-consistent instruments can not reasonably be expected to be employed to achieve the same result.

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

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

[126] Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

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

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

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

183. Korea further argues, on appeal, that the Panel did not make a separate finding on whether the display sign requirement was justified by Article XX(d), and requests that, should the Appellate Body uphold the Panel's finding that the sign requirement was inconsistent with Article III:4, it should proceed to consider the issue of its justification under Article XX(d).

184. We recall that Korean law requires an imported beef retailer to display a sign reading "Specialized Imported Beef Store". Since the Panel correctly regarded the sign requirement as merely ancillary to the dual retail system, we consider that it is unnecessary to examine separately whether the display sign requirement can be justified under Article XX(d).

185. In sum, we uphold the Panel's conclusion that the dual retail system, which is inconsistent with Article III:4, is not justified under Article XX(d) of the GATT 1994.

VII. FINDINGS AND CONCLUSIONS

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

(…)

(e) upholds the Panel's ultimate conclusion that Korea's dual retail system for beef is inconsistent with Article III:4 of the GATT 1994;

(f) upholds the Panel's conclusion that Korea's dual retail system for beef is not justified under Article XX(d) of the GATT 1994; and

(g) finds it unnecessary to pass upon separately whether the ancillary sign requirement is consistent with Article III:4 or justified under Article XX(d) of the GATT 1994.

187. The Appellate Body recommends that the DSB request that Korea bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Korea's obligations under the GATT 1994 and the *Agreement on Agriculture* into conformity with its obligations under those Agreements.

* * *

3. United States – Standards for Reformulated and Conventional Gasoline (1996)

US—Gasoline was the very first case brought under the new WTO dispute settlement system. Note carefully the differences in how the panel and the Appellate Body approach Art. XX GATT. What explains the variance between the panel and AB Reports? Is it just a mechanical dispute about interpretation, or are other interests and values at stake? Note further that this is the case in which the Appellate Body created the so-called "chapeau test." Pay close attention to the AB's methodology in deploying this test as you progress through the cases in this Unit.

2-1. Summary of Facts

From: WTO Committee on Trade and Environment (CTE) Summary (WT/CTE/W/203)

Main Facts

Following a 1990 amendment to the Clean Air Act, the Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the United States and to ensure that pollution from the combustion of gasoline did not exceed 1990 levels. These rules were established to address the ozone and pollution damage experienced by large US cities, as a result, principally, of car exhaust fumes.

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

The EPA regulation provided two different sets of baseline emissions standards.[2] First, it required any domestic refiner which was in operation for at least six months in 1990 to establish an "individual baseline", which represented the quality of gasoline produced by that refiner in 1990. Second, EPA established a "statutory baseline", intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. The statutory baseline imposed a stricter burden on foreign gasoline producers.

Venezuela and Brazil claimed that the Gasoline Rule was prejudicial to their exports to the United States and that it favored domestic producers. Accordingly, the Gasoline Rule was inconsistent with Articles III and XXIII:1(b) of the GATT 1994, with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), and was not covered by Article XX.[3] The United States argued that the Gasoline Rule was consistent with Article III, and, in any event, was justified under the exceptions contained in Article XX, paragraphs (b), (g) and (d), and that the Rule was also consistent with the TBT Agreement.[4] The United States appealed the panel report but limited its appeal to the panel's interpretation of Article XX of the GATT 1994.

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[1] *Ibid.*, Panel Report, para. 2.2.

[2] *Ibid.*, paras. 2.6, 2.8.

[3] *Ibid.*, paras. 3.1-3.2.

[4] Ibid., para. 3.4.

2-2. Panel Report, WT/DS2/R, 29 January 1996

Chairman: Mr. Joseph Wong, Panellists: Mr. Crawford Falconer, Mr. Kim Luotonen

https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf

Editorial comment: Most footnotes have been omitted from this report.

(…)

II. FACTUAL ASPECTS

A. The Clean Air Act

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

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

(…)

B. EPA's Gasoline Rule

1. Establishment of Baselines

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

2.6 EPA's final rule[2] ("Gasoline Rule") requires any domestic refiner, which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represents the quality of gasoline produced by that refiner in 1990. The rule establishes three methods for the purpose of determining a domestic refiner's individual historic baseline. Under Method 1, the refiner must use the quality data and volume records of its 1990 gasoline. However, as acknowledged by EPA at the time, it was not anticipated that many domestic refiners would have all the data necessary to establish an individual baseline based entirely on actual 1990 data. If Method 1 type data are not available, a domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that neither one of these two methods is available, a domestic refiner must turn to Method 3 type data which consist of its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show 1990 gasoline composition. Domestic refiners are not permitted to choose the statutory baseline.

2.7 An importer which is also a foreign refiner must determine its individual baseline using Methods 1, 2 and 3 if it imported at least 75 percent, by volume, of the gasoline produced at its foreign refinery in 1990 into the United States in 1990 (the so-called "75 % rule").

2.8 Certain entities are, however, automatically assigned to the statutory baseline. Firstly, refineries which began operation after 1990 or were in operation for less than 6 months in 1990 are required to use the statutory baseline. Secondly, importers and blenders are assigned the statutory baseline unless they can establish their individual baseline following Method 1. If actual 1990 data are not available, which is, as for domestic refiners, anticipated by EPA, importers and blenders are assigned to the statutory baseline. EPA considers that blenders which produce gasoline by combining gasoline blendstocks purchased from many sources cannot determine with accuracy the quality of their 1990 gasoline using Methods 2 and 3. Similarly, EPA considers that importers cannot use Methods 2 and 3, because these methods inherently apply only to refineries and because of the extreme difficulty in establishing the consistency of their gasoline quality over time.

(…)

C. The May 1994 Proposal

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

[2] 40 CFR 8, 59-Fed. Reg. 7716 (16 February 1994).

(…)

VI. FINDINGS

(…)

A. Introduction

6.1 The Panel noted that the dispute arose from the following facts. The Clean Air Act aims to control and reduce air pollution in the United States. The Act and certain of its regulations (the "Gasoline Rule") set standards for gasoline quality intended to reduce air pollution, including ozone, caused by motor vehicle emissions. From 1 January 1995, the Gasoline Rule permits only gasoline of a specified cleanliness ("reformulated gasoline") to be sold in areas of high air pollution. In other areas, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") can be sold.

6.2 The Gasoline Rule applies to refiners, blenders and importers of gasoline. It requires that certain chemical characteristics of the gasoline in which they deal respect, on an annual average basis, defined levels. In the Gasoline Rule some of these levels are fixed; others are expressed as "non-degradation" requirements. Under the non-degradation requirements, each domestic refiner must maintain, on an annual average basis, the relevant gasoline characteristics at levels no worse than its "individual baseline" — that is, the annual average levels achieved by that refiner in 1990. To establish an individual baseline, a refiner must show evidence of the quality of gasoline produced or shipped in 1990 ("Method 1"). If that evidence is not complete, then it must use data on the quality of blendstock produced in 1990 ("Method 2"). If these two methods do not result in sufficient evidence, the refiner must also use data on the quality of post-1990 gasoline blendstock or gasoline ("Method 3").

6.3 Importers are also required to use an individual baseline, but only in the case (unlikely, according to the parties to the dispute) that they are able to establish it using Method 1 data. Unlike domestic refiners, they are not allowed to establish an individual baseline by using the secondary or tertiary data specified in Methods 2 and 3. If an importer cannot produce Method 1 data, then it must use a "statutory baseline" which the United States claims is derived from the average characteristics of all gasoline consumed in the United States in 1990. Some other domestic entities (such as refiners with only partial or no 1990 operations, and blenders with insufficient Method 1 data) are also assigned the statutory baseline. Exceptionally, importers that imported in 1990 at least 75 percent of the production of an affiliated foreign refinery are treated as domestic refiners for the purpose of establishing baselines. Since this dispute concerns only the Gasoline Rule's non-degradation requirements, and not reformulated and conventional gasoline as such, the Panel will refer generally to "gasoline" in the course of its findings.

6.4 Venezuela and Brazil claim that the Gasoline Rule violates the national treatment provisions of Article III:1 and 4 of the General Agreement and the most-favoured-nation provision of Article I. … The United States rejects these claims and argues that the Gasoline Rule can be justified under the exceptions contained in Article XX, paragraphs (b), (d) and (g), which argument is rejected by Venezuela and Brazil. …

B. Article III

1. Article III:4

6.5 The Panel proceeded to examine the claim that the Gasoline Rule violates Article III:4 of the General Agreement, which states:

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

The Panel noted that under this provision the complainants are required to show the existence of: (a) a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and (b) treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported product than to the like product of national origin. The Panel agreed with the parties that the Gasoline Rule was a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product. It proceeded therefore to consider whether the Gasoline Rule accorded less favourable treatment to imported products than to like products of national origin.

6.6 The Panel noted the arguments of Venezuela and Brazil that imported gasoline was "like" domestic gasoline, but received treatment less favourable because imported gasoline was subjected to more demanding quality requirements than gasoline of US origin. The United States replied that gasoline from similarly-situated parties was treated in the same manner under the Gasoline Rule. Gasoline from importers was treated no less favourably than that from other domestic non-refiners such as blenders, or refiners who had only limited or no operations in 1990.

(…)

6.9 … The Panel observed first that the United States did not argue that imported gasoline and domestic gasoline were not like *per se*. It had argued rather that with respect to the treatment of the imported and domestic products, the situation of the parties dealing in the gasoline must be taken into consideration. The Panel, recalling its previous discussion of the factors to be taken into account in the determination of like product, noted that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable. The Panel found therefore that chemically-identical imported and domestic gasoline are like products under Article III:4.

6.10 The Panel next examined whether the treatment accorded under the Gasoline Rule to imported gasoline was less favourable than that accorded to like gasoline of national origin. The Panel observed that domestic gasoline benefitted in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product, as illustrated by the case of a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period

to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule. The Panel also noted that this less favourable treatment of imported gasoline induced the gasoline importer, in the case of a batch of imported gasoline not meeting the statutory baseline, to import that batch at a lower price. This reflected the fact that the importer would have to make cost and price allowances because of its need to import other gasoline with which the batch could be averaged so as to meet the statutory baseline. Moreover, the Panel recalled an earlier panel report which stated that "the words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."[28] The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.

6.11 The Panel then examined the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from *similarly situated* domestic parties — domestic refiners with limited 1990 operations and blenders. According to the United States, the difference in treatment between imported and domestic gasoline was justified because importers, like domestic refiners with limited 1990 operations and blenders, could not reliably establish their 1990 gasoline quality, lacked consistent sources and quality of gasoline, or had the flexibility to meet a statutory baseline since they were not constrained by refinery equipment and crude supplies. The Panel observed that the distinction in the Gasoline Rule between refiners on the one hand, and importers and blenders on the other, which affected the treatment of imported gasoline with respect to domestic gasoline, was related to certain differences in the characteristics of refiners, blenders and importers, and the nature of the data held by them. However, Article III:4 of the General Agreement deals with the treatment to be accorded to like products; its wording does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it. The Panel noted that in the *Malt Beverages* case, a tax regulation according less favourable treatment to beer on the basis of the size of the producer was rejected.[29] Although this finding was made under Article III:2 concerning fiscal measures, the Panel considered that the same principle applied to regulations under Article III:4. Accordingly, the Panel rejected the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from similarly situated domestic parties.

6.12 Apart from being contrary to the ordinary meaning of the terms of Article III:4, any interpretation of Article III:4 in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors. This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.

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[28] "United States - Section 337 of the Tariff Act of 1930", BISD 36S/386, para 5.11 (adopted on 7 November 1989).

[29] "United States - Measures Affecting Alcoholic and Malt Beverages", BISD 39S/206, para. 5.19 (adopted on 19 June 1992).

6.13 The Panel considered that the foregoing was sufficient to dispose of the US argument. It noted, however, that even if the US approach were to be followed, under any approach based on "similarly situated parties" the comparison could just as readily focus on whether imported gasoline from an identifiable *foreign* refiner was treated more or less favourably than gasoline from an identifiable US refiner. There were, in the Panel's view, many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were "similarly situated." Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the domestic entity to benefit from the advantages of an individual baseline. This consequential uncertainty and indeterminacy of the basis of treatment underlined, in the view of the Panel, the rationale of remaining within the terms of the clear language, object and purpose of Article III:4 as outlined above in paragraph 6.12.

6.14 The Panel then noted the argument of the United States that the treatment accorded to gasoline imported under a statutory baseline was *on the whole* no less favourable than that accorded to domestic gasoline under individual refiner baselines. The United States claimed that the Gasoline Rule did not discriminate against imported gasoline, since the statutory baseline (by the nature of its calculation) and the average of the sum of the individual baselines both corresponded to average gasoline quality in 1990, and that domestic and imported gasoline was treated equally overall. The Panel noted that, in these circumstances, the argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others. A previous panel had found that

> the "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.[30]

The Panel concurred with this reasoning that under Article III:4 less favourable treatment of particular imported products in some instances could not be balanced by more favourable treatment of other imported products in other instances. The Panel therefore rejected the US argument.

6.15 The Panel observed that, considered even from the point of view of imported gasoline as a whole, treatment was generally less favourable. Importers of gasoline had to adapt to an assigned average standard not linked to the particular gasoline imported, while refiners of

[30] "United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.14 (adopted on 7 November 1989).

domestic gasoline had only to meet a standard linked to their own product in 1990. Statistics on baselines bore out this difference in treatment. According to the United States, as of August 1995, approximately 100 US refiners, representing 98.5 percent of gasoline produced in 1990, had received EPA approval of their individual baselines. Only three of the refiners met the statutory baseline for all parameters. Thus, while 97 percent of US refiners did not and were not required to meet the statutory baseline, the statutory baseline was required of importers of gasoline, except in the rare case (according to the parties) that they could establish a baseline using Method 1.

6.16 The Panel found that imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.

(…)

F. Article XX(g)

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

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

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

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

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

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

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

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

1. Policy goal of conserving an exhaustible natural resource

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

6.37 The Panel then examined whether clean air could be considered an exhaustible natural resource. In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource.[39] Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).

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

6.38 The Panel proceeded to examine whether the baseline establishment methods found inconsistent with Article III:4 were "related to" the conservation of clean air. Venezuela argued that past panels had interpreted "related to" to mean "primarily aimed at" the conservation of the resource. According to Venezuela, loopholes in the establishment of the baseline undermined its own conservation objectives, and the measure could not therefore be seen as "primarily aimed" at conservation.

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

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

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

> 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).[40] (emphasis added)

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

> the terms "in conjunction with" in Article XX:(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective "in conjunction with" production restrictions if it was *primarily aimed* at rendering effective these restrictions.[41] (emphasis added)

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

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

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III – the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline – were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

6.41 With respect to whether the baseline establishment methods could be said to be primarily aimed at "rendering effective restrictions on domestic production or consumption", the Panel noted that it had not determined that the measures at issue were “restrictions”, and whether they were “on” domestic production or consumption. However, in light of its finding in paragraph.

(…)

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

[41] Ibidem.

VII. CONCLUDING REMARKS

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

VIII. CONCLUSIONS

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

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

* * *

2-3. Appellate Body Report, WT/DS2/AB/R, 22 April 1996

Feliciano, Presiding Member, Beeby, Member, Matsushita, Member

https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf

Editorial note: Most footnotes have been omitted from this report.

(…)

III. ISSUES RAISED IN THIS APPEAL

A. The Claims of Error by the United States

It is important to focus upon the subject matter of this appeal. We seek to do this first by identifying the issues which have been raised by the Appellant, the United States. In what follows we highlight those same issues by listing certain other issues dealt with in the Panel proceedings but which have *not* been brought before the Appellate Body in this appeal, and which we accordingly exclude from consideration in this Appellate Report.

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

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

(…)

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

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

(…)

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

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

(…)

III. THE ISSUE OF JUSTIFICATION UNDER ARTICLE XX(G) OF THE GENERAL AGREEMENT

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

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

A. "Measures"

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

Cast in the foregoing terms, the issue does not appear to be a live one. True enough the Panel Report used differing terms, or terms of shifting reference, in designating the "measures" in different parts of the Report. The Panel Report, however, held only the baseline establishment rules of the Gasoline Rule to be inconsistent with Article III:4, to the extent that such rules provided "less favourable treatment" for imported than for domestic gasoline. These are the same provisions which the Panel evaluated, and found wanting, under the justifying provisions of Article XX(g). The Panel Report did not purport to find the Gasoline Rule itself as a whole, or any part thereof other than the baseline establishment rules, to be inconsistent with Article III:4; accordingly, there was no need at all to examine whether the whole of the Gasoline Rule or any of its other rules, was saved or justified by Article XX(g). The Panel here was following the practice of earlier panels in applying Article XX to provisions found to be inconsistent with Article III:4: the "measures" to be analyzed under Article XX are the same provisions infringing Article III:4. These earlier panels had not interpreted "measures" more broadly under Article XX to include provisions not themselves found inconsistent with Article III:4. In the present appeal, no one has suggested in their final submissions that the Appellate Body should examine under Article XX any portion of the Gasoline Rule other than the baseline establishment rules held to be in conflict with Article III:4. No one has urged an interpretation of "measures" which would encompass the Gasoline Rule in its totality.

At the oral hearing and in its Post-Hearing Memorandum, the United States complained about the designation of the baseline establishment rules in the Panel Report and by the Appellees Venezuela and Brazil, in such terms as "the difference in treatment", "the less favourable treatment" or "the discrimination." It is, of course, true that the baseline establishment rules had been found by the Panel to be inconsistent with Article III:4 of the *General Agreement*. The frequent designation of those provisions by the Panel in terms of its legal conclusion in respect of Article III:4, in the Appellate Body's view, did not serve the cause of clarity in analysis when it came to evaluating the same baseline establishment rules under Article XX(g).

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

The Panel Report took the view that clean air was a "natural resource" that could be "depleted." Accordingly, as already noted earlier, the Panel concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX(g). Shortly thereafter, however, the Panel Report also concluded that "the less favourable baseline establishments methods" were *not* primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g).

The Panel, addressing the task of interpreting the words "relating to", quoted with approval the following passage from the panel report in the 1987 *Herring and Salmon* case:[30]

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

[30] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, para. 4.6; adopted on 22 March 1988, cited in Panel Report, para. 6.39.

> an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX:(g). (emphasis added by the Panel)

The Panel Report then went on to apply the 1987 *Herring and Salmon* reasoning and conclusion to the baseline establishment rules of the Gasoline Rule in the following manner:[31]

> The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III -- the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline -- were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

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

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

[31] Panel Report, para. 6.40.

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."

Furthermore, the Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not "necessary" for the protection of human, animal or plant life. The Panel Report, it will be recalled, found that the baseline establishment rules had not been shown by the United States to be "necessary" under Article XX(b) since alternative measures either consistent or less inconsistent with the *General Agreement* were reasonably available to the United States for achieving its aim of protecting human, animal or plant life. In other words, the Panel Report appears to have applied the "necessary" test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g).

A principal difficulty, in the view of the Appellate Body, with the Panel Report's application of Article XX(g) to the baseline establishment rules is that the Panel there overlooked a fundamental rule of treaty interpretation. This rule has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[33] which provides in relevant part:

> 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.

The "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law.[34] As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements" of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.

Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out

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[33] (1969), 8 International Legal Materials 679.

[34] See, *e.g.*, *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), I.C.J. Reports p. 6 (International Court of Justice); *Golder v. United Kingdom*, ECHR, Series A, (1995) no. 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases*, (1986) 70 International Law Reports 449 (Inter-American Court of Human Rights); Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours 1, p. 42; D. Carreau, Droit International (3è ed., 1991) p. 140; Oppenheim's International Law (9th ed., Jennings and Watts, eds. 1992) Vol. 1, pp. 1271-1275.

or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

"necessary" - in paragraphs (a), (b) and (d);	"essential" - in paragraph (j);
"relating to" - in paragraphs (c), (e) and (g);	"for the protection of" - in paragraph (f);
"in pursuance of" - in paragraph (h); and	"involving" - in paragraph (i).

It 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 of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.

At the same time, Article XX(g) and its phrase, "relating to the conservation of exhaustible natural resources," need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The 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.

The 1987 *Herring and Salmon* report, and the Panel Report itself, gave some recognition to the foregoing considerations of principle. As earlier noted, the Panel Report quoted the following excerpt from the *Herring and Salmon* report:

> 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.[36] (emphasis added)

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

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

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[36] *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, para. 4.6; adopted 22 March 1988, cited in Panel Report, para. 6.39.

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

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

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

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

On the other hand, Venezuela and Brazil refer to prior panel reports which include statements to the effect that to be deemed as "made effective in conjunction with restrictions on domestic production or consumption", a measure must be "primarily aimed at" making effective certain restrictions on domestic production or consumption.[38] Venezuela and Brazil also argue that the United States has failed to show the existence of restrictions on domestic production or consumption of a natural resource under the Gasoline Rule since clean air was not an exhaustible natural resource within the meaning of Article XX(g). Venezuela contends, finally, that the United States has not discharged its burden of showing that the baseline establishment rules make the United States' regulatory scheme "effective." The claim of Venezuela is, in effect, that to be properly regarded as "primarily aimed at" the conservation of natural resources, the baseline establishment rules must not only "reflect a conservation purpose" but also be shown to have had "some positive conservation effect."

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

The Appellate Body considers that the basic international law rule of treaty interpretation, discussed earlier, that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here, too. Viewed in this light, the ordinary or natural meaning of "made effective" when used in connection with a measure - a governmental act or regulation -may be seen to refer to such measure being "operative", as "in force", or as having "come into effect."[40] Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with."[41] Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.

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.[42] 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

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

[41] Id., p. 481.

[42] Some illustration is offered in the *Herring and Salmon* case which involved, *inter alia*, a Canadian prohibition of exports of unprocessed herring and salmon. This prohibition effectively constituted a ban on purchase of certain unprocessed fish by foreign processors and consumers while imposing no corresponding ban on purchase of unprocessed fish by domestic processors and consumers. The prohibitions appeared to be designed to protect domestic processors by giving them exclusive access to fresh fish and at the same time denying such raw material to foreign processors. The Panel concluded that these export prohibitions were not justified by Article XX(g). BISD 35S/98, para. 5.1, adopted 22 March 1988. See also the Panel Report in the *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD 29S/91, paras. 4.10-4.12; adopted on 22 February 1982.

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

IV. THE INTRODUCTORY PROVISIONS OF ARTICLE XX OF THE GENERAL AGREEMENT: APPLYING THE CHAPEAU OF THE GENERAL EXCEPTIONS

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

The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of [what was later to become] Article [XX]."[44] This insight drawn from the drafting history of Article XX is a valuable one. The 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 *General 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.

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

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. The provisions of the chapeau cannot

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

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 rule 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.[45]

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

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

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards its contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application. Such a question was put to the United States in the course of the oral hearing. It was asked whether the words incorporated into the first two standards "between countries where the same conditions prevail" refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries. It also said that the language spoke for itself, but there was no reference to third parties; while some thought that this was only between exporting countries *inter se,* there is no support in the text for that view. No such question was put to the United States concerning the field of application of the third standard - disguised restriction on international trade. But the United States put forward arguments designed to show that in the case under appeal, it had met all the standards set forth in the chapeau. In doing so, it clearly proceeded on the assumption that, whatever else they might relate to in another case, they were relevant to a case of national treatment where the Panel had found a violation of Article III:4. At no point in the appeal was that assumption challenged by Venezuela or Brazil. Venezuela argued that the United States had failed to meet all the standards contained in the chapeau. So did Norway and the European Communities as third participants. In short, the field of application of these standards was not at issue.

The assumption on which all the participants proceeded is buttressed by the fact that the chapeau says that "*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures ..." The exceptions listed in Article XX thus 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

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

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.

Against this background, we see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants.

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

There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners. The United States has put forward a series of reasons why either of these courses was not, in its view, realistically open to it and why, instead, it had to devise and apply the baseline establishment rules contained in the Gasoline Rule.

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

> Verification on foreign soil of foreign baselines, and subsequent enforcement actions, present substantial difficulties relating to problems arising whenever a country exercises enforcement jurisdiction over foreign persons. In addition, even if individual baselines were established for several foreign refiners, the importer would be tempted to claim the refinery of origin that presented the most benefits in terms of baseline restrictions, and tracking the refinery or origin would be very difficult because gasoline is a fungible commodity. The United States should not have to prove that it cannot verify information and enforce its regulations in every instance in order to show that the same enforcement conditions do not prevail in the United States and other countries ... The impracticability of verification and enforcement of foreign refiner baselines in this instance shows that the "discrimination" is based on serious, not arbitrary or unjustifiable, concerns stemming from different conditions between enforcement of its laws in the United States and abroad.

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

While the anticipated difficulties concerning verification and subsequent enforcement are doubtless real to some degree, the Panel viewed them as insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners. The Panel said:

> [6.26] … While the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less inconsistent with the General Agreement. Indeed, the Panel noted that a determination of origin would often be feasible. The Panel examined, for instance, the case of a direct shipment to the United States. It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.
>
> . . .
>
> [6.28] … In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve U.S. purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel's view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data.

We agree with the finding above made in the Panel Report. There are, as the Panel Report found, established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade - trade between territorial sovereigns - to go on and grow. The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been

necessary and appropriate. At the oral hearing, in the course of responding to an enquiry as to whether the EPA could have adapted, for purposes of establishing individual refinery baselines for foreign refiners, procedures for verification of information found in U.S. antidumping laws, the United States said that "in the absence of refinery cooperation and the possible absence of foreign government cooperation as well", it was unlikely that the EPA auditors would be able to conduct the on-site audit reviews necessary to establish even the overall quality of refineries' 1990 gasoline. From this statement, there arises a strong implication, it appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.[52] The fact that the United States Congress might have intervened, as it did later intervene, in the process by denying funding, is beside the point: the United States, of course, carries responsibility for actions of both the executive and legislative departments of government.

In its submissions, the United States also explained why the statutory baseline requirement was not imposed on domestic refiners as well. Here, the United States stressed the problems that domestic refineries would have faced had they been required to comply with the statutory baseline. The Panel Report summarized the United States' argument in the following terms:

> [3.52] … The United States concluded that, contrary to Venezuela's and Brazil's claim, Article XX did not require adoption of the statutory baseline as a national standard even if the difficulties associated with the establishment of individual baselines for importers were insurmountable. Application of the statutory baseline to domestic producers of reformulated and conventional gasoline in 1995 would have been *physically and financially impossible because of the magnitude of the changes required in almost all US refineries; it thus would have caused a substantial delay in the programme.* Weighing the feasibility of policy options in economic or technical terms in order to meet an environmental objective was a legitimate consideration, and did not, in itself, constitute protectionism, as alleged by Venezuela and Brazil. Article XX did not require a government to choose the most expensive possible way to regulate its environment. (emphasis added)

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

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

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

V. FINDINGS AND CONCLUSIONS

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

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

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

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

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

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

It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgment to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.

* * *

4. United States – Import Prohibition of Certain Shrimp and Shrimp Products ("Shrimp/Turtle") (1998–2001)

Shrimp/Turtle has been called a watershed in Article XX jurisprudence. Pay close attention to the debate between the panel and the AB over the interpretation of Art XX(g), as well as the debate over the proper test under the Chapeau. *How does* Shrimp/Turtle *compare to* US—Gasoline*?*

4-1. Panel Report, WT/DS58/R, 15 May 1998

Chairman: Mr. Michael Cartland; Members: Mr. Carlos Cozendey; Mr. Kilian Delbrück

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm

Editorial note: Most footnotes have been omitted from this report.

(…)

II. FACTUAL ASPECTS

1. Basic Facts about Sea Turtles

2.1 Seven species of sea turtles are currently recognized: the green turtle (*Chelonia mydas*), loggerhead (*Caretta caretta*), flatback (*Natator depressus*), hawksbill (*Eretmochelys imbricate*), leatherback (*Dermochelys coriacea*), olive ridley (*Lepidochelys olivacea*), and Kemp's ridley (*Lepidochelys kempi*).

2.2 Most species of sea turtles are distributed around the globe, in subtropical or tropical areas. Sea turtles spend their lives at sea, where they migrate between their foraging and their nesting grounds, but reproduce on land. … Little is known about the existence of sea turtles at seas.

2.3 Sea turtles have been adversely affected by human activity, either directly (sea turtles have been exploited for their meat, shells and eggs), or indirectly (incidental captures in fisheries, destruction of their habitats, pollution of the oceans). Presently, all species of sea turtles are included in Appendix I of the 1973 Convention on International Trade in Endangered Species ("CITES"). …

2. The US Endangered Species Act (ESA) and Related Legislation

2.4 All sea turtles that occur in US waters are listed as endangered or threatened species under the Endangered Species Act of 1973 ("ESA"). The ESA prohibits take of endangered sea turtles within the United States, within the US territorial sea, and the high seas, except as authorized by the Secretary of Commerce (for sea turtles in marine waters) or the Secretary of the Interior (for sea turtles on land).

2.5 Research programmes in the Gulf of Mexico and the Atlantic Ocean off the southeastern United States led to the conclusion that incidental capture and drowning of sea turtles by shrimp trawlers was the most significant source of mortality for sea turtles. Within the context of a programme aiming at reducing the mortality of sea turtles in shrimp trawls, the National Marine Fisheries Service ("NMFS") developed turtle excluder devices ("TEDs"). A TED is a grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net. In 1983, NFMS began a formal programme to encourage shrimp fishermen to use TEDs voluntarily, so as to reduce the incidental catch and mortality of sea turtles associated with shrimp trawling. As part of the voluntary TED programme, NMFS delivered TEDs to volunteer shrimp fishermen and showed them how to properly install and use the TEDs. However this voluntary programme did not turn out to be successful because an insufficient number of fishermen used TEDs on a regular basis.

(…)

VI. FINDINGS

A. Introduction

(…)

7.2 … In 1987, the United States issued regulations under the ESA whereby shrimp fishermen are required to use TEDs or tow time restrictions in specified areas where there is a significant mortality of sea turtles in shrimp trawls. Since December 1994, these regulations have eliminated the option for small trawl vessels to restrict tow times in lieu of using TBDs.

7.3 In 1989, the United States enacted Section 609 of Public Law 101-162 (hereafter "Section 609"). Section 609 calls upon the US Secretary of State, in consultation with the US Secretary of Commerce, *inter alia* to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with governments of countries engaged in commercial fishing operations likely to have a negative impact on sea turtles. Section 609 further provides that shrimp harvested with technology that may adversely affect certain sea turtles protected under US law may not be imported into the United States, unless the President annually certifies to the Congress that the harvesting country concerned has a regulatory programme governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States, that the average rate of that incidental taking by the vessels of the harvesting country is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting, or that the fishing environment of the harvesting country does not pose a threat of incidental taking to sea turtles in the course of such harvesting.

7.4 The United States issued guidelines in 1991 and 1993 for the implementation of Section 609. Pursuant to these guidelines, Section 609 was applied only to countries of the Caribbean/Western Atlantic. In September 1996, the United States concluded the Inter-American Convention for the Protection and Conservation of Sea Turtles with a number of countries of that region. In December 1995, the US Court of International Trade (hereafter "CIT") found the 1991 and 1993 guidelines illegal insofar as they limited the geographical scope of Section 609 to

shrimp harvested in the wider Caribbean/Western Atlantic area. The CIT directed the US Department of State to prohibit, no later than 1 May 1996, the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely those species of sea turtles the conservation of which is the subject of regulations of the Secretary of Commerce.

7.5 In April 1996, the Department of State published revised guidelines to comply with the CIT order of December 1995. The new guidelines extended the scope of Section 609 to shrimp harvested in all countries. The Department of State further determined that, as of 1 May 1996, all shipments of shrimp and shrimp products into the United States must be accompanied by a declaration attesting that the shrimp or shrimp product in question has been harvested "either under conditions that do not adversely affect sea turtles ... or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609." The 1996 guidelines define "shrimp or shrimp products harvested in conditions that do not affect sea turtles" to include: "(a) Shrimp harvested in an aquaculture facility ...; (b) Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States; (c) Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the US programme, would require TEDs; (d) Species of shrimp, such as the pandalid species, harvested in areas in which sea turtles do not occur". The 1996 guidelines provided that certification could be granted by 1 May 1996, and annually thereafter to harvesting countries other than those where turtles do not occur or that exclusively use means that do not pose a threat to sea turtles "only if the government of [each of those countries] has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of seaturtles in the course of commercial shrimp trawl harvesting that is comparable to that of the United States and if the average take rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting." For the purpose of these certifications, a regulatory programme must include, *inter alia*, a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use TEDs at all time. TEDs must be comparable in effectiveness to those used by the United States. Moreover, the average incidental take rate will be deemed comparable to that of the United States if the harvesting country requires the use of TEDs in a manner comparable to that of the US programme.

7.6 In October 1996, the CIT ruled that the embargo on shrimp and shrimp products enacted by Section 609 applies to "all shrimp and shrimp products harvested in the wild by citizens or vessels of nations which have not been certified." The CIT found that the 1996 guidelines are contrary to Section 609 when allowing, with a shrimp exporter declaration form, imports of shrimp from non-certified countries, if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles. The CIT later clarified its decision in ruling that shrimp harvested by manual methods which do not harm sea turtles, by aquaculture and in cold water, could continue to be imported even from countries which have not been certified under Section 609.

(…)

C. Violation of Article Xl:l of GATT 1994

(…)

7.17 Therefore, we find that the United States admits that, with respect to countries not certified under Section 609, the measures imposed in application of Section 609 amount to "prohibitions or restrictions" on the importation of shrimp within the meaning of Article Xl:l of GATT 1994. Even if one were to consider that the United States has not admitted that it imposes an import prohibition or restriction within the meaning of Article XI:l, we find that the wording of Section 609 and the interpretation made of it by the CIT are sufficient evidence that the United States imposes a "prohibition or restriction" within the meaning of Article XI:l. We therefore find that Section 609 violates Article Xl:l of GATT 1994.

(…)

E. Article XX of GATT 1994

1. Preliminary remarks

7.24 The United States claims that the measures at issue adopted pursuant to Section 609, which were found to be inconsistent with Articles XI:l GATT 1994, are justified under Article XX(b) and (g) of GATT 1994. India, Pakistan and Thailand argue that Article XX(b) and (g) cannot be invoked to justify a measure which applies to animals not within the jurisdiction of the Member enacting the measure. Malaysia contends that, since Section 609 allows the United States to take actions unilaterally to conserve a shared natural resource, it is therefore in breach of the sovereignty principle under international law. The United States responds that Article XX(b) and (g) contain no jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved and that, under general principles of international law relating to sovereignty, States have the right to regulate imports within their jurisdiction.

7.25 The relevant parts of Article XX provide as follows:

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

…

7.26 The arguments of the parties raise the general question of whether Article XX(b) and (g) apply at all when a Member has taken a measure conditioning access to its market for a given product on the adoption of certain conservation policies by the exporting Member(s). We note that Article XX can accommodate a broad range of measures aiming at the conservation and preservation of the environment.[629] At the same time, by accepting the WTO Agreement, Members commit themselves to certain obligations which limit their right to adopt certain measures. We therefore consider 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).

7.27 Pursuant to Article 3.2 of the DSU and in accordance with Appellate Body decisions, we should, when trying to clarify the scope of Article XX, have recourse to customary rules of interpretation of public international law. We note that Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (hereafter the "Vienna Convention") provides that:

> "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".

Therefore, in order to determine the scope of Article XX, it is necessary to consider not only the terms in their ordinary meaning, but also their context and the object and purpose of GATT 1994 and the WTO Agreement itself.

7.28 Article XX contains an introductory provision, or *chapeau*, and a number of specific requirements contained in successive paragraphs. As mentioned by the Appellate Body in its report in the *Gasoline* case, in order for the justification of Article XX to be extended to a given measure, it 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 clause of Article XX. We note that panels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyze first the introductory provision of Article XX.

7.29 We also recall that the Appellate Body considered, in the *Gasoline* case, that the chapeau by its express terms addresses, not so much the questioned measure or its specific contents, but rather the manner in which that measure is applied. The Appellate Body further underscored that "the purpose and object of the introductory clause of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX]'". Hence, the chapeau determines to a large extent the context of the specific exceptions contained in the paragraphs of

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[629] See, e.g. Appellate Body report on *United States – Standards for Reformulated and Conventional Gasoline* (hereafter "*Gasoline*"). WT/DS3/AB/R, adopted on 20 May 1996, which provides, at p. 30:

> "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements."

Article XX. Therefore, we shall first determine whether the measure at issue satisfies the conditions contained in the chapeau. If we find this to be the case, we shall then examine whether the US measure is covered by the terms of Article XX(b) or (g).

7.30 Finally, we keep in mind the well-established practice according to which when an affirmative defence, such as Article XX, is invoked, the burden of proof should rest on the party asserting it. We therefore consider that the burden of proving that the measure at issue is justified under Article XX rests on the United States, as the party asserting this affirmative defence.

2. Chapeau of Article XX

7.31 India, Pakistan and Thailand argue that the embargo applied by the United States is implemented in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail insofar as the newly affected nations, including India, Pakistan and Thailand, have been given substantially less notice than the other countries, whether the United States or initially affected countries, before being forced to comply with TEDs requirements. They maintain that there is not only a discrimination between exporting countries, but also between exporting countries and the United States. Furthermore, India, Pakistan and Thailand consider that, before requiring TEDs application from them, the United States should have demonstrated that the same conditions do not prevail between India, Pakistan or Thailand and the countries with no TEDs requirement. Moreover, for these complainants, the legislative history of Section 609, which includes discussions of this section in terms of the competitive position of the US shrimp industry, further supports the conclusion that the embargo is a disguised restriction on international trade. The effect of the restriction was not so much reduced importation as the additional cost on the foreign industry, making it less competitive, and the risk that the right to export might be revoked. Malaysia claims that disguised restrictions include disguised discrimination in international trade, and that it has been subject to such discrimination because it was given only a few months to comply with the US requirements as opposed to three years in the case of the initially affected countries.

7.32 The United States argues that the measures related to import of shrimp were carefully and justifiably tied to the particular conditions of each country exporting shrimp to the United States. All exporting nations with the same shrimp harvesting conditions are treated equally, with no discrimination. For the United States, the evidence is overwhelming that the conservation measures under Section 609 are not some artifice intended to protect the US fishing industry. The United States argued that the strong and growing international consensus regarding sea turtle conservation and the mandatory use of TEDs belies any claim that the US measures are some sort of disguised restriction on trade. In addition, the United States maintains that the extension of the application of Section 609 to other countries than the United States and the wider Caribbean/Western Atlantic area has not led to a decrease in the quantities imported nor to an increase in prices.

7.33 In order to apply Article XX in this case, we must, as mentioned in paragraph 7.27 above, interpret it in line with Article 31(1) of the Vienna Convention. More particularly, the chapeau of Article XX must be interpreted on the basis of the ordinary meaning of its terms, in their context and in the light of the object and purpose of GATT 1994 and the WTO Agreement. We consider first if the terms of the chapeau of Article XX explicitly address the issue of whether Article XX contains any limitation on a Member's use of measures conditioning market access to the adoption of certain conservation policies by the exporting Member. In this connection, we note that the chapeau prohibits such application of the measure at issue as would constitute "arbitrary

or unjustifiable discrimination" between countries where the same conditions prevail. We note that the US measure at issue applies to all Members seeking to export to the United States wild shrimp retrieved mechanically from waters where sea turtles and shrimp occur concurrently. We consider those Members to be "countries where the same conditions prevail", within the meaning of Article XX. We further note that some of those countries have been "certified" and can export shrimp to the United States whereas some have not and are subject to an import ban. Consequently, discriminatory treatment is applied to shrimp from non-certified countries. Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an "arbitrary" or unjustifiable" manner.

7.34 We therefore move to consider whether the US measure conditioning market access on the adoption of certain conservation policies by the exporting Member could be considered as "unjustifiable" discrimination. As was recalled by the Appellate Body in the *Gasoline* case, "the text of the chapeau of Article XX is not without ambiguity". The word "unjustifiable" has never actually been subject to any precise interpretation. The ordinary meaning of this term is susceptible to both narrow and broad interpretations. While the ordinary meaning of "unjustifiable" confirms that Article XX is to be applied within certain boundaries, it does not explicitly address the issue of whether Article XX should be interpreted to contain any limitation on a Member's use of measures conditioning market access on the adoption of certain conservation policies by the exporting Member. For that reason, it is essential that we interpret the term "unjustifiable" within its context and in the light of the object and purpose of the agreement to which it belongs.

7.35 Turning to an examination of the context of the terms and the object and purpose of the WTO Agreement, we note that the notion of "context", on the one hand, and of "object and purpose", on the other hand, are intimately linked. Indeed, Article 31(2) of the Vienna Convention provides that the context for the purpose of treaty interpretation comprises the text of the agreement, including its preamble and annexes. By the same token, determining the object and purpose of an agreement implies an examination of the text of the agreement and of its preamble. Consequently, we consider that the context of the chapeau of Article XX cannot be distinguished from that of Article XX as a whole. Furthermore, as the WTO Agreement is an integrated system including GATT 1994, 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.

7.36 GATT panels had the occasion to address the context and the object and purpose of Article XX. The 1989 panel on *United States - Section 337 of the Tariff Act of 1930* considered that:

> "[5.9] ... Article XX is entitled 'General Exceptions' ... Article XX(d) thus provides for a *limited and conditional exception* from obligations under other provisions".

Referring, *inter alia,* to the above-mentioned report, the panel in the *Tuna I* case found that:

> "[5.22] ... previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and *not a positive rule establishing obligations in itself*. Therefore, the practice of panels has been to interpret Article XX narrowly ...."

7.37 The Appellate Body also described Article XX in very similar language. In the *Wool Shirts* case, it found that:

> "Articles XX and XI:1(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves."[641]

7.38 The Appellate Body has also discussed the relationship of Article XX(g) to GATT as a whole, in terms that would apply to the relationship to GATT of Article XX taken in its entirety:

> "... Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources,' need to be read in context and in such a manner *as to give effect to the purposes and objects of the General Agreement*. The 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 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."[641]

7.39 While the Appellate Body has noted that the rights that Members do have under Article XX must, of course, be respected, it has also noted the existence of limits and conditions on the scope of Article XX. It has expressed those limits and conditions as follows in respect of its analysis of the object and purpose of the chapeau of Article XX:

> "... 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 *General Agreement*. If those exceptions [contained in Article XX] 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. "

7.40 We note that the chapeau to Article XX provides that "nothing in [GATT 1994] shall be construed to prevent the adoption or enforcement ... of measures" otherwise in conformity with Article XX conditions. However, we consider that this wording is not affected by the findings quoted above. As the Appellate Body also put it, 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 clauses of Article XX is generally the prevention of 'abuse of the exceptions of ... [Article XX]'. " We deduce from this that, when invoking Article XX, a Member invokes the right to derogate to certain specific substantive provisions of GATT 1994

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[641] Op. Cit., p. 16.

[641] Appellate Body Report in the *Gasoline* case, Op. Cit., p. 18 (emphasis added).

but that, in doing so, it must not frustrate or defeat the 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.

7.41 We consider this finding of the Appellate Body to be an application of the international law principle according to which international agreements must be applied in good faith, in light of the *pacta sunt servanda* principle. The concept of good faith is explained in Article 18 of the Vienna Convention which states that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty".[645]

7.42 We consequently turn to the consideration of the object and purpose of the WTO Agreement, of which GATT 1994 and Article XX thereof are an integral part. We note that the preamble of an agreement may assist in determining its object and purpose. On the one hand, the first paragraph of the Preamble of the WTO Agreement acknowledges that the optimal use of the world's resources must be pursued "in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development". On the other hand, the second paragraph of the Preamble of GATT and the third paragraph of the WTO Preamble refer to "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment" in international trade relations. While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis.

7.43 We also note that, by its very nature, the WTO Agreement favours a multilateral approach to trade issues. The Preamble to the WTO Agreement provides that Members are "resolved ...to develop an integrated, more viable and durable *multilateral trading system* [and] ... determined to preserve the basic principles and to further the objectives underlying this *multilateral trading system*" (emphasis added). Article III:2 of the WTO Agreement also mentions that:

> "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide for a forum for further negotiations among its Members concerning their multilateral trade relations ...".

This approach is also expressed in Article 23.1of the DSU which stresses the primacy of the *multilateral* system and rejects unilateralism as a substitute for the procedures foreseen in that agreement.

7.44 Therefore, we are of the opinion that the chapeau 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

[645] This rule, which applies to the period between the moment when a State has expressed its consent to be bound by a treaty and its entry into force, nevertheless seems to express a generally applicable principle. See Patrick Daillier & Alain Pellet, Droit International Public (1994), p. 216.

Article XX. Such undermining and abuse would occur when a Member jeopardizes the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible. As was recalled by previous panels, GATT rules "are not only to protect current trade but also to create the predictability needed to plan future trade".[648] The protection of expectations of Members as to the competitive relationship between their products and the products of other Members is therefore an important principle to be taken into account by panels when reviewing a particular measure. 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.

7.45 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 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.

7.46 We find support for our reasoning in the *Tuna II* case where the panel considered a similar issue and found as follows:

> "5.26 The Panel observed that Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly. In a manner that preserves the basic objectives and principles of the General Agreement. If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If, however Article XX were interpreted to permit contracting parties to take trade measures

[648] Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

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."[652]

(…)

7.47 In light of this analysis of the terms and context of the chapeau of Article XX in the light of the object and purpose of the WTO Agreement, we turn to a consideration of whether the US measure challenged in this case falls within the scope of Article XX.

7.48 The United States argues that the intent of Section 609 is to protect and conserve the life and health of sea turtles by requiring that shrimp imported into the United States has not been harvested in a manner that will harm sea turtles. As a result of judgements of the US Court of International Trade (hereafter "CIT"), the US Administration currently has to apply the import ban, including on TED-caught shrimp, as long as the country concerned has not been certified.[654] In addition, certification is only granted if comprehensive requirements regarding use of TEDs by fishing vessels are applied by the exporting country concerned, or if the shrimp trawling operations of the exporting country take place exclusively in waters in which sea turtles do not occur. Consequently, Section 609, as applied, is a measure conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the United States considers to be comparable to its own in terms of regulatory programmes and incidental taking.

7.49 Accordingly, it appears to us that, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement, the US measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX. However, before making a definitive finding on this issue, we must consider several arguments put forward by the United States that relate generally to our analysis of Article XX.

7.50 The United States argues that the Panel should consider the many examples of import bans under various international agreements that show that Members may take actions to protect animals, whether they are located *within or outside their jurisdiction*. We are of the view that these treaties show that environmental protection through international agreement - as opposed to unilateral measures - have for a long time been a recognized course of action for environmental protection. We note that this US argument addresses the issue of a potential jurisdictional scope of Article XX. However, we consider that this argument bears no direct relation to our finding, which rather addresses the inclusion of certain unilateral measures within the scope *ratione materiae* of Article XX. In addition, in the present case, we are not dealing with measures taken by the United States in application of an agreement to which it is party, as the United States does not claim that it is allowed or required by any international agreement (other than GATT 1994) to impose an import ban on shrimp in order to protect sea turtles. Rather, we are limiting our finding

[652] The report of the panel in the *Tuna II* case was not adopted. We nonetheless … consider that the reasoning of the panel in the *Tuna II* case, in the light of the similarities between the issues addressed by that panel and the present Panel, is relevant in the present case and provides useful guidance.

[654] United States Court of International Trade: *Earth Island Institute v. Christopher*, rulings of 8 October (942 F. Supp. 597) and 25 November 1996 (948 F. Supp. 1062).

to measures - taken independently of any such international obligation - conditioning access to the US market for a given product on the adoption by the exporting Member of certain conservation policies. In this regard, we note that banning the importation of a particular product does not *per se* imply that a change in policy is required from the *country* whose exports are subject to the import prohibition. For instance, a Member may ban a product on the ground that it is dangerous, and accept a similar product that is safe. This is clearly different from adopting a policy pursuant to which only countries that adopt measures restricting all of their production to products considered safe by a particular Member may export to the market of that Member. We note that a judgement of the CIT interpreting Section 609 ruled that the US Administration has to apply the import ban, including on TED-caught shrimp, as long as the country concerned has not been certified. Currently, certification is only granted if *comprehensive requirements* regarding use of TEDs by fishing vessels are applied by the exporting country concerned.

7.51 The United States further argues that the complainants confuse the difference between extra jurisdictional application of a country's law and the application by a country of its law, within its jurisdiction, in order to protect resources located outside its jurisdiction. However, we note that we are not basing our finding on an extra-jurisdictional application of US law. Many domestic governmental measures can have an effect outside the jurisdiction of the government which takes them. What we found above was that a measure cannot be considered as falling within the scope of Article XX if it operates so as to affect other governments' policies in a way that threatens the multilateral trading system, as described in paragraph 7.45 above. For instance, a US requirement, that US norms regarding the characteristics of a given product be met for that product to be allowed on the US market, would not constitute such a threat. Such types of measures are contemplated by the WTO Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures. However, requiring that other Members adopt policies comparable to the US policy for their domestic markets, and all other markets represents a threat to the WTO multilateral trading system. As affirmed by the Appellate Body in its report in the *Gasoline* case, "Members have a large measure of autonomy to determine their own policies on the environment ..., their environmental objectives and the environmental legislation they enact and implement", circumscribed only, so far as concerns the WTO, by the need to respect the requirements of the General Agreement and the other covered agreements. Therefore, a Member's measure which conditions access to its market on the adoption by the exporting Member of certain conservation policies is a denial of such autonomy.

7.52 The United States argues that the right of WTO Members to take measures under Article XX to conserve and protect natural resources is reaffirmed and reinforced by the Preamble to the WTO Agreement. Although we do not disagree in general with this statement, we are not persuaded that this argument is a reason to change our finding. Whilst the central focus of that Agreement is to promote economic development through trade, we note that the Preamble acknowledges that the optimal use of the world's resources must be pursued "in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development". Thus the Preamble endorses the fact that environmental policies must be designed taking into account the situation of each Member, both in terms of its actual needs and in terms of its economic means. Moreover, the record before us and, in particular, the answers of the experts to the questions of the Panel, strongly suggest that the environmental issues at stake in this case should be evaluated to a large degree in light of local and regional conditions. They also suggest that conservation measures should be adapted, *inter alia*, to the environmental, social and economic conditions prevailing where they are to be applied. We further note that the 1992 Rio Declaration on Environment and Development recognizes the right of States to design their own environmental policies on the basis of their

particular environmental and developmental situations and responsibilities. It also stresses the need for international cooperation and for avoiding unilateral measures. In this light, we consider that the Preamble does not justify interpreting Article XX to allow a Member to condition access to its market for a given product on the adoption of certain conservation policies by exporting Members in order to bring them into line with those of the importing Member. On the contrary, the diversity of the environmental and development situations underlined by the Preamble can best be taken into account through international cooperation. The Preamble also implies that attempts to generalize standards of environmental protection would require multilateral discussion, especially when, as here, developing countries are involved. Therefore, we do not consider that the wording of the Preamble referred to by the United States should lead us to a different conclusion than the one reached above.

7.53 The United States further claims that sea turtles are a shared global resource and that, therefore, it has an interest and a right to impose the measures at issue. Firstly, the United States argues that sea turtles are a shared global resource because they are highly migratory creatures which travel through large expanses of sea, within the range of thousands of kilometres, from the jurisdiction of one Member to those of other Members. Secondly, the United States also argues that, even if sea turtles were not migratory at all, they may still represent a shared global resource in terms of biological diversity in the protection of which the United States may have a legitimate interest. Information brought to the attention of the Panel, including documented statements from the experts, tends to confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea. This said, even assuming that sea turtles were a shared global resource, we consider that the notion of "shared" resource implies a common interest in the resource concerned. If such a common interest exists, it would be better addressed through the negotiation of international agreements than by measures taken by one Member conditioning access to its market to the adoption by other Members of certain conservation policies. We note in this respect that Article 5 of the 1992 Convention on Biological Diversity provides that:

> "each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity."

We consider that this provision is evidence that "matters of mutual interest" have normally to be addressed primarily through international cooperation. Therefore, we find that if, as alleged by the United States, sea turtles are shared global resources, that would not call for a change in our finding. Instead, it suggests that the United States should have entered into international cooperation with the aim of developing internationally accepted conservation methods, including with the complainants.

7.54 In addition, the United States argues that nothing in Article XX requires a Member to seek negotiation of an international agreement instead of, or before adopting unilateral measures. In any event, the United States claims it offered to negotiate but the complainants did not reply.

7.55 Regarding whether there is an obligation for a Member to negotiate, we recall our finding in paragraph 7.45 above that the WTO multilateral trading system would be undermined if Members were allowed to adopt measures making access of other Members to their market conditional upon the adoption by the exporting Members of certain conservation policies because it would not be possible for Members to meet conflicting requirements of such a nature. This is clearly a situation where elaboration of international standards would be desirable. We note in

that respect that the WTO Agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures promote the use of international standards. We also recall our consideration in paragraph 7.52. The nature of the measures that the United States was seeking to obtain from the exporting countries concerned and the principles recalled in several international environmental agreements imply that a country seeking to promote environmental concerns of such a nature should engage into international negotiations. The negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system.

7.56 We note that Section 609 contains provisions calling upon the US Secretary of State to initiate negotiations as soon as possible for the development of bilateral or multilateral agreements for the protection and conservation of the species of sea turtles covered by that Section. The judgement of the CIT which was handed over on 29 December 1995 required the US Administration to apply Section 609 on a world-wide basis (and no longer only to the Wider Caribbean/Western Atlantic region) by no later than 1 May 1996. This implied that, unless the exporting countries decided to use TEDs in their shrimp trawling activities - either of their own initiative or through negotiations - the import ban on wild shrimp would be applied to them as of that date. The United States told us of its efforts to have the deadline set in the CIT judgement postponed. However, we have no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques which would have included the complainants *before* the imposition of the import ban as a result of the CIT judgement. From the replies of the parties to our question on this subject, in particular that of the United States, we understand that the United States did not propose the negotiation of an agreement to any of the complainants until after the conclusion of negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, in September 1996, i.e. well after the deadline for the imposition of the import ban of 1 May 1996. Even then, it seems that the efforts made merely consisted of an exchange of documents. We therefore conclude that, in spite of the possibility offered by its legislation, the United States did not enter into negotiations before it imposed the import ban.[668] As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures.

7.57 Finally, we note that the United States argues that the use of TEDs has become a recognized multilateral environmental standard. In support of this, the United States firstly contends that the international community has long recognized the need to protect endangered species such as sea turtles. Secondly, several international conventions require parties to adopt conservation policies and urge them to ensure, through proper conservation measures, the maintenance of living resources, including non-target species caught in fishing operations. …

7.58 Moving to examine whether international obligations exist with regard to the protection of sea turtles, we first note that both the United States and the complainants have elaborated at length on the policies they have developed to protect sea turtles. Both the United States and the complainants have referred to the Convention on International Trade in Endangered Species of

[668] We note in this respect that, in the *Gasoline* case, the Appellate Body considered that a strong implication arose from the fact that the United States had not pursued the possibility of entering into cooperative arrangements, which would have been a means of alleviating the discrimination suffered by foreign refiners *vis-à-vis* US refiners. In that case, the Appellate Body concluded that the discrimination was not "inadvertent or unavoidable" and that the measure at issue constituted "unjustifiable discrimination" and a "disguised restriction on international trade".

Wild Fauna and Flora (CITES). Parties to the dispute are all parties to CITES and the turtles' species covered by the US measures at issue are all listed in Appendix I (Species threatened with extinction). The endangered nature of the species of sea turtles mentioned in Annex I as well as the need to protect them are consequently not contested by the parties to the dispute. However, CITES is about *trade in endangered species* and the subject of the US import prohibition (shrimp) is not the endangered species whose protection is sought through the import ban. We also note that the United States has mentioned that CITES neither authorizes nor prohibits the seaturtles conservation measures which are at issue in this dispute. Therefore, we consider that CITES, even though its object is to contribute to the protection of certain species, does not impose on its members specific methods of conservation such as TEDs.

(…)

7.60 In conclusion, we do not consider that any of the arguments raised by the United States would justify a finding different from that reached in paragraph 7.49 above. We consider that our findings do not question the legitimacy of environmental policies, including those promoted through multilateral conventions.[674] We consider our findings to be in line with the principles embodied in many international agreements pursuant to which international cooperation is to be sought before having recourse to unilateral measures. Furthermore, the risk of a multiplicity of conflicting requirements clearly is reduced when requirements are decided in multilateral fora. Moreover, we do not suggest that import markets must exist as an incentive for the destruction of natural resources. Rather, we address a particular situation where a Member has taken unilateral measures which, by their nature, could put the multilateral trading system at risk.

7.61 In reaching our conclusions, we based ourselves on the current status of the WTO rules and of international law. As far as the WTO Agreement is concerned, we considered that certain unilateral measures, insofar as they could jeopardize the multilateral trading system, could not be covered by Article XX. Our findings with respect to international norms confirm our reasoning regarding the WTO Agreement and GATT. General international law and international environmental law clearly favour the use of negotiated instruments rather than unilateral measures when addressing transboundary or global environmental problems, particularly when developing countries are concerned. Hence a negotiated solution is clearly to be preferred, both from a WTO and an international environmental law perspective. However, our findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply that, in any given case, they would be permitted. Nevertheless, in the present case, even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system and were applied without any serious attempt to reach, beforehand, a negotiated solution.

7.62 We therefore find that the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX.

(…)

[674] We do not question either the fact generally acknowledged by the experts that TEDs, when properly installed and used and adapted to the local area, would be an effective tool for the preservation of sea turtles.

VIII. CONCLUSIONS

8.1 In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.

(…)

IX. CONCLUDING REMARKS

9.1 We note that the issue in dispute was not the urgency of protection of sea turtles. The matter we have been asked to review is Section 609 as interpreted by the CIT and as applied by the United States on the date this Panel was established. It was not our task to review generally the desirability or necessity of the environmental objectives of the US policy on sea turtle conservation. In our opinion, Members are free to set their own environmental objectives. However, they are bound to implement these objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose. … [T]he protection of sea turtles throughout their life stages is important and TEDs are one of the recommended means of protection within an integrated conservation strategy. We consider that the best way for the parties to this dispute to contribute effectively to the protection of sea turtles in a manner consistent with WTO objectives, including sustainable development, would be to reach cooperative agreements on integrated conservation strategies, covering, *inter alia*, the design, implementation and use of TEDs while taking into account the specific conditions in the different geographical areas concerned.

* * *

4-2. Appellate Body Report, WT/DS58/AB/R, 12 October 1998

Presiding Member: Feliciano; Members: Bacchus; Mr. Lacarte-Muró

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm

Editorial note: Most footnotes have been omitted from this report.

(…)

IV. ISSUES RAISED IN THIS APPEAL

98. The issues raised in this appeal by the appellant, the United States, are the following:

(…)

(b) whether the Panel erred in finding that the measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX of the GATT 1994.

(…)

VI. APPRAISING SECTION 609 UNDER ARTICLE XX OF THE GATT 1994

111. We turn to the second issue raised by the appellant, the United States, which is whether the Panel erred in finding that the measure at issue[76] constitutes unjustifiable discrimination between countries where the same conditions prevail and, thus, is not within the scope of measures permitted under Article XX of the GATT 1994.

A. The Panel's Findings and Interpretative Analysis

(…)

113. Article XX of the GATT 1994 reads, in its relevant parts:

[76] The United States measure at issue is referred to in this Report as "Section 609" or "the measure". By these terms, we mean Section 609 and the 1996 Guidelines.

Article XX

General Exceptions

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

114. The Panel did not follow all of the steps of applying the "customary rules of interpretation of public international law" as required by Article 3.2 of the DSU. As we have emphasized numerous times, these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.

115. In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied". In *United States - Gasoline*, we pointed out that the chapeau of Article XX "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*."[84] (emphasis added) The Panel did not inquire specifically into how the *application* of Section 609 constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the *design of the measure itself*. For instance, the Panel stressed that it was addressing "a particular situation where a Member has taken unilateral measures which, *by their nature*, could put the multilateral trading system at risk." (emphasis added)

116. The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the

[84] Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

paragraphs of Article XX following the chapeau. 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" must be regarded as "not within the scope of measures permitted under the chapeau of Article XX." 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. In *United States - Gasoline*, we stated that it is "important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of '*abuse of the exceptions of* [*Article XX*]'."[88] (emphasis added) The Panel did not attempt to inquire into how the measure at stake was being *applied in such a manner* as to constitute *abuse or misuse of a given kind of exception*.

117. The above flaws in the Panel's analysis and findings flow almost naturally from the fact that the Panel disregarded the sequence of steps essential for carrying out such an analysis. The Panel defined its approach as first "determin[ing] whether the measure at issue satisfies the conditions contained in the chapeau."[89] If the Panel found that to be the case, it said that it "shall then examine whether the US measure is covered by the terms of Article XX(b) or (g)." The Panel attempted to justify its interpretative approach in the following manner:

> [7.28] … As mentioned by the Appellate Body in its report in the *Gasoline* case, in order for the justification of Article XX to be extended to a given measure, it 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 clause of Article XX. We note that panels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, *as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX*. (emphasis added)

…

118. In *United States - Gasoline*, we enunciated the appropriate method for applying Article XX of the GATT 1994:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is,* in other words, *two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further*

[88] Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[89] Panel Report, para. 7.29.

appraisal of the same measure under the introductory clauses of Article XX.[92] (emphasis added)

119. The sequence of steps indicated above 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 *United States - Gasoline* "seems equally appropriate." We do not agree.

120. The task of interpreting the chapeau so as to prevent the abuse or 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: the prohibition of the *application* of a measure "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."(emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

121. The consequences of the interpretative approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, 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. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

122. We hold that the findings of the Panel quoted in paragraph 112 above, and the interpretative analysis embodied therein, constitute error in legal interpretation and accordingly reverse them.

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[92] Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

123. Having reversed the Panel's legal conclusion that the United States measure at issue "is not within the scope of measures permitted under the chapeau of Article XX", we believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX. In doing this, we are fully aware of our jurisdiction and mandate under Article 17 of the DSU. …

(…)

B. Article XX(g): Provisional Justification of Section 609

125. In claiming justification for its measure, the United States primarily invokes Article XX(g). … We proceed, therefore, to the first tier of the analysis of Section 609 and to our consideration of whether it may be characterized as provisionally justified under the terms of Article XX(g).

126. Paragraph (g) of Article XX covers measures:

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

1. "Exhaustible Natural Resources"

127. We begin with the threshold question of whether Section 609 is a measure concerned with the conservation of "exhaustible natural resources" within the meaning of Article XX(g). The Panel, of course, with its "chapeau-down" approach, did not make a finding on whether the sea turtles that Section 609 is designed to conserve constitute "exhaustible natural resources" for purposes of Article XX(g). In the proceedings before the Panel, however, the parties to the dispute argued this issue vigorously and extensively. India, Pakistan and Thailand contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources." In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed." Moreover, they argued, if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous. They also referred to the drafting history of Article XX(g), and, in particular, to the mention of minerals, such as manganese, in the context of arguments made by some delegations that "export restrictions" should be permitted for the preservation of scarce natural resources. For its part, Malaysia added that sea turtles, being living creatures, could only be considered under Article XX(b), since Article XX(g) was meant for "nonliving exhaustible natural resources". It followed, according to Malaysia, that the United States cannot invoke both the Article XX(b) and the Article XX(g) exceptions simultaneously.

128. We are not convinced by these arguments. Textually, Article XX(g) is *not* limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that

sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.[106]

129. 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*[107]":

> The *Parties* to this Agreement,
>
> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand*, and *expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development*, *seeking both to protect and preserve the environment and to enhance the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development, …[108] (emphasis added)

130. 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".[109] 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. For instance, the 1982 United Nations Convention on the Law of

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[106] We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet … ." World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

[107] This concept has been generally accepted as integrating economic and social development and environmental protection …

[108] Preamble of the *WTO Agreement*.

[109] See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law … . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978-I) 159 *Recueil des Cours* 1, p. 49.

the Sea[110] ("UNCLOS"), in defining the jurisdictional rights of coastal states in their exclusive economic zones, provides:

> *Article 56*
>
> *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the *natural resources, whether living or non-living*, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, … (emphasis added)

The UNCLOS also repeatedly refers in Articles 61 and 62 to "living resources" in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity[111] uses the concept of "biological resources". Agenda 21[112] speaks most broadly of "natural resources" and goes into detailed statements about "marine living resources". In addition, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, recites:

> Conscious that an important element of development lies in the conservation and management of *living natural resources* and that migratory species constitute a significant part of these resources; …[113] (emphasis added)

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[110] Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261. We note that India, Malaysia and Pakistan have ratified the UNCLOS. Thailand has signed, but not ratified the Convention, and the United States has not signed the Convention. In the oral hearing, the United States stated: "… we have not ratified this Convention although, with respect to fisheries law, for the most part we do believe that UNCLOS reflects international customary law." Also see, for example, W. Burke, *The New International Law of Fisheries* (Clarendon Press, 1994), p. 40:

> [the] coastal state sovereign rights over fisheries in a 200-mile zone are now considered part of customary international law. The evidence of state practice supporting this derives not only from the large number of coastal states claiming an EEZ [exclusive economic zone] in which such rights are advanced, but also from the fact that many of those states not claiming an EEZ assert rights not appreciably different than those in an EEZ. The provision for sovereign rights of the coastal state in [Article 56.1(a) of] the 1982 Convention is also a part of this evidence, but has particular weight because of the uniformity of state practice outside the Convention.

[111] Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 International Legal Materials 818. We note that India, Malaysia and Pakistan have ratified the Convention on Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.

[112] Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, ff.

[113] Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15. We note that India and Pakistan have ratified the Convention on the Conservation of Migratory Species of Wild Animals, but that Malaysia, Thailand and the United States are not parties to the Convention.

131. 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.[114] Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g).[115] We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).

132. We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes "all species *threatened with extinction* which are or may be affected by trade."[117] (emphasis added)

133. Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. In the Panel Report, the Panel said:

> [7.53] … Information brought to the attention of the Panel, including documented statements from the experts, tends to *confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea*. … (emphasis added)

The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

134. For all the foregoing reasons, we find that the sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994.

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[114] Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 *to exclude* "living" natural resources from the scope of application of Article XX(g).

[115] *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, para. 4.9; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98, para. 4.4.

[117] CITES, Article II.1.

2. "Relating to the Conservation of [Exhaustible Natural Resources]"

135. Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources. It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.[120] None of the parties to this dispute question the genuineness of the commitment of the others to that policy.[121]

136. In *United States - Gasoline*, we inquired into the relationship between the baseline establishment rules of the United States Environmental Protection Agency (the "EPA") and the conservation of natural resources for the purposes of Article XX(g). There, we answered in the affirmative the question posed before the panel of whether the baseline establishment rules were "primarily aimed at" the conservation of clean air.[122] We held that:

> … The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. … We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).

The substantial relationship we found there between the EPA baseline establishment rules and the conservation of clean air in the United States was a close and genuine relationship of ends and means.

137. In 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.

138. Section 609(b)(1) imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused. There are two basic exemptions from the import ban, both of which relate clearly and directly to the policy goal of

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[120] There are currently 144 states parties to CITES.

[121] We note that all of the participants in this appeal are parties to CITES.

[122] Adopted 20 May 1996, WT/DS2/AB/R, p. 19.

conserving sea turtles. First, Section 609, as elaborated in the 1996 Guidelines, excludes from the import ban shrimp harvested "under conditions that do not adversely affect sea turtles". Thus, the measure, by its terms, excludes from the import ban: aquaculture shrimp; shrimp species (such as *pandalid* shrimp) harvested in water areas where sea turtles do not normally occur; and shrimp harvested exclusively by artisanal methods, even from non-certified countries. The harvesting of such shrimp clearly does not affect sea turtles. Second, under Section 609(b)(2), the measure exempts from the import ban shrimp caught in waters subject to the jurisdiction of certified countries.

139. There are two types of certification for countries under Section 609(b)(2). First, under Section 609(b)(2)(C), a country may be certified as having a fishing environment that does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. There is no risk, or only a negligible risk, that sea turtles will be harmed by shrimp trawling in such an environment.

140. The second type of certification is provided by Section 609(b)(2)(A) and (B). Under these provisions, as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States is required to adopt a regulatory program that is comparable to that of the United States program and to have a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels. This is, essentially, a requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles. This requirement is, in our view, directly connected with the policy of conservation of sea turtles. It is undisputed among the participants, and recognized by the experts consulted by the Panel, that the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant cause of sea turtle mortality. Moreover, the Panel did "not question … the fact generally acknowledged by the experts that TEDs, when properly installed and adapted to the local area, would be an effective tool for the preservation of sea turtles."

141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake[128], it appears to us 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.

142. In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.

[128] We focus on the *application* of the measure below, in Section VI.C of this Report.

3. "If Such Measures are Made Effective in conjunction with Restrictions on Domestic Production or Consumption"

143. In *United States – Gasoline*, we held that the above-captioned clause of Article XX(g),

> … 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.[129]

In this case, we need to examine whether the restrictions imposed by Section 609 with respect to imported shrimp are also imposed in respect of shrimp caught by United States shrimp trawl vessels.

144. We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls. These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs "in areas and at times when there is a likelihood of intercepting sea turtles", with certain limited exceptions.[132] Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions. The United States government currently relies on monetary sanctions and civil penalties for enforcement. The government has the ability to seize shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations. We believe that, in principle, Section 609 is an even-handed measure.

145. Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).

C. The Introductory Clauses of Article XX: Characterizing Section 609 under the Chapeau's Standards

(…)

147. Although provisionally justified under Article XX(g), Section 609, if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses -- the "chapeau" -- of Article XX, that is,

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[129] Adopted 20 May 1996, WT/DS2/AB/R, pp. 20-21.

[132] According to the 1996 Guidelines, p. 17343, the exceptions are: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Service determines that the use of TEDs would be impracticable because of special environmental conditions, vessels are permitted to restrict tow-times instead of using TEDs.

Article XX

General Exceptions

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

We turn, hence, to the task of appraising Section 609, and specifically the manner in which it is applied under the chapeau of Article XX; that is, to the second part of the two-tier analysis required under Article XX.

1. General Considerations

148. We begin by noting one of the principal arguments made by the United States in its appellant's submission. The United States argues:

> In context, *an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification*. If, for example, a measure is adopted for the purpose of conserving an exhaustible natural resource under Article XX(g), it is relevant whether the conservation goal justifies the discrimination. In this way, the Article XX chapeau guards against the misuse of the Article XX exceptions for the purpose of achieving indirect protection.
>
> …
>
> [A]n evaluation of whether a measure constitutes "unjustifiable discrimination [between countries] where the same conditions prevail" should take account of *whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception*, rather than for protectionist reasons, *the measure does not amount to an abuse of the applicable Article XX exception*. (emphasis added)

149. We believe this argument must be rejected. The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under Article XX(g), and the treaty interpreter may then and there declare the measure inconsistent with Article XX(g). If the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX. On the other hand, 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. To accept the argument of the United States would be to disregard the standards established by the chapeau.

150. We commence the second tier of our analysis with an examination of the ordinary meaning of the words of the chapeau. The precise language of the chapeau requires that a measure not be 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." There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.[138] Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned. Thus, the standards embodied in the language of the chapeau are not only different from the requirements of Article XX(g); they are also different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994.

151. In *United States – Gasoline*, we stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'."[140] We went on to say that:

> … The 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 *General 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.[141]

152. At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new *WTO Agreement,* which strengthened the multilateral trading system by establishing an international organization, *inter alia,* to facilitate the implementation, administration and

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[138] In *United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23, we stated: "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."

[140] *Ibid*., p. 22.

[141] *Ibid*.

operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round. In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*. Those negotiators evidently believed, however, that the objective of "full use of the resources of the world" set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

> … while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, …[143]

153. We note once more that this language 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. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.

(…)

155. … [W]e 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, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular.

156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and,

[143] Preamble of the *WTO Agreement*, first paragraph.

in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

157. In our view, 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. This interpretation of the chapeau is confirmed by its negotiating history.[152] The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.[153] Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.[154] In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]", the chapeau of this provision should be qualified. This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.

158. The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[156] An abusive exercise by a

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[152] Article 32 of the Vienna Convention permits recourse 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 interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

[153] The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization, which formed the basis for discussions at the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in late 1946, read, in relevant part:

> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: …

[154] For example, the Netherlands, Belgium and Luxembourg stated that the exceptions should be qualified in some way …

[156] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

> … A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with

Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.[157]

159. The task of interpreting and applying the chapeau is, hence, 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.

160. With these general considerations in mind, we address now the issue of whether the *application* of the United States measure, although the measure itself falls within the terms of Article XX(g), nevertheless constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade". We address, in other words, whether the application of this measure constitutes an abuse or misuse of the provisional justification made available by Article XX(g). We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.

2. "Unjustifiable Discrimination"

161. We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail". Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers. As enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries.[158]

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the bona fide execution of the treaty obligation, and a breach of the treaty. … (emphasis added)

[157] Vienna Convention, Article 31(3)(c).

[158] Pursuant to Section 609(b)(2), a harvesting nation may be certified, and thus exempted from the import ban, if:

> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.

162. According to the 1996 Guidelines, certification "shall be made" under Section 609(b)(2)(A) and (B) if an exporting country's program includes a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use, at all times, TEDs comparable in effectiveness to those used in the United States. Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States program.[160] Furthermore, the harvesting country must have in place a "credible enforcement effort". The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an *exclusive* manner. That is, the 1996 Guidelines specify the *only* way that a harvesting country's regulatory program can be deemed "comparable" to the United States' program, and, therefore, they define the *only* way that a harvesting nation can be certified under Section 609(b)(2)(A) and (B). Although the 1996 Guidelines state that, in making a comparability determination, the Department of State "shall also take into account other measures the harvesting nation undertakes to protect sea turtles", in practice, the competent government officials only look to see whether there is a regulatory program requiring the use of TEDs or one that comes within one of the extremely limited exceptions available to United States shrimp trawl vessels.[163]

163. The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.

164. We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, 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 territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

(B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting…

[160] As already noted, these exceptions are extremely limited …

[163] Statements by the United States at the oral hearing.

165. Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

166. Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, 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 against the shrimp exports of those other Members. The relevant factual finding of the Panel reads:

> [7.56] … However, *we have no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques which would have included the complainants before the imposition of the import ban as a result of the CIT judgement*. From the replies of the parties to our question on this subject, in particular that of the United States, we understand that the United States did not propose the negotiation of an agreement to any of the complainants until after the conclusion of negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, in September 1996, i.e. well after the deadline for the imposition of the import ban of 1 May 1996. Even then, it seems that the efforts made merely consisted of an exchange of documents. We therefore conclude that, in spite of the possibility offered by its legislation, the United States did not enter into negotiations before it imposed the import ban. As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures. (emphasis added)

167. *A propos* this failure to have prior consistent recourse to diplomacy as an instrument of environmental protection policy, which produces discriminatory impacts on countries exporting shrimp to the United States with which no international agreements are reached or even seriously attempted, a number of points must be made. First, the Congress of the United States expressly recognized the importance of securing international agreements for the protection and

conservation of the sea turtle species in enacting this law. Section 609(a) *directs* the Secretary of State to:

> (1) *initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations* for the protection and conservation of such species of sea turtles;
>
> (2) *initiate negotiations as soon as possible* with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, *for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles*;
>
> (3) *encourage such other agreements* to promote the purposes of this section *with other nations* for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
>
> (4) *initiate the amendment of any existing international treaty* for the protection and conservation of such species of sea turtles to which the United States is a party *in order to make such treaty consistent with the purposes and policies of this section*; and
>
> (5) provide to the Congress by not later than one year after the date of enactment of this section: …
>
> (C) a full report on:
>
> (i) the results of his efforts under this section; …
>
> (emphasis added)

Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.

168. Second, the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. As stated earlier, the Decision on Trade and Environment, which provided for the establishment of the CTE and set out its terms of reference, refers to both the Rio Declaration on Environment and Development and Agenda 21. Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development, which states, in part:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global*

> *environmental problems should, as far as possible, be based on international consensus.* (emphasis added)

In almost identical language, paragraph 2.22(i) of Agenda 21 provides:

> Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: …
>
> (i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. *Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus*.(emphasis added)

Moreover, we note that Article 5 of the Convention on Biological Diversity states:

> … each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

The Convention on the Conservation of Migratory Species of Wild Animals, which classifies the relevant species of sea turtles in its Annex I as "Endangered Migratory Species", states:

> The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle.

Furthermore, we note that WTO Members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference, endorsed and supported:

> … *multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature*. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue *shared goals*, and in the development of a mutually supportive relationship between them, *due respect must be afforded to both*.[169] (emphasis added)

[169] Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996.

169. Third, the United States did negotiate and conclude one regional international agreement for the protection and conservation of sea turtles: The Inter-American Convention. This Convention was opened for signature on 1 December 1996 and has been signed by five countries[170], in addition to the United States, and four of these countries are currently certified under Section 609.[171] This Convention has not yet been ratified by any of its signatories. The Inter-American Convention provides that each party shall take "appropriate and necessary measures" for the protection, conservation and recovery of sea turtle populations and their habitats within such party's land territory and in maritime areas with respect to which it exercises sovereign rights or jurisdiction.[172] Such measures include, notably,

> [t]he reduction, to the greatest extent practicable, of the incidental capture, retention, harm or mortality of sea turtles in the course of fishing activities, through the appropriate regulation of such activities, as well as the development, improvement and use of appropriate gear, devices or techniques, including the use of turtle excluder devices (TEDs) pursuant to the provisions of Annex III [of the Convention].[173]

Article XV of the Inter-American Convention also provides, in part:

> Article XV
> Trade Measures
>
> 1. *In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organization* (WTO), as adopted at Marrakesh in 1994, including its annexes.
>
> 2. In particular, and *with respect to the subject-matter of this Convention, the Parties shall act in accordance with the provisions of* the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as *Article XI of the General Agreement on Tariffs and Trade of 1994*. … (emphasis added)

170. The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention together marked out the equilibrium line to which we referred earlier. The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available

[170] Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

[171] As of 1 January 1998, Brazil was among those countries certified as having adopted programs to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the United States' program. See Panel Report, para. 2.16. However, according to information provided by the United States at the oral hearing, Brazil is not currently certified under Section 609.

[172] Inter-American Convention, Article IV.1.

[173] Inter-American Convention, Article IV.2(h).

and feasible for the establishment of programs for the conservation of sea turtles. Moreover, the Inter-American Convention emphasizes the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the *WTO Agreement* generally, in maintaining the balance of rights and obligations under the *WTO Agreement* among the signatories of that Convention.

171. The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles[174] before imposing the import ban.

172. Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.[175] The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.

173. The application of Section 609, through the implementing guidelines together with administrative practice, also resulted in other differential treatment among various countries desiring certification. Under the 1991 and 1993 Guidelines, to be certifiable, fourteen countries in the wider Caribbean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries had a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs. With respect to all other countries exporting shrimp to the United States (including the appellees, India, Malaysia, Pakistan and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State

[174] While the United States is a party to CITES, it did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states. In this context, we note that the United States, for example, has not signed the Convention on the Conservation of Migratory Species of Wild Animals or UNCLOS, and has not ratified the Convention on Biological Diversity.

[175] Section 609(a).

to apply the import ban on a world-wide basis not later than 1 May 1996.[176] On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foreign countries within the scope of Section 609, effective 1 May 1996. Thus, all countries that were not among the fourteen in the wider Caribbean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs. We acknowledge that the greatly differing periods for putting into operation the requirement for use of TEDs resulted from decisions of the Court of International Trade. Even so, this does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.[177]

174. The length of the "phase-in" period is not inconsequential for exporting countries desiring certification. That period relates directly to the onerousness of the burdens of complying with the requisites of certification and the practical feasibility of locating and developing alternative export markets for shrimp. The shorter that period, the heavier the burdens of compliance, particularly where an applicant has a large number of trawler vessels, and the greater the difficulties of re-orienting the harvesting country's shrimp exports. The shorter that period, in net effect, the heavier the influence of the import ban. The United States sought to explain the marked difference between "phase-in" periods granted to the fourteen wider Caribbean/western Atlantic countries and those allowed the rest of the shrimp exporting countries. The United States asserted that the longer time-period was justified by the then undeveloped character of TED technology, while the shorter period was later made possible by the improvements in that technology. This explanation is less than persuasive, for it does not address the administrative and financial costs and the difficulties of governments in putting together and enacting the necessary regulatory programs and "credible enforcement effort", and in implementing the compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels.[178]

175. Differing 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. Far greater efforts to transfer that technology successfully were made to certain exporting countries -- basically the fourteen wider Caribbean/western Atlantic countries cited earlier -- than to other exporting countries, including the appellees. The level of these efforts is probably related to the length of the "phase-in" periods granted -- the longer the "phase-in" period, the higher the possible level of efforts at technology transfer. Because compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements under Section 609, within the very limited "phase-in" periods allowed them.

176. When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting

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[176] *Earth Island Institute* v. *Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

[177] See *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 28. Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.

[178] For example, at the oral hearing, India stated that its "number of mechanized nets is estimated at about 47,000. Most of these are mechanized vessels … ."

countries desiring certification in order to gain access to the United States shrimp market within the meaning of the chapeau of Article XX.

3. "Arbitrary Discrimination"

177. We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions.[181] In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.

178. Moreover, the description of the administration of Section 609 provided by the United States in the course of these proceedings highlights certain problematic aspects of the certification processes applied under Section 609(b). With respect to the first type of certification, under Section 609(b)(2)(A) and (B), the 1996 Guidelines set out certain elements of the procedures for acquiring certification, including the requirement to submit documentary evidence of the regulatory program adopted by the applicant country. This certification process also generally includes a visit by United States officials to the applicant country.

179. With respect to certifications under Section 609(b)(2)(C), the 1996 Guidelines state that the Department of State "shall certify" any harvesting nation under Section 609(b)(2)(C) if it meets the criteria in the 1996 Guidelines "without the need for action on the part of the government of the harvesting nation … ." Nevertheless, the United States informed us that, in all cases where a country has not previously been certified under Section 609, it waits for an application to be made before making a determination on certification. In the case of certifications under Section 609(b)(2)(C), there appear to be certain opportunities for the submission of written evidence, such as scientific documentation, in the course of the certification process.

180. However, with respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved

[181] In the oral hearing, the United States stated that "as a policy matter, the United States government believes that all governments should require the use of turtle excluder devices on all shrimp trawler boats that operate in areas where there is a likelihood of intercepting sea turtles" and that "when it comes to shrimp trawling, we know of only one way of effectively protecting sea turtles, and that is through TEDs."

applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.

181. The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, 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.

182. The provisions of Article X:3[191] of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

183. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

184. We find, accordingly, that the United States measure is 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.

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[191] Article X:3 states, in part:

> (a) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
>
> (b) Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters … .

185. In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

186. What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.

VII. FINDINGS AND CONCLUSION

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

(…)

(b) 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, and

(c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

188. The Appellate Body *recommends* that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

4-3. Article 21.5 Appellate Body Report, WT/DS58/AB/RW, 22 October 2001

After losing its appeal before the AB, the US made certain efforts to comply with the rulings and recommendations of the DSB. Malaysia challenged the US' purported compliance measures in a proceeding under DSU Article 21.5 ("Art. 21.5 proceeding"), yielding a new panel report, and a new appeal to the Appellate Body. Consider the AB's assessment of the US' revised measures in its Art. 21.5 Report, below. Why did the AB now find the US measures satisfactory? What differences proved decisive? How does this AB Report enrich our understanding of the Chapeau?

Presiding Member: Bacchus; Members: Ganesan; Lacarte-Muró

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm

Editorial note: Most footnotes have been omitted from this report.

I. INTRODUCTION

1. Malaysia appeals from certain issues of law and legal interpretations in the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (the "Panel Report"). In accordance with Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Malaysia requested that the Dispute Settlement Body (the "DSB") refer to a panel its complaint with respect to whether the United States had complied with the recommendations and rulings of the DSB in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*").

(…)

3. Malaysia's complaint relates to a measure taken by the United States in the form of an import prohibition to protect and conserve certain species of sea turtles, considered to be an endangered species. This original measure, Section 609 of the United States Public Law 101-162 ("Section 609"), and its application are described in detail in the Appellate Body Report in *United States – Shrimp*. The Appellate Body found that Section 609 was provisionally justified under Article XX(g) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In implementing the recommendations and rulings of the DSB, the United States did not amend Section 609, with the result that the import prohibition is still in effect. However, the United States Department of State issued the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines").[7] These Revised Guidelines replace the guidelines issued in April 1996 that were part of the original measure. This dispute between Malaysia and the United States arises in relation to the import prohibition of shrimp and shrimp products provided for by Section 609, and its application by the United States.

(…)

[7] United States Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946 – 36952. The Revised Guidelines are attached to the Panel Report.

5. Section 609(b)(2) provides that the import prohibition on shrimp does not apply to harvesting nations that are "certified" according to criteria set by the United States. The Revised Guidelines set forth the criteria for certification. The stated goal of the programme set out in the Revised Guidelines is the same as that set out in the programme of the original guidelines, namely, to protect endangered sea turtle populations from further decline by reducing their incidental mortality in commercial shrimp trawling. A central element of the United States programme is that commercial shrimp trawlers are required to use Turtle Excluder Devices ("TEDs") approved in accordance with standards established by the United States National Marine Fisheries Service. Where the government of a harvesting country seeks certification on the basis of having adopted a programme that is based on TEDs, certification will be granted if this government's programme includes a requirement that commercial shrimp trawlers use TEDs that are "*comparable in effectiveness*" to those used in the United States, and a credible enforcement effort that includes monitoring for compliance.

6. Under the original guidelines, the practice of the Department of State was to certify countries *only after* they had shown that they required the use of TEDs. Under the Revised Guidelines, countries may apply for certification even if they do not require the use of TEDs. In such cases, a harvesting country has to demonstrate that it has implemented, and is enforcing, a "*comparably effective*" regulatory programme to protect sea turtles without the use of TEDs. The Department of State is required "to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources."

7. An exporting country may also be certified if its shrimp fishing environment does not pose a threat of incidental capture of sea turtles. The Revised Guidelines provide that the Department of State shall certify a harvesting country pursuant to Section 609 if it meets any of the following criteria: the relevant species of sea turtles do not occur in waters subject to that country's jurisdiction; in that country's waters, shrimp is harvested exclusively by means that do not pose a threat to sea turtles, for example, any country that harvests shrimp exclusively by artisanal means; or, commercial shrimp trawling operations take place exclusively in waters in which sea turtles do not occur.

8. Before the Panel, Malaysia argued that the United States had failed to comply with the recommendations and rulings of the DSB, and that, consequently, the United States continued to violate its obligations under the GATT 1994. In its Report circulated on 15 June 2001, the Panel found as follows:

> (a) [t]he measure adopted by the United States in order to comply with the recommendations and rulings of the DSB violates Article XI.1 of the GATT 1994;
>
> (b) in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.

9. The Panel urged "Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment." (footnote omitted)

(…)

IV. ISSUES RAISED IN THIS APPEAL

79. The measure at issue in this dispute consists of three elements: Section 609 of the United States Public Law 101-162 ("Section 609"); the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines"); and the application of both Section 609 and the Revised Guidelines in the practice of the United States. Both the United States and Malaysia agree on this definition of the measure. So does the Panel. So do we.

80. With respect to this measure, the following issues are raised in this appeal:

(…)

(b) whether the Panel erred in finding that the measure at issue is now applied in a manner that no longer constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is, therefore, within the scope of measures permitted under Article XX of the GATT 1994.

(…)

82. Malaysia has not appealed the conclusion of the Panel that Section 609 is provisionally justified under subparagraph (g) of Article XX of the GATT 1994. Also, Malaysia confirmed at the oral hearing in this appeal that it has also not appealed the conclusion of the Panel that the measure at issue is not applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX of the GATT 1994. Thus, we do not address those issues in this appeal.

(…)

VI. THE CHAPEAU OF ARTICLE XX OF THE GATT 1994

111. The second issue raised in this appeal is whether the Panel erred in finding that the new measure at issue is applied in a manner that no longer constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is, therefore, within the scope of measures permitted under Article XX of the GATT 1994.

112. In its Notice of Appeal, Malaysia appeals the finding of the Panel that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as

the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied." In its appellant's submission, Malaysia has put forward six points of disagreement with respect to the reasoning and findings of the Panel that lead Malaysia to conclude that, despite the changes made by the United States to the original measure, elements of "arbitrary or unjustifiable discrimination" still remain in the manner in which the new measure is applied by the United States.

113. Malaysia argues that:

> — the Panel erred in interpreting our previous ruling in *United States – Shrimp* as imposing upon the United States an obligation to *negotiate* rather than an obligation to *conclude* an international agreement;
>
> — the Panel's finding results in "the absurd situation where any WTO Member would be able to offer to negotiate in good faith on an agreement incorporating its unilaterally defined standards before claiming that its measure is justified under Article XX of the GATT 1994 and in the event of failure to conclude an agreement, claim that the measure applying the unilateral standards could not constitute unjustifiable discrimination";
>
> — the Panel erred in concluding that the Inter-American Convention can reasonably be regarded as a "benchmark" of what can be achieved through multilateral negotiations in the field of protection and conservation;
>
> — the Panel misconstrued the usage of the term "measures comparable in effectiveness to United States measures" by the Appellate Body to mean that the Appellate Body accepted the legitimacy of such "comparable measures";
>
> — the Panel erred in concluding that the Revised Guidelines are sufficiently flexible, even though the Revised Guidelines do not provide explicitly for the particular conditions prevailing in Malaysia; …
>
> (…)

114. Malaysia's first three arguments relate to the nature and extent of the duty of the United States to pursue international cooperation in protecting and conserving endangered sea turtles. Malaysia's last three arguments relate to the flexibility of the Revised Guidelines. Our analysis will address each of these arguments made by Malaysia.

A. The Nature and the Extent of the Duty of the United States to Pursue International Cooperation in the Protection and Conservation of Sea Turtles

115. Before the Panel, Malaysia asserted that the United States should have negotiated and *concluded* an international agreement on the protection and conservation of sea turtles before imposing an import prohibition. Malaysia argued that "by continuing to apply a unilateral measure after the end of the reasonable period of time pending the conclusion of an international agreement, the United States failed to comply with its obligations under the GATT 1994". The

United States replied that it had in fact made serious, good faith efforts to negotiate and *conclude* a multilateral sea turtle conservation agreement that would include both Malaysia and the United States, and that these efforts, as detailed and documented before the Panel, should, in view of our previous ruling, be seen as sufficient to meet the requirements of the chapeau of Article XX. The Panel found as follows:

> … The Panel first recalls that the Appellate Body considered "the *failure of the United States to engage the appellees*, as well as other Members exporting shrimp to the United States, 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 against the shrimp exports of those other Members" bears heavily in any appraisal of justifiable or unjustifiable discrimination within the meaning of the chapeau of Article XX. From the terms used, it appears to us that the Appellate Body had in mind a negotiation, not the conclusion of an agreement. If the Appellate Body had considered that an agreement had to be concluded before any measure can be taken by the United States, it would not have used the terms "with the objective"; it would have simply stated that an agreement had to be concluded.
>
> …
>
> We are consequently of the view that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection and conservation of sea turtles in order to comply with Article XX. However, we reach the conclusion that the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We also consider that those efforts cannot be a "one-off" exercise. There must be a continuous process, including once a unilateral measure has been adopted pending the conclusion of an agreement. Indeed, we consider the reference of the Appellate Body to a number of international agreements promoting a multilateral solution to the conservation concerns subject to Section 609 to be evidence that a multilateral, ideally non-trade restrictive, solution is generally to be preferred when dealing with those concerns, in particular if it is established that it constitutes "an alternative course of action reasonably open".
>
> …

> We understand the Appellate Body findings as meaning that the United States has an obligation to make serious good faith efforts to address the question of the protection and conservation of sea turtles at the international level. We are mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality.[62] (footnotes omitted)

116. Malaysia appeals these findings of the Panel. According to Malaysia, demonstrating serious, good faith efforts to *negotiate* an international agreement for the protection and conservation of sea turtles is not sufficient to meet the requirements of the chapeau of Article XX. Malaysia maintains that the chapeau requires instead the *conclusion* of such an international agreement. As Malaysia sees it, the "pertinent observations and comments" that we made in *United States – Shrimp* that could be construed to suggest otherwise "constitute dicta" in our previous Report. On this basis, Malaysia argues that the Panel used that Report improperly in attempting to justify its reasoning that serious, good faith efforts alone would be enough to meet the requirements of the chapeau. Further, Malaysia submits that the Panel misread our Report with respect to the Inter-American Convention, and, consequently, did not use that Convention properly in its analysis.

117. The chapeau of Article XX states:

> 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: …

118. The chapeau of Article XX establishes three standards regarding the *application* of measures for which justification under Article XX may be sought: first, there must be no "arbitrary" discrimination between countries where the same conditions prevail; second, there must be no "unjustifiable" discrimination between countries where the same conditions prevail; and, third, there must be no "disguised restriction on international trade".[67] The Panel's findings appealed by Malaysia concern the first and second of these three standards.

119. It is clear from the language of the chapeau that these two standards operate to prevent a Member from applying a measure provisionally justified under a sub-paragraph of Article XX in a manner that would result in "arbitrary or unjustifiable discrimination". In *United States – Shrimp*, we stated that the measure at issue there resulted in "unjustifiable discrimination", in part because, as applied, the United States treated WTO Members differently. The United States had adopted a cooperative approach with WTO Members from the Caribbean/Western Atlantic region, with whom it had concluded a multilateral agreement on the protection and conservation of sea turtles, namely the Inter-American Convention. Yet the United States had not, we found, pursued the negotiation of such a multilateral agreement with other exporting Members, including Malaysia and the other complaining WTO Members in that case.

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[62] Panel Report, paras. 5.63, 5.67 and 5.76.

[67] Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 150; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 21-22.

120. Moreover, we observed there that Section 609, which was part of that original measure and remains part of the new measure at issue here, calls upon the United States Secretary of State to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of … sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in commercial fishing operations … for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles."[70] We concluded in that appeal that the United States had failed to comply with this statutory requirement in Section 609.

121. As we pointed out there:

> Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles … which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.[71] (footnotes omitted)

We also stated:

> Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable.[72]

122. We concluded in *United States – Shrimp* that, to avoid "arbitrary or unjustifiable discrimination", the United States had to provide all exporting countries "similar opportunities to negotiate" an international agreement. Given the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other. The negotiations need not be identical. Indeed, no two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that "arbitrary or unjustifiable discrimination" will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.

123. Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be *concluded* by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that

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[70] Section 609(a). *See also*, Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 167.

[71] Appellate Body Report, *supra*, footnote 24, para. 167.

[72] *Ibid*., para. 172.

any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.

124. As we stated in *United States – Shrimp*, "the protection and conservation of highly migratory species of sea turtles … demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations".[73] Further, the "need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations". For example, Principle 12 of the Rio Declaration on Environment and Development states, in part, that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus". Clearly, and "as far as possible", a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.

(…)

131. The Panel noted that while "factual circumstances may influence the duration of the process or the end result, … any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention."[85] Such a comparison is a central element of the exercise to determine whether there is "unjustifiable discrimination". The Panel then analyzed the negotiation process in the Indian Ocean and South-East Asia region to determine whether the efforts made by the United States in those negotiations were serious, good faith efforts comparable to those made in relation with the Inter-American Convention. In conducting this analysis, the Panel referred to the following elements:

— A document communicated on 14 October 1998 by the United States Department of State to a number of countries of the Indian Ocean and the South-East Asia region. This document contained possible elements of a regional convention on sea turtles in this region.

— The contribution of the United States to a symposium held in Sabah on 15-17 July 1999. The Sabah Symposium led to the adoption of a Declaration calling for the negotiation and implementation of a regional agreement throughout the Indian Ocean and South-East Asia region.

— The Perth Conference in October 1999, where participating governments, including the United States, committed themselves to developing an

[73] Appellate Body Report, *supra*, footnote 24, para. 168.

[85] Panel Report, para. 5.71.

international agreement on sea turtles for the Indian Ocean and South-East Asia region.

— The contribution of the United States to the Kuantan round of negotiations, 11-14 July 2000. This first round of negotiations towards the conclusion of a regional agreement resulted in the adoption of the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (the "South-East Asian MOU"). The Final Act of the Kuantan meeting provided that before the South-East Asian MOU can be finalized, a Conservation and Management Plan must be negotiated and annexed to the South-East Asian MOU. At the time of the Panel proceedings, the Conservation and Management Plan was still being drafted.

132. On this basis and, in particular, on the basis of the "contribution of the United States to the steps that led to the Kuantan meeting and its contribution to the Kuantan meeting itself", the Panel concluded that the United States had made serious, good faith efforts that met the "standard set by the Inter-American Convention." In the view of the Panel, whether or not the South-East Asian MOU is a legally binding document does not affect this comparative assessment because differences in "factual circumstances have to be kept in mind".[93] Furthermore, the Panel did not consider as decisive the fact that the final agreement in the Indian Ocean and South-East Asia region, unlike the Inter-American Convention, had not been concluded at the time of the Panel proceedings. According to the Panel, "at least until the Conservation and Management Plan to be attached to the MOU is completed, the United States efforts should be judged on the basis of its active participation and its financial support to the negotiations, as well as on the basis of its previous efforts since 1998, having regard to the likelihood of a conclusion of the negotiations in the course of 2001."

133. We note that the Panel stated that "any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention." In our view, in assessing the serious, good faith efforts made by the United States, the Panel did not err in using the Inter-American Convention as an *example*. In our view, also, the Panel was correct in proceeding then to an analysis broadly in line with this principle and, ultimately, was correct as well in concluding that the efforts made by the United States in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those that led to the conclusion of the Inter-American Convention. We find no fault with this analysis.[96]

134. In sum, Malaysia is incorrect in its contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX requires the *conclusion* of an international

[93] Panel Report. It appears that the United States was in favour of a legally binding agreement for the Indian Ocean and South-East Asia region, but a number of other parties were not, and the latter view prevailed. *See,* Panel Report, para. 5.83.

[96] We note that a multilateral conference on sea turtles was held in Manila and resulted in the adoption of the Conservation and Management Plan to be annexed to the South-East Asian MOU. We also note that the South-East Asian MOU came into effect on 1 September 2001. To our mind, these events only reinforce the finding of the Panel that the efforts made by the United States to negotiate an international agreement in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those made in relation to the Inter-American Convention. …

agreement on the protection and conservation of sea turtles. Therefore, we uphold the Panel's finding that, in view of the serious, good faith efforts made by the United States to negotiate an international agreement, "Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination, as identified by the Appellate Body in its Report".[97]

B. The Flexibility of the Revised Guidelines

135. We now turn to Malaysia's arguments relating to the flexibility of the Revised Guidelines. Malaysia argued before the Panel that the measure at issue results in "arbitrary or unjustifiable discrimination" because it conditions the importation of shrimp into the United States on compliance by the exporting Members with policies and standards "unilaterally" prescribed by the United States. Malaysia asserted that the United States "unilaterally" imposed its domestic standards on exporters. With respect to this argument, the Panel found:

> It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries." We therefore conclude that if, *in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed.[100] (footnote omitted)

136. Malaysia disagrees with the Panel that a measure can meet the requirements of the chapeau of Article XX if it is flexible enough, both in design and application, to permit certification of an exporting country with a sea turtle protection and conservation programme "comparable" to that of the United States. According to Malaysia, even if the measure at issue allows certification of countries having regulatory programs "comparable" to that of the United States, and even if the measure is applied in such a manner, it results in "arbitrary or unjustifiable discrimination" because it conditions access to the United States market on compliance with policies and standards "unilaterally" prescribed by the United States. Thus, Malaysia puts considerable emphasis on the "unilateral" nature of the measure, and Malaysia maintains that our previous Report does not support the conclusion of the Panel on this point.

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[97] Panel Report, para. 5.137. We do wish to note, though, that there is one observation by the Panel with which we do not agree. In assessing the good faith efforts made by the United States, the Panel stated that:

> The United States is a *demandeur* in this field and given its scientific, diplomatic and financial means, it is reasonable to expect rather more than less from that Member in terms of serious good faith efforts. Indeed, the capacity of persuasion of the United States is illustrated by the successful negotiation of the Inter-American Convention.

[100] [Panel Report], para. 5.93.

(…)

138. … As we said before, it appears to us "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." This statement expresses a principle that was central to our ruling in *United States – Shrimp*.

139. A separate question arises, however, when examining, under the chapeau of Article XX, a measure that provides for access to the market of one WTO Member for a product of other WTO Members *conditionally*. Both Malaysia and the United States agree that this is a common aspect of the measure at issue in the original proceedings and the new measure at issue in this dispute.

140. In *United States - Shrimp*, we concluded that the measure at issue there did not meet the requirements of the chapeau of Article XX relating to "arbitrary or unjustifiable discrimination" because, through the application of the measure, the exporting members were faced with "a single, rigid and unbending requirement" to adopt *essentially the same* policies and enforcement practices as those applied to, and enforced on, domestic shrimp trawlers in the United States. In contrast, in this dispute, the Panel found that this new measure is more flexible than the original measure and has been applied more flexibly than was the original measure. In the light of the evidence brought by the United States, the Panel satisfied itself that this new measure, in design and application, does *not* condition access to the United States market on the adoption by an exporting Member of a regulatory programme aimed at the protection and the conservation of sea turtles that is *essentially the same* as that of the United States.

141. As the Panel's analysis suggests, an approach based on whether a measure requires "essentially the same" regulatory programme of an exporting Member as that adopted by the importing Member applying the measure is a useful tool in identifying measures that result in "arbitrary or unjustifiable discrimination" and, thus, do *not* meet the requirements of the chapeau of Article XX. However, this approach is not sufficient for purposes of judging whether a measure *does* meet the requirements of the chapeau of Article XX. Therefore, in construing our previous Report, the Panel inferred from our reasoning there that a measure requiring United States and foreign regulatory programmes to be "comparable in effectiveness", as opposed to being "essentially the same", would, absent some other shortcoming, comply with the chapeau of Article XX. …

142. The Panel reads our previous Report to state that a major deficiency of the original measure was its lack of flexibility, in both design and application. The Panel sees our previous Report as suggesting that the original measure was applied in a manner which constituted "unjustifiable discrimination" essentially "because the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries."[105] The Panel reasons that a measure that, in its design and application, allows certification of exporting Members having regulatory programmes "comparable in effectiveness" to that of the United States does take into account the specific conditions prevailing in the exporting WTO Members and is, therefore, flexible enough to meet the requirements of the chapeau of Article XX.

[105] Panel Report, para. 5.92.

143. Given that the original measure in that dispute required "essentially the same" practices and procedures as those required in the United States, we found it necessary in that appeal to rule only that Article XX did not allow such inflexibility. Given the Panel's findings with respect to the flexibility of the new measure in this dispute, we find it necessary in this appeal to add to what we ruled in our original Report. The question raised by Malaysia in this appeal is whether the Panel erred in inferring from our previous Report, and thereby finding, that the chapeau of Article XX permits a measure which requires only "comparable effectiveness".

144. In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination". We, therefore, agree with the conclusion of the Panel on "comparable effectiveness".

145. Malaysia also argues that the measure at issue is not flexible enough to meet the requirement of the chapeau of Article XX relating to "unjustifiable or arbitrary discrimination" because the Revised Guidelines do not provide explicitly for the specific conditions prevailing in Malaysia.[106]

146. We note that the Revised Guidelines contain provisions that permit the United States authorities to take into account the specific conditions of Malaysian shrimp production, and of the Malaysian sea turtle conservation programme, should Malaysia decide to apply for certification. The Revised Guidelines explicitly state that "[if] the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification." Likewise, the Revised Guidelines provide that the "Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations as well as information available from other sources."

147. Further, the Revised Guidelines provide that the import prohibitions that can be imposed under Section 609 do not apply to shrimp or products of shrimp "harvested in any other manner or under any other circumstances that the Department of State may determine, following consultations with the [United States National Marine Fisheries Services], does not pose a threat of the incidental taking of sea turtles." Under Section II.B(c)(iii) of the Revised Guidelines (*Additional Sea Turtle Protection Measures*), the "Department of State recognizes that sea turtles require protection throughout their life-cycle, not only when they are threatened during the course of commercial shrimp trawl harvesting." Additionally, Section II.B(c)(iii) states that "[i]n making certification determinations, the Department shall also take fully into account other measures the

[106] According to Malaysia, the specificity of its case rests on the fact that shrimp trawling is not practised in Malaysia; shrimp is a by-catch from fish trawling and therefore, the incidental catch of sea turtles is due to fish trawling, not shrimp trawling. *See*, Malaysia's appellant's submission, para. 3.21 and Panel Report, para. 3.128. …

harvesting nation undertakes to protect sea turtles, including national programmes to protect nesting beaches and other habitat, prohibitions on the direct take of sea turtles, national enforcement and compliance programmes, and participation in any international agreement for the protection and conservation of sea turtles." With respect to the certification process, the Revised Guidelines specify that a country that does not appear to qualify for certification will receive a notification that "will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification, and invite the government of the harvesting nation to provide … any further information." Moreover, the Department of State commits itself to "actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification."

148. These provisions of the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification. As Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation.[113]

149. We need only say here that, in our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member, including, of course, Malaysia. Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in *every individual* Member.

150. We are, therefore, not persuaded by Malaysia's argument that the measure at issue is not flexible enough because the Revised Guidelines do not explicitly address the specific conditions prevailing in Malaysia.

(…)

152. For all these reasons, we uphold the finding of the Panel, in paragraph 6.1 of the Panel Report, that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied".

VII. FINDINGS AND CONCLUSIONS

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

(a) *finds* that the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency, with the relevant provisions of the GATT 1994, of

[113] In this respect, we note that the European Communities stated that:

> … the complaint by Malaysia in this case is somewhat premature. As it appears Malaysia has not yet applied for certification and it is therefore not yet clear how the contested legislation would apply to imports of shrimp and shrimp products from Malaysia.

the United States measure taken to comply with the recommendations and rulings of the DSB in *United States - Shrimp*; and

(b) *upholds* the finding of the Panel, in paragraph 6.1 of its Report, that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied".

* * *

5. Brazil – Measures Affecting Imports of Retreaded Tyres (2007)

Consider the discussion of alternative measures. Is the Panel's argumentation with respect to the non-arbitrariness of the discrimination between the MERCOSUR countries and other WTO Members convincing?

Consider the Appellate Body's discussion of the Chapeau *test. Compare Brazil—Tyres to US—Gasoline and US—Shrimp in this regard. How has the* Chapeau *Analysis evolved? Has the AB moved the ball? Which approach is most compelling?*

5-1. Case Note on the Panel Report by Julia Qin

Excerpted from *Julia Qin, ASIL Insight, September 5, 2007, Volume 11, Issue 23*

The recent decision of the World Trade Organization's Panel in the *Brazil - Tyres*[1] case has the potential to become a milestone in WTO jurisprudence on trade and the environment. At issue was Brazil's ban on imports of retreaded tyres. The European Communities (EC) challenged the ban as a violation of WTO rules, whereas Brazil defended the measure as necessary to protect health and the environment. The Panel held that, although the ban was necessary to protect health and the environment, it was applied in a WTO-inconsistent manner because Brazil failed to enforce a similar ban on used tyre imports. Thus, the Panel decision effectively directed Brazil to impose further trade restrictions so as to advance its environmental objective. Previous WTO decisions have not gone this far in safeguarding environmental values.

Brazil has indicated that it will accept the Panel's ruling and implement the additional ban on used tyres. The European Communities, however, has decided to appeal. It remains to be seen, therefore, whether the WTO Appellate Body will uphold the Panel's "green" decision.

Background

Retreaded tyres are produced by reconditioning used tyres; they have a shorter lifespan than new tyres and are sold at a cheaper price. Brazil imposed the ban on retread imports in 2000, claiming such imports led to a faster accumulation of waste tyres, which create health and environmental hazards by providing breeding grounds for mosquito-borne diseases such as dengue fever, yellow fever, and malaria, and by causing tyre fires that are difficult to control. Furthermore, Brazil claimed, it is not only costly to collect waste tyres scattered in its vast territory, but also technologically impossible to dispose of waste tyres without negative environmental consequences.

[1] Panel Report, Brazil – Measuers Affecting Imports of Retreaded Tyres, WT/DS332/R (12 June 2007) available at http://www.worldtradelaw.net/reports/wtopanelsfull/brazil-tyres(panel)(full).pdf.

There is an exemption for retreaded tyres produced in members of MERCOSUR - the free trade arrangement among Brazil, Argentina, Uruguay, and Paraguay. Brazil established this exception after it lost to Uruguay in a MERCOSUR arbitration, which ruled that its ban violated MERCOSUR obligations.

Brazil originally also imposed a ban on used tyre imports, but that ban has been suspended through domestic court injunctions obtained by Brazilian retread producers. It is cheaper for the Brazilian producers to import used tyres than to collect them domestically.

The EC is a net exporter of retreaded tyres, for which there is only a limited demand in European markets. Its retread exports declined substantially after Brazil imposed the ban. The EC claimed that the ban was not designed to protect the environment, but rather to protect Brazil's domestic retread industry from foreign competition.

Major Legal Issues

An import ban violates the General Agreement on Tariffs and Trade (GATT) Article XI:1, which prohibits quantitative restrictions on imports or exports. The question, however, is whether the ban can be justified by one of the GATT exceptions. In this case, Brazil invoked GATT Article XX(b) that excepts measures "necessary to protect human, animal or plant life or health."

Is the ban "necessary" to protect human health and the environment?

- *The link between retreaded tyres and health/environmental risks*

A threshold issue was to determine whether retreaded tyres could cause health and environmental concerns. (The Panel accepted the use of the term "environment" in this case as shorthand for "animal or plant life or health" within the meaning of Article XX(b).) According to the EC, retreaded tyres are not waste tyres and do not in themselves cause health concerns. Since all products eventually turn into waste, and since many low- quality products have short lives, the EC argued, if Brazil's ban were allowed, there would be no reason why other members could not restrict imports of any product having a shorter life than competing domestic products. The Panel dismissed the EC's argument by noting that there had been other WTO cases in which the risk being addressed through a measure did not involve the exact product at issue. For example, the Panel pointed out, the health risk addressed in *U.S. – Gasoline*[2] related to air pollution caused by the consumption of gasoline rather than to gasoline itself. "While retreaded

[2] Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AD/R, adopted 20 May 1996 …

tyres are distinct from waste tyres," the Panel stated, "waste tyres are nothing other than tyres that have reached the end of their lifecycle as tyres."[3]

The Panel then examined whether the accumulation of waste tyres creates health and environmental risks. It accepted the evidence presented by Brazil that numerous waste tyres scattered in its territory provide perfect breeding grounds for mosquito-borne diseases, and can cause tyre fires that harm humans, animals and plants alike. As for the EC's argument that the risks posed by waste tyres are due to Brazil's poor management of waste tyres, the Panel stated that, even if proper management of waste tyres may significantly reduce such risks, "that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil."[4]

- *The "necessity" test*

In deciding whether the ban was "necessary" to achieve Brazil's stated objective, the Panel followed the established approach in Article XX cases. It engaged in weighing and balancing several factors: the relative importance of the policy objective pursued by the measure; the contribution of the measure to the realization of the policy objective; and the restrictive impact of the measure on international commerce. While recognizing that an import ban is as trade-restrictive as a measure can be, the Panel believed that "the objective of protecting human health and life against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree."[5] In evaluating the ban's contribution to this objective, the Panel decided it was unnecessary to examine the actual impact of the ban on the reduction of waste tyres; instead, it would suffice to know whether the ban is capable of contributing to such objective. Since all retreaded tyres have a shorter lifespan than new tyres, the Panel logically concluded that the ban can contribute to the reduction of waste tyre accumulation in Brazil.

Under Article XX jurisprudence, a measure is "necessary" only if there is no less traderestrictive alternative reasonably available. The Panel examined a number of alternatives identified by the EC, which ranged from preventive measures, such as promotion of public transportation, to various disposal methods, such as landfill, stockpiling, energy recovery and recycling. It found that while these measures could each contribute to the reduction of waste tyres or address some aspects of the heath/environmental risks involved, none of them, either individually or collectively, would safely eliminate the risks arising from waste tyres, as intended by the import ban. Hence, the Panel concluded, they were not reasonably available alternatives to the ban.

Is the ban applied consistently with the requirement of the chapeau?

[3] Panel Report, paras. 7.49-7.50.

[4] Id., para. 7.67.

[5] Id., para. 7.111.

A measure justifiable under Article XX(b) must also meet the requirement of the chapeau of Article XX that it is "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."

1. Arbitrary or unjustifiable discrimination

The EC argued that the manner in which Brazil applied the ban constituted arbitrary and unjustifiable discrimination because (i) the ban did not apply to MERCOSUR countries, and (ii) Brazilian producers were allowed to import used tyres, even though such imports produce the same environmental externalities as imports of retreaded tyres. The Panel agreed that the ban was implemented in a manner that resulted in discrimination between MERCOSUR and non-MERCOSUR countries and between Brazil and other WTO members. The question then is whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau.

- *The MERCOSUR exemption*

The Panel found the discrimination arising from the MERCOSUR exemption was neither "arbitrary" nor "unjustifiable." According to the Panel, this discrimination was not arbitrary because Brazil adopted the exemption to comply with the ruling of a MERCOSUR tribunal rather than as a result of its own capricious or unpredictable decision. The Panel then examined the volumes of retreaded tyres imported from MERCOSUR countries and found that such imports had not been significant enough to undermine Brazil's ability to fulfill its objective. Based on this "effect" test, the Panel concluded that, as of the time of its ruling, the discrimination arising from the MERCOSUR exemption was not unjustifiable.

It should be noted that, while allowing the MERCOSUR exemption, the Panel did not exclude the regional trade arrangement categorically from the application of Article XX. On the contrary, it indicated that "the fact that we give due consideration to the existence of Brazil's commitments under MERCOSUR ... does not imply that the exemption must necessarily be justified."[6] Indeed, the Panel's ruling suggests that should the imports from MERCOSUR countries increase significantly in the future, the exemption may become "unjustifiable."

- *Imports of used tyres*

As for the discrimination arising from used tyre imports, the Panel found it not "arbitrary" but "unjustifiable." The discrimination was not arbitrary because the imports were made through injunctions granted by Brazilian courts, which the Panel believed were not capricious or unpredictable. However, the Panel also found the granting of

[6] Id., para. 7.285.

injunctions directly contradicted the rationale of the ban on retreads since "it effectively allows the very used tyres that are prevented from entering into Brazil after retreading to be imported *before* retreading.[7] In this regard, the Panel again employed an effect test. It found that used tyre imports had been taking place in such a large amount that the achievement of Brazil's declared objective was being "significantly undermined."[8] Consequently, it found the discrimination arising from used tyre imports "unjustifiable."

Since Brazil did not claim the conditions prevailing in Brazil were different from those in other WTO members, the Panel held that the ban was being applied in a manner that "constitutes a means of unjustifiable discrimination between countries where the same conditions prevail."[9]

2. Disguised restriction on international trade

Based on the same rationale as that underlying its finding on unjustifiable discrimination, the Panel found that the ban was applied in a manner that constituted a disguised restriction on international trade, "since imports of used tyres are taking place to the benefit of the Brazilian retreading industry in such quantities as to seriously undermine the achievement of the stated objective of avoiding the further accumulation of waste tyres in Brazil."[10]

If Brazil restores its ban on used tyre imports, as it is expected to do under the Panel's ruling, Brazilian retread producers will have to rely on domestically-generated used tyres for production. Consequently, more used tyres can be collected domestically, contributing to a reduction of waste tyre accumulation in Brazil.

Tyre retreading is an environmentally-friendly measure; free trade in retreaded tyres may well lead to a more efficient allocation of resources for retreading and for disposing of tyre waste on a *global* basis. However, insofar as the importing country is concerned, such trade can also worsen its environment, as Brazil has demonstrated in this case. Trade in waste or recycled products, therefore, may present a different set of issues from trade in new products.

(…)

[7] Id., para. 7.295.

[8] Id., para. 7.306.

[9] Id., paras. 7.307-7.309.

[10] Id., para.7.355.

5-2. Appellate Body Report, WT/DS332/AB/R, 3 December 2007

Presiding Member: Abi-Saab; Members: Baptista, Taniguchi

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm

Editorial note: Most footnotes have been omitted from this report.

(…)

I. INTRODUCTION

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (the "Panel Report"). The Panel was established to consider a complaint by the European Communities concerning the consistency of certain measures imposed by Brazil on the importation and marketing of retreaded tyres[2] with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

2. Before the Panel, the European Communities claimed that Brazil imposed a prohibition on the importation of retreaded tyres, notably by virtue of Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004"), and that this prohibition was inconsistent with Article XI:1 of the GATT 1994. The European Communities also contended that certain Brazilian measures providing for the imposition of fines on the importation of retreaded tyres, and on the marketing, transportation, storage, keeping, or warehousing of imported retreaded tyres, were similarly inconsistent with Article XI:1 or, alternatively, Article III:4 of the GATT 1994. In addition, the European Communities made claims under Article III:4 of the GATT 1994 in respect of certain state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres. Finally, the European Communities challenged the exemption from the import prohibition on retreaded tyres and associated fines provided by Brazil to retreaded tyres originating in countries of the Mercado Común del Sur ("MERCOSUR")

[2] Retreaded tyres are used tyres that are reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls. (See Panel Report, para. 2.1) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retreading". These methods are: (i) top-capping, which consists of replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. (See *ibid*., para. 2.2) The retreaded tyres covered in this dispute are classified under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types) of the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983. In contrast, used tyres are classified under subheading 4012.20. New tyres are classified under heading 4011. (See *ibid*., para. 2.4)

(Southern Common Market). The European Communities contended that these exemptions were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.

3. Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were *prima facie* inconsistent with Article XI:1; or that state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres were *prima facie* inconsistent with Article III:4; or that the exemptions from both the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries were *prima facie* inconsistent with Articles I:1 and XIII:1 of the GATT 1994. Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all justified under Article XX(b) of the GATT 1994. Brazil contended that the fines associated with the import prohibition on retreaded tyres were justified also under Article XX(d) of the GATT 1994. Brazil further maintained that the exemption from the import prohibition and associated fines afforded to imports of *remoulded* tyres from MERCOSUR countries was justified under Articles XX(d) and XXIV of the GATT 1994.

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 12 June 2007. The Panel found that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX of the GATT 1994. In its analysis, the Panel found that the import prohibition on retreaded tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b). However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both "a means of unjustifiable discrimination [between countries] where the same conditions prevail" and "a disguised restriction on international trade", within the meaning of the chapeau of Article XX of the GATT 1994.

5. The Panel found further that the fines associated with the import prohibition on retreaded tyres were inconsistent with Article XI:1 and not justified under either paragraph (b) or (d) of Article XX of the GATT 1994. The Panel also determined that state law restrictions on the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Article III:4 and not justified under Article XX(b) of the GATT 1994. The Panel exercised judicial economy with respect to the European Communities' claims that the exemption from the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, and with respect to Brazil's related defence under Articles XX(d) and XXIV of the GATT 1994. …

(…)

ÍII. ISSUES RAISED IN THIS APPEAL

117. The following issues are raised in this appeal:

with respect to the Panel's analysis of "necessity" within the meaning of Article XX(b) of the GATT 1994:

whether the Panel erred in finding that the Import Ban is "necessary" to protect human or animal life or health; and

(…)

with respect to the Panel's interpretation and application of the chapeau of Article XX of the GATT 1994:

whether the Panel erred in finding that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau; and

whether the Panel erred in its analysis of whether imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau; and

(…)

IV. BACKGROUND AND THE MEASURE AT ISSUE

A. Factual Background

118. Tyres are an integral component in passenger cars, lorries, and airplanes and, as such, their use is widespread in modern society. New passenger cars are typically sold with new tyres. When tyres need to be replaced, consumers in some countries[147] may have a choice between new tyres or "retreaded" tyres. This dispute concerns the latter category of tyres. Retreaded tyres are used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls. Retreaded tyres can be produced through different methods, one of which is called "remoulding".[150]

119. At the end of their useful life[151], tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health. Specific risks to human life and health include:

[147] We note that Brazil is not the only WTO Member that has adopted a ban on imports of retreaded tyres. According to Brazil, countries that have restricted imports of used and retreaded tyres include Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela. (Brazil's first submission to the Panel, para. 67) At the oral hearing, Brazil identified the following as countries that ban imports of retreaded tyres: Argentina, Morocco, Nigeria, Pakistan, Thailand, Tunisia, and Venezuela.

[150] "Remoulding" consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. The other two methods of retreading are "top-capping", which consists of replacing only the tread, and "re-capping", which entails replacing the tread and part of the sidewall. ([Panel Report], para. 2.2)

[151] The Panel assumed that, on average, a tyre—whether new or retreaded—can be used on a passenger car for five years before it becomes a used tyre. (*Ibid*., para. 7.128)

> (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.

Risks to animal and plant life and health include: "(i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals."

120. Governments take actions to minimize the adverse effects of waste tyres. Policies to address "waste" include preventive measures aiming at reducing the generation of additional waste tyres[155], as well as remedial measures aimed at managing and disposing of tyres that can no longer be used or retreaded, such as landfilling, stockpiling, the incineration of waste tyres, and material recycling.

121. The Panel observed that the parties to this dispute have not suggested that retreaded tyres used on vehicles pose any particular risks compared to new tyres, provided that they comply with appropriate safety standards. Various international standards exist in relation to retreaded tyres, including, for example, the norm stipulating that passenger car tyres may be retreaded only once. One important difference between new and retreaded tyres is that the latter have a shorter lifespan and therefore reach the stage of being waste earlier.

B. The Measure at Issue

122. Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004") reads as follows:

> Article 40 – An import license will not be granted for retreaded tyres and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.

Article 40 of Portaria SECEX 14/2004 contains three main elements: (i) an import ban on *retreaded* tyres (the "Import Ban")[160]; (ii) an import ban on *used* tyres; and (iii) an exemption

[155] See the Panel's finding, in paragraph 7.100 of its Report, that "policies to address 'waste' by non-generation of additional waste are a generally recognized means of addressing waste management issues", as well as footnote 1170 thereto, detailing the evidence on which the Panel relied in reaching this conclusion.

[160] Throughout this Report, reference to the "Import Ban" shall be understood as referring only to the

from the Import Ban of imports of certain retreaded tyres from other countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market), which has been referred to in this dispute as the "MERCOSUR exemption".[161] The MERCOSUR exemption did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX No. 8 of 25 September 2000 ("Portaria SECEX 8/2000"), but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.[163]

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres. In its request for the establishment of a panel, the European Communities identified the Import Ban and the MERCOSUR exemption as distinct measures, and made separate claims against each of these measures. The European Communities claimed that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, and could not be justified under Article XX of the GATT 1994. The European Communities also made distinct claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and could not be justified under either Article XXIV:5 of the GATT 1994 or the Enabling Clause. In comments made during the interim review, Brazil stated that it had treated the Import Ban and the MERCOSUR exemption as two separate measures contained in the same legal instrument.

124. Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claims made against the MERCOSUR exemption. The Panel found the Import Ban to be inconsistent with Article XI:1 of the GATT 1994. It then turned to Brazil's related defence under Article XX(b) of the GATT 1994, stating that its analysis of Brazil's justification of the violation should focus also on the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1. Thus, according to the Panel, its analysis of the necessity of *that* specific measure should not have taken account of "elements extraneous to the measure itself" or of situations in which the Import Ban "does *not* apply (i.e. the exemption of MERCOSUR imports)". The Panel recognized, nonetheless, that "the MERCOSUR exemption is foreseen in the very legal instrument containing the import ban". It then included the MERCOSUR exemption in its analysis of the chapeau of Article XX, because the chapeau involves consideration of the manner in which the specific measure to be justified (in this case, the Import Ban) is applied.

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import ban on retreaded tyres. It therefore does not include the MERCOSUR exemption, despite the fact that this exemption is contained in the same legal instrument as the Import Ban, that is, Article 40 of Portaria SECEX 14/2004.

[161] The MERCOSUR exemption applies exclusively to remoulded tyres, a subcategory of retreaded tyres, which result from the process of replacing the tread and the sidewall, including all or part of the lower area of the tyre. (See Panel Report, para. 2.74 and footnote 1440 to para. 7.265)

[163] Following the adoption of Portaria SECEX 8/2000, Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings within MERCOSUR. Uruguay alleged that Portaria SECEX 8/2000 constituted a new restriction of commerce between MERCOSUR countries, which was incompatible with Brazil's obligations under MERCOSUR. In its ruling of 9 January 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of 29 June 2000, which obliges MERCOSUR countries not to introduce new *inter se* restrictions of commerce. (See Panel Report, para. 2.13; see also Exhibits BRA-103 and EC-40 submitted by Brazil and the European Communities, respectively, to the Panel) Following the arbitral award, Brazil enacted Portaria SECEX No. 2 of 8 March 2002, which eliminated the import ban for remoulded tyres originating in other MERCOSUR countries. (See Panel Report, para. 2.14; see also Exhibit BRA-78 submitted by Brazil to the Panel; see also Exhibit EC-41 submitted by the European Communities to the Panel) This exemption was incorporated into Article 40 of Portaria SECEX 14/2004.

(…)

126. We observe, nonetheless, that the Panel might have opted for a more holistic approach to the measure at issue by examining the two elements of Article 40 of Portaria SECEX 14/2004 that relate to retreaded tyres *together*. The Panel could, under such an approach, have analyzed whether the Import Ban in combination with the MERCOSUR exemption violated Article XI:1, and whether that *combined* measure, or the resulting partial import ban, could be considered "necessary" within the meaning of Article XX(b).

127. Yet, the Panel's approach reflects the manner in which the European Communities formulated its claims to the Panel, and the fact that the MERCOSUR exemption was not part of the original ban on the importation of retreaded tyres adopted by Brazil (Portaria SECEX 8/2000), but was only introduced following a ruling in 2002 by a MERCOSUR arbitral tribunal. These considerations prompt us to examine the issues appealed on the basis of the conceptual approach adopted by the Panel in defining the scope of the measure at issue, which, as indicated above, has not specifically been appealed by the European Communities.

C. Related Measures

128. In addition to the Import Ban, Brazil has adopted a variety of other measures which were also challenged or discussed before the Panel. Although none of these measures are directly at issue in this appeal, we consider it useful to identify them briefly.

129. Presidential Decree 3.179, as amended, provides sanctions applicable to conduct and activities harmful to the environment, and other provisions, and its Article 47-A subjects the importation, as well as the marketing, transportation, storage, keeping or warehousing, of imported used and retreaded tyres to a fine of R$400/unit.

130. Resolution No. 258 of 26 August 1999 of the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment) ("CONAMA Resolution 258/1999"), as amended by CONAMA Resolution No. 301 of 21 March 2002, created a collection and disposal scheme that makes it mandatory for domestic manufacturers of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions. CONAMA Resolution 258/1999, as amended in 2002, aims to ensure the environmentally appropriate final disposal of unusable tyres. Also, by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil, CONAMA Resolution 258/1999, as amended in 2002, seeks to encourage Brazilian retreaders to retread more domestically used tyres.

131. Brazilian states have also enacted measures aiming at reducing risks arising from the accumulation of waste tyres. Law 12.114 of the State of Rio Grande do Sul prohibits the commercialization of imported used tyres within its territory, which includes imported retreaded tyres, as well as retreaded tyres made in Brazil from imported casings. A 2005 amendment to that law allows the importation and marketing of imported retreaded tyres provided that the importer proves that it has destroyed ten used tyres in Brazil for every retreaded tyre imported. In the case of imports of used tyre casings, however, the destruction of only one used tyre per imported tyre is required. The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, *inter alia*, all existing unusable tyres currently discarded throughout the territory of Paraná.

132. Finally, we note that, notwithstanding the import ban on used tyres contained in Article 40 of Portaria SECEX 14/2004, a number of Brazilian retreaders have sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres from those used tyres. Although the Brazilian government has, within the Brazilian domestic legal system, opposed these injunctions, it has had mixed results in its efforts to prevent the grant, or obtaining the reversal, of court injunctions for the importation of used tyres.

V. THE PANEL'S ANALYSIS OF THE NECESSITY OF THE IMPORT BAN

A. The Panel's Necessity Analysis under Article XX(b) of the GATT 1994

133. The first legal issue raised by the European Communities' appeal relates to the Panel's finding that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994. The European Communities challenges three specific aspects of the Panel's analysis under Article XX(b). First, the European Communities contends that the Panel applied an "erroneous legal standard" in assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban. Secondly, the European Communities submits that the Panel did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities. Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out a proper, if any, weighing and balancing of the relevant factors. We will examine these contentions of the European Communities in turn.

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

134. In the analysis of the contribution of the Import Ban to the achievement of its objective, the Panel first recalled its previous findings that, through the Import Ban, Brazil pursued the objective of reducing exposure to the risks to human, animal, and plant life and health arising from the accumulation of waste tyres, and that such policy fell within the range of policies covered by paragraph (b) of Article XX of the GATT 1994. The Panel also found that Brazil's chosen level of protection is the "reduction of the risks of waste tyre accumulation to the maximum extent possible". In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres", the Panel examined two questions. First, the Panel sought to assess whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil. Secondly, the Panel sought to evaluate whether a reduction in the number of waste tyres can contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres.

135. Regarding the first question, the Panel noted Brazil's explanation that the Import Ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading. The Panel began by examining the replacement of imported retreaded tyres with new tyres on Brazil's market. The Panel determined that "all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres." Accordingly, the Panel reasoned that "an

import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan." The Panel verified next whether there is a link between the replacement of imported retreaded tyres with domestically retreaded tyres and a reduction in the number of waste tyres in Brazil. If retreaded tyres are manufactured in Brazil from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of the accumulation of waste tyres in Brazil by "giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." The Panel added that "an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise", because it "compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres." The Panel then assessed whether domestic used tyres can be retreaded in Brazil. On the basis of the evidence provided by the parties, the Panel found that "at least some domestic used tyres are being retreaded in Brazil", that Brazil "has the production capacity to retread domestic used tyres", and that new tyres sold in Brazil have the potential to be retreaded. The Panel also observed that "Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil" and that "the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste tyres." The Panel concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil."

136. The Panel then turned to the question of whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health arising from waste tyres. For the Panel, "the very essence of the problem is the actual accumulation of waste in and of itself." The Panel added that "[t]o the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires." The Panel concluded that:

> ... the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.

137. According to the European Communities, the Panel, in its assessment of the contribution of the Import Ban to the realization of the ends pursued by it, referred only to the potential contribution this measure might make. The European Communities argues that the Panel applied an "erroneous legal standard" in so doing, and that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution". For the European Communities, the Panel was required to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective because, otherwise, it is not possible to weigh and balance properly this contribution against other relevant factors. Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban. For the European Communities, "[t]he very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of the waste tyres arising in Brazil."

138. Brazil counters that the Panel correctly assessed the contribution of the Import Ban to the achievement of its objective. Brazil argues that actual contribution is properly assessed under the chapeau of Article XX of the GATT 1994, which focuses on the application of the measure. Brazil asserts further that the Appellate Body expressly recognized, in *EC – Asbestos*, that "a risk may be evaluated either in quantitative or *qualitative* terms"[213] and, therefore, the Panel was under no obligation to quantify the Import Ban's contribution to the reduction in waste tyre volumes.

139. We begin by recalling that the analysis of a measure under Article XX of the GATT 1994 is two-tiered.[214] First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX. Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

140. We note at the outset that the participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.

141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In *Korea – Various Measures on Beef*, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable'". The Appellate Body added:

> Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[219] (footnote omitted)

142. In *Korea – Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

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[213] Brazil's appellee's submission, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

[214] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 64.

[219] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

> ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[220]

143. In *US – Gambling*, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"[221], and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".[222]

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres", and noted that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important." The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible." Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."

145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective. In previous cases, the Appellate Body has not

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[220] *Ibid*., para. 164.

[221] Appellate Body Report, *US – Gambling*, para. 306. (footnote omitted)

[222] *Ibid*. In *Korea – Various Measures on Beef*, the Appellate Body observed that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." (Appellate Body Report, *Korea – Various Measures on Beef*, para. 163)

established a requirement that such a contribution be quantified.[228] To the contrary, in *EC – Asbestos*, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health".[229] In other words, "[a] risk may be evaluated either in quantitative or qualitative terms."[230] Although the reference by the Appellate Body to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban. In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence. It examined first the impact of the replacement of imported retreaded tyres with *new tyres* on the reduction of waste. Secondly, the Panel sought to determine whether imported retreaded tyres would be replaced with *domestically retreaded tyres*, which led it to examine whether domestic used tyres can be and are being retreaded in Brazil. Thirdly, it considered whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health.

149. The Panel's analysis was not only directed at an assessment of the current situation and the *immediate* effects of the Import Ban on the reduction of the exposure to the targeted risks. The Panel's approach also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the exposure to these risks.[232] In the course of its reasoning, the Panel made and tested some key hypotheses, including: that imported retreaded tyres are being replaced with new tyres and domestically retreaded tyres; that some proportion of domestic used tyres are retreadable and are being retreaded; that Brazil introduced a number of measures to facilitate the access of domestic retreaders to good-quality used tyres; that more automotive inspections in Brazil lead to an increase in the number of retreadable used tyres; and that Brazil has the production capacity to retread such tyres. The Panel sought to verify these hypotheses on the basis of the evidence adduced by the parties and found them to be logically sound and supported by sufficient evidence. In the next Section, we will examine the European Communities' claim that the Panel failed to make an objective assessment of the facts with respect to the verification of some of these hypotheses. Assuming, for the time being, that the Panel assessed the facts in accordance with Article 11 of the DSU, it appears to us that the Panel's analysis supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks. We have now to determine whether this was sufficient to

[228] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 163 and 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[229] Appellate Body Report, *EC – Asbestos*, para. 167. (original emphasis; footnote omitted)

[230] *Ibid*.

[232] In the Panel's view, "it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk ... or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure." (Panel Report, para. 7.145)

conclude that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.

150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be". We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in *Korea – Various Measures on Beef*, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'".[241] Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.[242]

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

152. We have now to assess whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres.

153. We observe, first, that the Panel analyzed the contribution of the Import Ban as initially designed, without taking into account the imports of remoulded tyres under the MERCOSUR exemption. As we indicated above, this is not the only possible approach. Nevertheless, we

[241] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[242] Brazil's appellee's submission, paras. 80 and 83. According to Brazil, given its chosen level of protection to reduce the risk of waste tyre accumulation to the maximum extent possible, "[i]f the Panel finds that there are no reasonable alternatives to the measure, the measure is necessary—no matter how small its contribution—because the WTO does not second-guess the Member's chosen level of protection." (*Ibid*., para. 80)

proceed with our examination of the Panel's reasoning on that basis for the reasons we explained earlier. In the light of the evidence adduced by the parties, the Panel was of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings, or with new tyres that are retreadable. As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres" and that, accordingly, the Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan." As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres[248] and that "at least some domestic used tyres are being retreaded in Brazil." The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres, and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded. The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide for the safe disposal of waste tyres in specified proportions. For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil. Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material.[255] Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil.

[248] [Panel Report], para. 7.141. The Panel noted that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported) and 18.6 million retreaded tyres were produced domestically.

[255] Leaving aside, as explained above, the imports under the MERCOSUR exemption and under court injunctions.

Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a *key element* of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel's Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.[259] As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."[257] We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[258] If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available".[259] As the Appellate Body indicated in *US – Gambling,* "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[260] If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being

[259] Appellate Body Report, *US – Gambling,* para. 311.

[257] *Ibid*., para. 309. (original emphasis)

[258] *Ibid*., para. 308.

[259] *Ibid*., para. 311.

[260] Appellate Body Report, *US – Gambling,* para. 308.

pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.[261]

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil. The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

158. Regarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres. The Panel observed that these measures had already been implemented or were in the process of being implemented so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable". Therefore, the Panel disagreed with the European Communities that "the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban".

159. The Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions. The Panel noted that imports of used tyres were already prohibited by law in Brazil, "so that if the 'alternative measure' proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure." Accordingly, the Panel concluded that the possible alternative measures identified by the European Communities to avoid the *generation* of waste tyres could not "apply *as a substitute*" for the Import Ban but are, rather, complementary measures that Brazil already applies, at least in part.

160. Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

161. The European Communities referred mainly to two collection and disposal schemes.[268] In the analysis of these schemes, the Panel recalled that "Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible". According to the Panel, "insofar as the level of protection pursued by Brazil involves the 'non-generation' of waste tyres in the first place", collection and disposal schemes, such as that adopted by CONAMA Resolution 258/1999 or the Paraná Rodando Limpo programme, "would not seem able to achieve the same level of protection as the import ban". The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks. The Panel concluded that these schemes cannot be considered as alternatives to the Import Ban at the level of protection sought by Brazil, because they were already implemented in Brazil and do not address the risks associated with the disposal of waste tyres.

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[261] *Ibid*., para. 311.

[268] The scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic producers and importers of new tyres to provide for the safe disposal of waste tyres (or unusable tyres) in specified proportions; and a voluntary multi-sector programme called Paraná Rodando Limpo, which has been put in place in the State of Paraná. …

162. The Panel then examined the following disposal methods identified by the European Communities: (i) landfilling; (ii) stockpiling; (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.

163. Concerning *landfilling*, the Panel found that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the Import Ban, and for this reason cannot constitute a reasonably available alternative. For the Panel, landfilling of waste tyres poses problems, including the "instability of sites that will affect future land reclamation, long-term leaching of toxic substances, and the risk of tyre fires and mosquito-borne diseases." The Panel also observed that the evidence it examined showing the existence of such risks did not make a clear distinction between landfilling of shredded tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfilling"). Thus, for the Panel, it was not possible to conclude that landfilling of shredded tyres does not pose risks similar to those linked to other types of waste tyre landfills.

164. Regarding *stockpiling*[277], the Panel observed that this method does not "dispose of" waste tyres, and added that "the evidence shows that even the so-called 'controlled stockpiling' that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment." The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.

165. With respect to the *incineration* of waste tyres, the Panel found that sufficient evidence demonstrated that health risks exist in relation to the incineration of waste tyres, even if such risks could be significantly reduced through strict emission standards. For the Panel, the evidence suggested that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans." The Panel added that, although emission levels can vary largely depending on the emission control technology, "the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons."

166. Finally, the Panel examined *material recycling* applications. Regarding civil engineering applications using waste tyres, the Panel found that demand for these applications was fairly limited partly due to their high costs, that they are capable of disposing of only a small number of waste tyres, and that the evidence casts doubt on the safety of some of these engineering applications. With respect to rubber asphalt, the Panel found that the information showed that "the use of rubber asphalt results in higher costs." Consequently, "the demand for this technology is limited and its waste disposal capacity is reduced." The Panel also noted that the use of rubber granulates in the production of certain products may dispose of only a limited amount of waste tyres. Finally, as regards devulcanization and other forms of chemical or thermal transformation, the Panel observed that, "under current market conditions, the economic viability of these options has yet to be demonstrated." In the light of these considerations, the Panel concluded that "it is not clear that material recycling applications are entirely safe", and that even if they were completely harmless, "they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative".

(…)

[277] Stockpiling consists of storing waste tyres in designated installations. …

169. The Panel examined each of the measures or practices put forward by the European Communities in order to determine whether they were reasonably available alternatives in the light of the objective of the Import Ban and Brazil's chosen level of protection.

170. We note that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres" and that "Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible", and that a measure or practice will not be viewed as an alternative unless it "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[294]

171. We recall that tyres—new or retreaded—are essential for modern transportation. However, at the end of their useful life, they turn into waste that carries risks for public health and the environment. Governments, legitimately, take actions to minimize the adverse effects of waste tyres. They may adopt preventive measures aiming to reduce the accumulation of waste tyres, a category into which the Import Ban falls. Governments may also contemplate remedial measures for the management and disposal of waste tyres, such as landfilling, stockpiling, incineration of waste tyres, and material recycling. Many of these measures or practices carry, however, their own risks or require the commitment of substantial resources, or advanced technologies or know-how. Thus, the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve "prohibitive costs or substantial technical difficulties".[296]

172. Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres. Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.

173. We move now to the other measures or practices proposed by the European Communities as alternatives to the Import Ban.[298] The European Communities contends that the Panel committed an error of law by applying a "narrow definition of alternative", according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres", or one "equal to a waste non-generation measure". For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure", and resulted in the rejection of several disposal and waste management measures presented by the European Communities that should have been accepted as alternatives to the Import Ban.

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[294] Appellate Body Report, *US – Gambling,* para. 308. (footnote omitted)

[296] Appellate Body Report, *US – Gambling*, para. 308.

[298] These measures or practices are the following disposal methods: landfilling; stockpiling; incineration of waste tyres; and material recycling.

174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection[303], that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[304] to the maximum extent possible.[305] In this respect, we believe, like the Panel, that non-generation measures are more apt to achieve this objective because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated. Furthermore, we note that, in comparing a proposed alternative to the Import Ban, the Panel took into account specific risks attached to the proposed alternative, such as the risk of leaching of toxic substances that might be associated to landfilling, or the risk of toxic emissions that might arise from the incineration of waste tyres. In our view, the Panel did not err in so doing. Indeed, we do not see how a panel could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative. In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban.[309] Because these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres. We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it". According to the European Communities, although the Appellate Body has not defined the term "weighing and balancing", "this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued." … In sum,

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[303] Panel Report, para. 7.157.

[304] *Ibid*., para. 7.102.

[305] *Ibid*., para. 7.108. (footnote omitted) See also *ibid*., para. 7.152:

> We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection. (footnote omitted)

[309] Panel Report, para. 7.195; see also para. 7.186 (landfilling); para. 7.189 (stockpiling); and para. 7.194 (waste tyre incineration).

the European Communities argues that the Panel conducted a "superficial analysis" that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued."

(…)

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree". The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important. Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.

(…)

183. In the light of all these considerations, we are of the view that the Panel did not err in the manner it conducted its analysis under Article XX(b) of the GATT 1994 as to whether the Import Ban was "necessary to protect human, animal or plant life or health".

(…)

C. General Conclusion on the Necessity Analysis under Article XX(b) of the GATT 1994

210. At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is

the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.

211. The European Communities proposed a series of alternatives to the Import Ban. Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

212. Accordingly … we uphold the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary to protect human, animal or plant life or health."

VI. THE PANEL'S INTERPRETATION AND APPLICATION OF THE CHAPEAU OF ARTICLE XX OF THE GATT 1994

A. The MERCOSUR Exemption and the Chapeau of Article XX of the GATT 1994

213. After finding that the Import Ban was provisionally justified under Article XX(b) of the GATT 1994, the Panel examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX.

214. The chapeau of Article XX of the GATT 1994 reads:

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

> the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

215. The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX. The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.[404]

216. Having determined that the exemption from the Import Ban of remoulded tyres originating in MERCOSUR countries resulted in discrimination in the application of the Import Ban, the Panel examined whether this discrimination was arbitrary or unjustifiable. The Panel concluded that, as of the time of its examination, the operation of the MERCOSUR exemption had not resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination", within the meaning of the chapeau of Article XX. The Panel also found that the MERCOSUR exemption had not been shown "to date" to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade", within the meaning of the chapeau of Article XX. The European Communities appeals these findings of the Panel.

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

217. Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable. The Panel also observed that it was only after a MERCOSUR tribunal found Brazil's ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating in MERCOSUR countries from the application of the Import Ban. For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR." The Panel added that the discrimination arising from the MERCOSUR exemption was not "*a priori* unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."

[404] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Gambling*, para. 339.

218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.[411] The Panel was not persuaded by this submission. Indeed, the Panel considered it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."

219. For the Panel, the MERCOSUR ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary. The Panel indicated, however, that it was not suggesting that "the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX."[414] The Panel acknowledged that "casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR." The Panel underscored that, "[i]f such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination." However, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant."[417] The Panel concluded that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.

220. The European Communities claims that the Panel erred in its interpretation and application of the term "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption does not constitute such discrimination. According to the European Communities, whether a measure involves arbitrary or unjustifiable discrimination can only be determined by taking into account the objective of the measure at issue, in this case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable" in the light of this objective. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it was introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further but may undermine the stated objective of the measure. For this reason, it must be regarded as "unreasonable, contradictory, and thus arbitrary". For the European Communities, allowing a Member's obligations under other

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[411] Article 50(d) of the Treaty of Montevideo provides for an exception similar to Article XX(b) of the GATT 1994. …

[414] Panel Report, para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV:8(a) of the GATT 1994—which specifically excludes measures taken under Article XX from the requirement to liberalize "substantially all the trade" within a customs union—to take into account, as it did, "the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR." (*Ibid*., para. 7.284)

[417] *Ibid*., para. 7.288. The Panel noted that imports of retreaded tyres under the MERCOSUR exemption had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. For the Panel, "[t]hat figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban." (*Ibid*. (referring to European Communities' first written submission to the Panel, para. 80))

international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The European Communities adds that, in any event, the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, and that Brazil could have implemented the ruling by lifting the Import Ban for all third countries.

221. With respect to the Panel's finding that unjustifiable discrimination could arise if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined, the European Communities argues that the Panel applied a test that has no basis in the text of Article XX and no support in the case law of the Appellate Body or of previous panels. The European Communities also notes that "the level of imports in a given year may be subject to strong fluctuations, and for this reason ... is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX".

(…)

224. We begin our analysis by recalling that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX. In *US – Shrimp*, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."[425] The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'"[426] Accordingly, the task of interpreting and applying the chapeau is "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."[427] The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[428]

225. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Thus, we observe that, in *US – Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.[429] As it found them unsatisfactory, the Appellate Body concluded that the application of the

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[425] Appellate Body Report, *US – Shrimp*, para. 158.

[426] *Ibid*. (quoting B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), chap. 4, at 125).

[427] *Ibid*., para. 159.

[428] *Ibid*.

[429] The *US – Gasoline* case involved a programme aiming to ensure that pollution from gasoline combustion did not exceed 1990 levels. Baselines for the year 1990 were set as a means for determining compliance with the programme requirements. These baselines could be either individual or statutory, depending on the nature of the entity concerned. Whereas individual baselines were available to domestic refiners, they were not to foreign refiners.

The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. (Appellate Body Report, *US –*

baseline establishment rules resulted in arbitrary or unjustifiable discrimination. In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part of an analysis that was directed at the cause, or the rationale, of the discrimination.[431] *US – Shrimp (Article 21.5 – Malaysia)* concerned measures taken by the United States to implement recommendations and rulings of the DSB in *US – Shrimp*. The Appellate Body's analysis of these measures under the chapeau of Article XX focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX.[432]

226. The Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries

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Gasoline, pp. 25-26, DSR 1996:I, 3, at 23-24) Secondly, the United States explained that imposing the statutory baseline requirement on domestic refiners as well was not an option, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. (*Ibid*., p. 28, DSR 1996:I, 3, at 26-27)

[431] These factors were: (i) the discrimination that resulted from a "rigid and unbending requirement" (Appellate Body Report, *US – Shrimp*, para. 177; see also para. 163) that countries exporting shrimp into the United States adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the discrimination that resulted from the failure to take into account different conditions that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles (*ibid*., paras. 163 and 164); (iii) the discrimination that resulted from the application of the measure was "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" (*ibid*., para. 165), because, in some circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market; and (iv) the discrimination that resulted from the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members (*ibid*., paras. 166 and 172).

[432] Thus, the Appellate Body endorsed the panel's conclusion that conditioning market access on the adoption of a regulatory programme for the protection and conservation of sea turtles comparable in effectiveness—as opposed to the adoption of "essentially the same" regulatory programme—"allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'". (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144) The Appellate Body also considered that the measures adopted by the United States permitted a degree of flexibility that would enable the United States to consider the particular conditions prevailing in Malaysia, notably because it provides that, in making certification determinations, the United States authorities "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles". (*Ibid*., para. 147)

in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision. In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market[434]) was "difficult to reconcile with the declared objective of protecting and conserving sea turtles".[435] Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is "unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.[437]

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[434] Appellate Body Report, *US – Shrimp*, para. 165.

[435] *Ibid*.

[437] … We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan – Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above, the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random" because it was adopted further to a ruling within the framework of MERCOSUR.

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.

233. Accordingly, we *find* that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we *reverse* the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore *reverse* the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also *reverse* the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.

234. This being said, we observe, like the Panel, that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo. Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show, in our view,

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to ensure "equality of competitive conditions for imported products in relation to domestic products". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (*Ibid*., at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (*Ibid*. (footnote omitted))

that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.

(…)

B. Imports of Used Tyres through Court Injunctions and the Chapeau of Article XX of the GATT 1994

1. Imports of Used Tyres through Court Injunctions and Arbitrary or Unjustifiable Discrimination

240. The European Communities submits that the Panel erred in its analysis of the imports of used tyres through court injunctions under the chapeau of Article XX of the GATT 1994. We begin our analysis with the requirement in the chapeau of Article XX that the measure at issue not be applied in a manner that would result in "arbitrary or unjustifiable discrimination".

241. The Panel determined that the imports of used tyres through court injunctions resulted in discrimination in favour of domestic retreaders. This is because these imports enabled retreaded tyres to be produced in Brazil from imported casings, while retreaded tyres produced abroad using the same casings could not be imported. Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

242. The Panel noted that the importation of used tyres into Brazil is prohibited, and that "used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases." The Panel found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and that, to this extent, the Import Ban was not applied in a manner that would constitute arbitrary discrimination.

243. The Panel recalled, however, that the contribution of the Import Ban to the achievement of its objective "is premised on imports of used tyres being prohibited". For the Panel, the granting of injunctions allowing used tyres to be imported "runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading." The Panel examined the volumes of imports of used tyres that have taken place under the court injunctions. For the Panel, the amounts of imports of used tyres that have actually taken place under the court injunctions were significant.[464] Accordingly, the Panel found that, "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination."

[464] Panel Report, paras. 7.297 and 7.303. In particular, the Panel noted that, in 2005, Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted (Portaria SECEX 8/2000). The Panel also observed that the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the Import Ban. Thus, according to the Panel, in 2005, the imports of used tyres were approximately three times the amount of retreaded and used tyres combined that were imported annually prior to the Import Ban. (*Ibid*., paras. 7.301 and 7.302).

(…)

246. As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination. For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions. We observe that this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we *find* that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

247. The Panel approached the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as it did with the MERCOSUR exemption. We explained above why we are of the view that this quantitative approach—according to which discrimination would be characterized as unjustifiable only if imports under the MERCOSUR exemption take place in such amounts that the achievement of the objective of the measure at issue would be "significantly undermined"—is flawed. Accordingly, we *reverse* the Panel's findings, in paragraphs 7.296 and 7.306 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban. Furthermore, for the same reasons as those explained in paragraph 0, we *reverse* the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of "capricious" or "random" action.

2. Imports of Used Tyres and Disguised Restriction on International Trade

248. The Panel found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied in a manner that constitutes a disguised restriction on international trade." The Panel reasoned that the restriction on international trade inherent in the Import Ban has operated to the benefit of domestic retreaders, because "[t]he granting of court injunctions for the importation of used tyres has ... in effect meant that ... domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts, while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market."

249. The European Communities submits that the Panel erred in finding that the imports of used tyres through court injunctions would have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban. The European Communities refers to the arguments it made regarding the existence of arbitrary or unjustifiable discrimination, and reiterates its view that the Panel's reliance on

import volumes for the purpose of determining compatibility with the chapeau of Article XX of the GATT 1994 is erroneous.

250. Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted a disguised restriction on international trade, and refers to the arguments that it made before the Panel in support of this position.

251. The reasoning elaborated by the Panel to reach the challenged finding was the same as that it developed in respect of "arbitrary or unjustifiable discrimination". Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of imports of used tyres in amounts that would significantly undermine the achievement of the objective of the Import Ban. We explained above why we consider this reasoning of the Panel erroneous. As the challenged finding results from the same reasoning that we have found to be erroneous and have rejected, this finding of the Panel cannot stand. Accordingly, we *reverse* the Panel's finding, in paragraph 7.349 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.

252. We found that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994. In the light of these findings, we *uphold*, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban, found by the Panel to be inconsistent with Article XI:1 of the GATT 1994, is not justified under Article XX of the GATT 1994.

(…)

VIII. FINDINGS AND CONCLUSIONS

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

(a) with respect to the analysis of the necessity of the Import Ban under Article XX(b) of the GATT 1994:

(i) upholds the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision; and

(ii) finds that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts;

(b) with respect to the analysis under the chapeau of Article XX of the GATT 1994:

(i) reverses the Panel's findings, in paragraphs 7.287, 7.354, and 7.355 of the Panel Report, that the MERCOSUR exemption would result in the Import Ban being applied in a manner that constitutes unjustifiable

discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the Import Ban;

(ii) reverses the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX;

(iii) reverses the Panel's findings, in paragraphs 7.296, 7.306, 7.349, and 7.355 of the Panel Report, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban;

(iv) reverses the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and finds, instead, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX; and

(c) with respect to Article XX of the GATT 1994, upholds, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban is not justified under Article XX of the GATT 1994; and

(…)

259. The Appellate Body recommends that the DSB request Brazil to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.