WORLD TRADE ORGANIZATION

WT/CTE/W/203
8 March 2002

(02-1188)

Committee on Trade and Environment

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

Note by the Secretariat

I. INTRODUCTION

1. This Note has been prepared in response to a request from the Committee on Trade and Environment for factual background information on GATT/WTO dispute settlement practice relating to the application of Article XX to environmental measures. The Note is an updated and revised version of document WT/CTE/W/53/Rev.1. An outline of the structure of this Note is provided at the end of the document. The Note focuses on paragraphs (b), (d) and (g) of GATT Article XX, which are the three exceptions usually referred to in so-called "environmental" disputes, the latter term being understood in a broad sense as covering disputes relating to the protection of the environment, as such, and also the protection of human health. The Note is limited to environmental disputes involving Article XX and therefore excludes health cases brought under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

2. The Note highlights the most important aspects of relevant panel and Appellate Body reports, but is not meant to interpret them. Although the Appellate Body in *Japan – Alcoholic Beverages* rejected the panel's approach that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" [1] as the phrase "subsequent practice" is used in Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"),[2] the Appellate Body held that:

> "Adopted panel reports are an important part of the GATT *acqui*s. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[3]

In the same case, the Appellate Body agreed with the panel finding that unadopted panel reports had no binding effects but could nevertheless serve as "useful guidance".[4] Furthermore, in the *US –*

---

[1] *Japan – Taxes on Alcoholic Beverages* (hereinafter *Japan – Taxes on Alcoholic Beverages*), Panel Report adopted on 1 November 1996, as modified by the Appellate Body Report, WT/DS8,10,11/R, para. 6.10.

[2] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331; 8 *International Legal Materials* 679. Article 31 on "General rule of interpretation" reads as follows:

" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

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

[3] *Japan – Alcoholic Beverages*, WT/DS8,10,11/AB/R, Appellate Body report, adopted on 1 November 1996, *in* WTO, *Dispute Settlement Reports 1996* (hereinafter *DSR 1996*), volume I, Geneva, 1998, p. 108.

[4] *Japan – Alcoholic Beverages*, Panel Report, para. 6.10 and Appellate Body Report, p. 108.

Shrimp (Article 21.5) case,[5] the Appellate Body held that its reasoning in *Japan – Alcoholic beverages* on the GATT *acquis* "applies to adopted Appellate Body Reports as well".[6]

3. Under the GATT, six panel proceedings involving an examination of environmental measures or human health-related measures under Article XX have been completed (*US – Canadian Tuna*,[7] *Canada – Salmon and Herring*,[8] *Thailand – Cigarettes*,[9] *US – Tuna (Mexico)*,[10] *US – Tuna (EEC)* [11] and *US – Automobiles* [12]). Out of the six reports, three remained unadopted (*US – Tuna (Mexico), US – Tuna (EEC)* and *US – Automobiles*). So far, under the WTO, three disputes led to the adoption of panel and Appellate Body reports (*US – Gasoline*,[13] *US – Shrimp* [14] and *EC – Asbestos* [15]) including one case (*US – Shrimp*) followed by a procedure under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") (referred to hereinafter as *US – Shrimp (Article 21.5)*). A brief description of the relevant facts of each case is provided in the Annex.

4. The relevant text of Article XX of GATT 1994 reads as follows:

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

---

[5] *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (hereinafter *US – Shrimp (Article 21.5)*), Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

[6] *Ibid.*, Appellate Body Report, para. 109.

[7] *United States – Prohibition of Imports of Tuna and Tuna Products from Canada* (hereinafter *US – Canadian Tuna*), adopted on 22 February 1982, BISD 29S/91.

[8] *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (hereinafter *Canada – Salmon and Herring*), adopted on 22 March 1988, BISD 35S/98.

[9] *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (hereinafter *Thailand – Cigarettes*), adopted on 7 November 1990, BISD 37S/200.

[10] *United States – Restrictions on Imports of Tuna* (hereinafter *US – Tuna (Mexico)*), circulated on 3 September 1991, not adopted, DS 21/R.

[11] *United States – Restrictions on Imports of Tuna*, circulated on 16 June 1994, not adopted, DS29/R, (hereinafter *US – Tuna (EEC)*).

[12] *United States – Taxes on Automobiles* (hereinafter *US – Automobiles*), circulated on 11 October 1994, not adopted, DS31/R.

[13] *United States – Standards for Reformulated and Conventional Gasoline* (hereinafter *US – Gasoline*), Appellate Body Report and Panel Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

[14] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US – Shrimp*), Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

[15] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (hereinafter *EC – Asbestos*), Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

(…)

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

(…)".

5. The structure of this Note is based upon the approach followed both by panels and by the Appellate Body in addressing a defence under Article XX. Part II introduces some preliminary issues of specific concern to the application of Article XX, namely the burden of proof, the sequence of steps and the policy choice. The following two parts address a defence under Article XX which is two-tiered: the challenged measure must meet the criteria of one of the Article XX exceptions and the measure must pass the requirements of the introductory clause. Part III details the process of applying an Article XX exception, i.e. the identification of the policy pursued by the measure and the compliance with the specific requirements under Article XX(b), (d), and (g). Finally, Part IV addresses the conditions a measure has to meet to comply with the introductory clause of Article XX.

II. PRELIMINARY ISSUES

A. BURDEN OF PROOF

6. As set out in the Appellate Body report on *US – Wool Shirts and Blouses*, and recalled by subsequent reports of panels and of the Appellate Body, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[16] It implies that the complaining party will be required to make a *prima facie* case of violation of the relevant provisions of the WTO Agreement.

7. The Appellate Body in *US – Wool Shirts and Blouses* asserted that Article XX contains "limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves".[17] Article XX is an example of provisions which are in the nature of "affirmative" defences and the Appellate Body noted further that "it is only reasonable that the burden of establishing such a defence should rest on the party asserting it".[18] Such provisions are invoked by the party complained against and are considered by the panel only once it has determined a violation of some other provisions.

8. In the *US – Gasoline* case, the Appellate Body found that the burden of showing that a measure complies with the requirements of the introductory clause of Article XX falls on the defending party, even after that party has established that the measure qualifies under one of the subheadings of Article XX. Therefore a party invoking an exception under Article XX has to prove:

---

[16] See *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (hereinafter *US – Wool Shirts and Blouses*), Appellate Body Report, adopted on 23 May 1997, WT/DS/33/AB/R, *in* WTO, *Dispute Settlement Reports 1997* (hereinafter *DSR 1997)*, volume 1, Geneva, 2000, p. 335. This ruling has been applied by the Appellate Body in *inter alia*: *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R adopted on 19 December 1997, paras. 73-75; *European Communities Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 16 January 1998, para. 98; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted on 23 August 1999, para. 44; and by the Panel in *EC – Asbestos*, para. 8.177.

[17] *US – Wool Shirts and Blouses*, Appellate Body Report, *in DSR 1997*, volume 1, Geneva, 2000, p. 335.

[18] *Ibid.*, p. 335.

first, that the inconsistent measure comes within the scope of one exception and, second, that the measure complies with the chapeau of Article XX. In addition, the Appellate Body indicated that the latter is more difficult to prove than the former. The Appellate Body stated:

> "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, (...) encompasses the measure at issue".[19]

B. SEQUENCE OF STEPS

1. General sequence of steps

9. The defending party must demonstrate that the measure (i) falls under at least one of the ten exceptions - paragraphs (a) to (j) - listed under Article XX, and (ii) satisfies the requirements of the preamble, i.e. is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade". These are cumulative requirements. In the *US – Gasoline* case, the Appellate Body presented a two-tiered test under Article XX, as follows:

> "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 [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX".[20]

10. In the *US – Shrimp* case, the Appellate Body disagreed with the panel that had started its analysis with the chapeau of Article XX and had reasoned that "(…) 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".[21] The Appellate Body said:

> "The sequence of steps indicated above [reference to the *US – Gasoline* case, see 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 the *United States – Gasoline* 'seems equally appropriate'. [footnote omitted] We do not agree".[22]

> "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 (...).

---

[19] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 21.
[20] *Ibid.*, pp. 20-21.
[21] *US – Shrimp*, Panel Report, para. 7.28.
[22] *US – Shrimp*, Appellate Body Report, para. 119.

> When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies".[23]
>
> "(…) 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".[24]

11. This sequence of steps is now part of both panel and Appellate Body practice. In the *EC – Asbestos* case, for instance, the panel observed:

> "In accordance with the approach noted by the Panel in *United States – Gasoline* and the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, we will first examine whether the measure falls within the scope of paragraph (b) of Article XX, the provision expressly invoked by the European Communities. If we decide that it does, we will consider whether, in its application, the Decree satisfies the conditions of the introductory clause of Article XX".[25]

2. Specific sequence of steps

12. As noted above, the party invoking Article XX bears the burden of proving that the contested measure meets the requirements contained in that provision.

(a) Under Article XX(b)

13. Under paragraph (b), the panel, in *US – Gasoline*, determined that this demonstration includes the following steps:

> "(1) [T]hat the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
>
> (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
>
> (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX".[26]

(b) Under Article XX(d)

14. In the *Korea – Various Measures on Beef* case, the Appellate Body noted that the party invoking paragraph (d) had to demonstrate the following steps:

> "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

[23] *Ibid.*, para. 120.
[24] *Ibid.*, para. 149.
[25] *EC – Asbestos*, Panel Report, para. 8.167. See also *US – Shrimp (Article 21.5)*, Panel Report, paras. 5.27-5.28.
[26] *US – Gasoline*, Panel Report, para. 6.20. See also *US – Tuna (EEC)*, para. 5.29.

> Article XX(d) as a justification has the burden of demonstrating that these two requirements are met".[27]

(c) Under Article XX(g)

15. Finally, under Article XX(g), the Appellate Body in *US – Shrimp* followed a three-step analysis:

> (1) The measure at issue is "a measure concerned with the conservation of 'exhaustible natural resources' within the meaning of Article XX(g)"; [28]
>
> (2) "Article XX(g) requires that the measure sought to be justified be one which 'relat[es] to' the conservation of exhaustible natural resources"; [29] and
>
> (3) The measure at issue is "a measure made effective in conjunction with restrictions on domestic production or consumption".[30]

C. THE POLICY CHOICE

16. None of the Appellate Body and panel reports questioned the environmental or health policy choices made by governments. Already in the *US – Tuna (Mexico)* case, the panel observed that it was the measure and not the policy goal that had to meet the requirements under Article XX. The panel noted that:

> "The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they do not 'constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade' refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party".[31]

17. Moreover, in the *US – Gasoline* case, the panel underlined that:

> "(…) [I]t 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".[32]

18. In the same case, the Appellate Body stated as follows:

> "It is of some importance that the Appellate Body point out what this [the Appellate Body's finding] does *not* mean. It does not mean, or imply, that the ability of any

---

[27] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (Hereinafter *Korea – Various Measures on Beef*), WT/DS161/AB/R, WT/DS169/AB/R, Appellate Body Report, adopted on 10 January 2001, para. 157.

[28] *US – Shrimp*, Appellate Body Report, para. 127.

[29] *Ibid.*, para. 135.

[30] *Ibid.*, paras. 143-145.

[31] *US – Tuna (Mexico)*, Panel Report, unadopted, para. 5.32.

[32] *US – Gasoline*, Panel Report, para. 7.1. See also para. 6.22.

> 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*, [footnote omitted] there is specific acknowledgement 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".[33]

19. In the *EC – Asbestos* case, the Appellate Body asserted clearly that it was each WTO Member's "(…) right to determine the level of protection of health that [it] consider[s] appropriate in a given situation".[34] Accordingly, the Appellate Body did not question France's goal of reducing the spread of asbestos-related health risks to zero. The Appellate Body also ruled that "there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health".[35] Similarly, in the *Australia – Salmon* case, the Appellate Body asserted that the '"appropriate level of protection' established by a Member and the '(…) measure' have to be clearly distinguished. [footnote omitted] They are not one and the same thing. The first is an *objectiv*e, the second is an *instrument* chosen to attain or implement that objective".[36]

20. In the *US – Gasoline* case, the panel found that it was the inconsistency of the measure with the GATT 1994 (the imported gasoline was treated less favourably than domestic gasoline) that requires justification under Article XX and not the policy goal (the protection of the environment or of public health, for instance). The Appellate Body reversed this panel's finding and found that the panel erred in law in referring to the inconsistency of the measure instead of the measure at issue. The Appellate Body held:

> "The result of this analysis is to turn Article XX on its head. (…) The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment'". [37]

III. APPLICATION OF THE EXCEPTIONS UNDER ARTICLE XX

21. The first step in the application of Article XX exceptions is to identify whether the policy pursued through the measure falls within the range of policies designed either to protect human, animal or plant life or health, or to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994, or to conserve exhaustible natural resources (Section A). The second step consists of determining whether the specific requirements under Article XX(b), (d) and (g) are met. This examination comprises either the elements of "necessary" for paragraphs (b) and (d) (Section B), or of "relating to" and "in conjunction with" for paragraph (g) (Section C)

---

[33] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 28.
[34] *EC – Asbestos*, Appellate Body Report, para. 168.
[35] *Ibid.*, para. 167.
[36] *Australia – Measures affecting importation of Salmon* (Hereinafter *Australia – Salmon)*, WT/DS18/AB/R, Appellate Body Report, adopted on 20 October 1998, para. 200.
[37] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 15.

A. IDENTIFICATION OF THE POLICY PURSUED THROUGH THE MEASURE

1. Protecting human, animal or plant life or health under Article XX(b)

22. In the *Thailand – Cigarettes* case, the panel acknowledged, in accordance with the parties to the dispute and the expert from the World Health Organisation ("WHO"), that:

> "[S]moking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization".[38]

23. In the two *Tuna* disputes, the panel and the parties accepted - implicitly in *US – Tuna (Mexico)*, explicitly in *US – Tuna (EEC)* -[39] that the protection of dolphin life or health was a policy that could fall under Article XX(b): "(…) [T]he Panel noted that the parties did not disagree that the protection of dolphin life or health was a policy that could come within Article XX (b)".[40]

24. In the *US – Gasoline* case, the panel and the parties agreed that "the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b)".[41]

25. In the *EC – Asbestos* case, the panel had to provide an assessment on the health risk posed by chrysotile-cement products because the parties disagreed on its extent. The panel considered first that "[I]n principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists".[42] The panel subsequently found that "the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health (…)",[43] and that therefore "the EC ha[s] shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health".[44] The Appellate Body upheld the finding of the panel and found that "[t]he Panel enjoyed a margin of discretion in assessing the value of evidence, and the weight to be ascribed to that evidence",[45] and that "the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health".[46]

2. Securing compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994 under Article XX(d)

26. The panel, in the *EEC – Parts and Components* case, interpreted the phrase "to secure compliance with laws and regulations" to mean "to enforce obligations under laws and regulations", and not "to ensure the attainment of the objectives of the laws and regulations".[47] The panel found

[38] *Thailand – Cigarettes*, Panel Report, para. 73.
[39] *US – Tuna (Mexico)*, Panel Report, unadopted, paras. 5.24-5.29 and *US – Tuna (EEC)*, Panel Report, unadopted, para. 5.30.
[40] *US – Tuna (EEC)*, Panel Report, unadopted, para. 5.30.
[41] *US – Gasoline*, Panel Report, para. 6.21.
[42] *EC – Asbestos*, Panel Report, para. 8.186.
[43] *Ibid.*, para. 8.193.
[44] *Ibid.*, para. 8.194.
[45] *EC – Asbestos*, Appellate Body Report, para. 161.
[46] *Ibid.*, para. 162.
[47] *European Economic Community – Regulation on Imports of Parts and Components* (Hereinafter *EEC – Parts and Components*), Panel Report, adopted on 16 May 1990, L/6657 - 37S/132, para. 5.17.

that "Article XX(d) covers only measures related to the enforcement of obligations under laws or regulations consistent with the General Agreement".[48]

27. In the *US – Gasoline* case, the panel followed this approach. It examined whether the aspect of the baseline establishment methods found inconsistent with the GATT 1994 secured compliance with a law or regulation not inconsistent with the GATT 1994.[49] The panel observed that:

> "[A]ssuming that a system of baselines by itself were consistent with Article III:4, the US scheme might constitute, for the purposes of Article XX(d), a law or regulation 'not inconsistent' with the General Agreement. However, the Panel found that maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not 'secure compliance' with the baseline system. *These methods were not an enforcement mechanism*. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned".[50] (emphasis added)

28. In *US – Tuna (Mexico)*, the panel examined the second aspect of Article XX(d), i.e. whether those laws or regulations are not inconsistent with the provisions of the GATT. The panel noted:

> "Article XX(d) requires that the 'laws and regulations' with which compliance is being secured be themselves 'not inconsistent' with the General Agreement. The Panel noted that the United States had argued that the 'intermediary nations' embargo was necessary to support the direct embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo's effect by exporting to the United States indirectly through third countries. The Panel found that, given its finding that the direct embargo was inconsistent with the General Agreement, the 'intermediary nations' embargo and the provisions of the MMPA [Marine Mammal Protection Act] under which it is imposed could not be justified under Article XX(d) as a measure to secure compliance with 'laws or regulations not inconsistent with the provisions of this Agreement'".[51]

29. A similar reasoning was followed in *US – Tuna (EEC)*, where the panel, "recalling its finding that the measures taken under the primary nation embargo were inconsistent with Article XI:1 of the General Agreement, concluded that the primary nation embargo could not, by the explicit terms of Article XX(d), serve as a basis for the justification of the intermediary nation embargo".[52]

30. In *US – Automobiles*, the panel followed the same approach:

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

---

[48] *Ibid.*, para. 5.18.
[49] *US – Gasoline*, Panel Report, para. 6.33.
[50] *Ibid*.
[51] *US – Tuna (Mexico)*, Panel Report, unadopted, para. 5.40.
[52] *US – Tuna (EEC)*, Panel Report, unadopted, para. 5.41.

> Accordingly, the Panel found that those aspects of the CAFE regulation found inconsistent with Article III:4 could not be justified under Article XX(d)".[53]

3. Conserving exhaustible natural resources under Article XX(g)

31. In the *US – Canadian Tuna* case, the panel noted that "both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management".[54] In the *Canada – Salmon and Herring* case, the panel agreed with the parties that salmon and herring stocks are "exhaustible natural resources".[55] In *US – Tuna (Mexico)*, the parties and the panel seem to have implicitly agreed that dolphins are an exhaustible natural resource, whereas in *US – Tuna (EEC)* the parties disagreed as to whether dolphins should be considered as an "exhaustible natural resource". In the latter case, the panel, "noting that dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource".[56]

32. In *US – Automobiles*, the panel considered whether the CAFE regulation was a policy to conserve an exhaustible natural resource. The panel, "noting that gasoline was produced from petroleum, an exhaustible natural resource, found that a policy to conserve gasoline was within the range of policies mentioned in Article XX(g)".[57]

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

> "In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource [footnote referring to *Canada – Salmon and Herring*]. 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)".[58]

34. In the *US – Shrimp* case, the parties disagreed as to whether sea turtles could be considered "exhaustible nature resources" within the meaning of paragraph (g). The Appellate Body noted that, contrary to what the complainants had argued, the text of Article XX(g) was *not* limited to the conservation of "mineral" or "non-living" natural resources and that living species, which are in principle "renewable", "are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities".[59] The Appellate Body further noted that:

> "The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the

---

[53] *US – Automobiles*, Panel Report, unadopted, para. 5.67.
[54] *US – Canadian Tuna*, Panel Report, para. 4.9.
[55] *Canada – Salmon and Herring*, Panel Report, para. 4.4.
[56] *US – Tuna (EEC)*, Panel Report, unadopted, para. 5.13.
[57] *US – Automobiles*, Panel Report, unadopted, para. 5.57.
[58] *US – Gasoline*, Panel Report, para. 6.37.
[59] *US – Shrimp*, Appellate Body Report, para. 128.

> signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges 'the objective of *sustainable development*' [footnote omitted] (…)".[60]
>
> "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' [footnote referring *inter alia* to *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31]. 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 (...)".[61]
>
> "Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. [footnote omitted] Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g) [reference to *US – Canadian Tuna* and *Canada – Salmon and Herring*]. We hold that, in line with the principle of effectiveness in treaty interpretation [footnote omitted], measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)".[62]

Considering further that all of the seven recognized species of sea turtles are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),[63] and that there was "a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)",[64] the Appellate Body concluded that the five species of sea turtles involved in the dispute constituted "exhaustible natural resources" within the meaning of Article XX(g) of the GATT 1994.[65]

---

[60] *Ibid.*, para. 129.
[61] *Ibid.*, para. 130.
[62] *Ibid.*, para. 131.
[63] *Ibid.*, para. 132.
[64] *Ibid.*, para. 133.
[65] In this context, it is worth observing that in *US – Shrimp* and in *US – Shrimp (Article 21.5)*, neither the panel nor the Appellate Body referred to the approach of *US – Tuna (Mexico)* and *US – Tuna (EEC)*. In these two unadopted reports, the panel addressed the question of the extra-jurisdictional application of Article XX. In *US – Tuna (EEC)*, the panel looked at the negotiating history of Article XX(b) and (g) and found that "the statements and drafting changes made during the negotiation of the Havana Charter and the General Agreement did not clearly support any particular contention of the parties with respect to the location of the living thing to be protected under Article XX (b) [and (g)]" (paras. 5.20 and 5.33) and further observed that neither the GATT nor "general international law" prohibited in principle measures related to things or matters located outside a country's own territory. The panel also noted that the text of both Article XX(b) and Article XX(g) did "not spell out any limitation on the location" of the living things to be protected and of the exhaustible natural resources to be conserved (paras. 5.15 and 5.31). It stated that it "could not (…) be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure" (para. 5.16).

B. NECESSITY TEST UNDER ARTICLE XX(b) AND (d)

35. Paragraphs (b) and (d) of Article XX both require the performance of what has been commonly refered to as a "necessity test": measures must be *necessary* either "to protect human, animal or plant life or health" or to "secure compliance with laws or regulations". In *Thailand – Cigarettes*, the panel concluded that the term "necessary" had the same meaning under paragraphs (b) and (d):

> "The Panel could see no reason why under Article XX the meaning of the term 'necessary' under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term 'necessary'".[66]

36. The examination of whether or not a measure is "necessary" under paragraphs (b) and (d) has proved to be a crucial step in panel practice. The "necessity test" was first defined for paragraph (d) in the *US – Section 337* case. A similar approach was followed for paragraph (b) in the *Thailand – Cigarettes* case. In these two cases, a requirement of so-called "least-trade restrictiveness" was established to decide whether a measure was "necessary" under Article XX(b) and (d). In its report on *US – Section 337*, the panel indicated that concerning Article XX(d) it needed to be determined whether a GATT-consistent alternative could have been employed:

> "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*".[67] (emphasis added)

37. The panel in the *Thailand – Cigarettes* case borrowed the "least-trade restrictive" requirement from the *US – Section 337* panel report. The panel defined the test of "necessity" applicable under Article XX(b) as follows:

> "[T]he import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives".[68]

38. In the *United States - Measures Affecting Alcoholic and Malt Beverages* case, the panel followed the same approach. When considering Article XX(d), the panel stated that:

> "In the view of the Panel, the United States has not demonstrated that the common carrier requirement is the least trade-restrictive enforcement measure available to the

[66] *Thailand – Cigarettes*, Panel Report, para. 74.
[67] See *US – Section 337 of the Tariff Act of 1930*, 36S/345, Panel Report adopted on 7 November 1989, para. 5.26.
[68] *Thailand – Cigarettes*, Panel Report, para. 75.

> various states and that less restrictive measures, e.g. record-keeping requirements of retailers and importers, are not sufficient for tax administration purposes. In this regard, the Panel noted that not all fifty states of the United States maintain common carrier requirements. *It thus appeared to the Panel that some states have found alternative, and possibly less trade-restrictive, and GATT-consistent, ways of enforcing their tax laws.* The Panel accordingly found that the United States has not met its burden of proof in respect of its claimed Article XX(d) justification for the common carrier requirement of the various states".[69] (emphasis added)

39. In the *US – Gasoline* case, the panel also held, in essence, that an alternative measure did not cease to be "reasonably" available simply because the alternative measure involved administrative difficulties for a Member. The panel's findings on this point were not appealed.[70]

40. The definition of the "necessity test" was supplemented by the Appellate Body in the *Korea – Various Measures on Beef* case. In its report, the Appellate Body addressed the issue of "necessity" under Article XX(d) and found that the panel was correct in following the standard set forth by the panel in *US – Section 337*.[71] However, the Appellate Body introduced some additional considerations. It first studied carefully the meaning of the word "necessary" and observed that the reach of this word was not limited to what was "indispensable". It further considered 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'".[72]

41. In the *Korea – Various Measures on Beef* case, the Appellate Body bifurcated the necessity test as follows: 1) situations where the claim may be that a measure is indispensable, i.e. where the measure is the only available and 2) situations where a Member may be able to justify its measure as "necessary" within the meaning of Article XX, even if there would be other measures available. For the second situation, the Appellate Body adopted the following approach:

> "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".[73]
>
> "(…) [D]etermination 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

---

[69] *United States - Measures Affecting Alcoholic and Malt Beverages*, DS23/R, Panel Report adopted on 19 June 1992, para. 5.52

[70] *US – Gasoline*, Panel Report, paras. 6.26 and 6.28.

[71] *Korea – Various Measures on Beef*, Appellate Body Report, para. 159 ff.

[72] *Ibid.*, para. 161. The whole paragraph reads as follows:
"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' [footnote omitted]".

[73] *Ibid.*, para. 163.

> by that law or regulation, and the accompanying impact of the law or regulation on imports or exports".[74] (emphasis added)

42. It may be possible to say that there has been some evolution in the interpretation of the necessity requirement of Article XX (b) and (d). It has evolved from a least-trade restrictive approach to a less-trade restrictive one, supplemented with a proportionality test ("a process of weighing and balancing a series of factors").

43. Finally, in the *EC – Asbestos* case, for the first time, an "environmental" measure passed the necessity test. The Appellate Body, in recalling the finding of the *Korea – Various Measures on Beef* case, noted that the extent to which the alternative measure "contribute[d] to the realization of the end pursued" [75] was to be taken into consideration. It observed that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept, as "necessary", measures designed to achieve those ends.[76] This seems to suggest that there might be differing levels of scrutiny applicable to the analysis of the necessity test, depending on the importance of the "interests or values" it served. The Appellate Body noted that in this case, the objective pursued by the measure was the preservation of human life and health, a value both "vital" and "important in the highest degree".[77]

C. "RELATING TO …" AND "… IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION OR CONSUMPTION" UNDER ARTICLE XX(g)

1. "Relating to …"

44. Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources". The first application of the "relating to" clause was made in the *Canada – Salmon and Herring* case.[78] The panel decided to examine the meaning of "relating to" in the light of the context in which Article XX(g) appears in the GATT and of the purpose of that provision. It noted that:

> "[S]ome of the subparagraphs of Article XX state that the measure must be 'necessary' or 'essential' to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures 'relating to' the conservation of exhaustible natural resources. This suggests that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded for these reasons that, *while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an*

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

[75] *EC – Asbestos*, Appellate Body Report, para. 172, referring to *Korea – Various Measures on Beef*, Appellate Body Report, para. 163

[76] *EC – Asbestos*, Appellate Body Report, para. 172, referring to *Korea – Various Measures on Beef*, Appellate Body Report, para. 162.

[77] *EC – Asbestos*, Appellate Body Report, para. 172.

[78] The panel already examined Article XX(g) in *US – Canadian Tuna*, but did not have to interpret the terms "relating to" and "in conjunction with" because the panel found that the party invoking Article XX(g) did not maintain restrictions on the production or consumption of tuna.

> *exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX(g)*".[79] (emphasis added)

The panel introduced thereby the interpretation that the measure had to be "primarily aimed at" and not "necessary or essential". Panel and Appellate Body reports thereafter have referred to this interpretation.

45. In *US – Tuna (Mexico)*, *US – Tuna (EEC)*, *US – Automobiles*, *US – Gasoline* and *US – Shrimp*, panels progressively complemented the "primarily aimed at" interpretation by introducing additional elements to be taken into account when determining whether a measure was *relating to* the conservation of exhaustible natural resources.

46. First, in *US – Tuna (Mexico)*, the panel found that the measure at issue was not primarily aimed at the objectives of Article XX(g) because it was based on "unpredictable conditions": "[t]he Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins".[80]

47. Second, in *US – Tuna (EEC)*, the panel concluded concerning the consistency of a measure with Article XX(g) that "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed at either the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g)".[81]

48. Third, in *US – Automobiles*, the panel was of the view that "a measure that did not further the objectives of conservation of an exhaustible resource could not be deemed to be primarily aimed at such conservation and therefore found that the measure found to be inconsistent with Article III:4 was not justified by Article XX(g)".[82]

49. Fourth, in the *US – Gasoline* case, the panel remained unconvinced that "the less favourable baseline establishment methods" at issue were primarily aimed at the conservation of exhaustible natural resources on the grounds that there was "no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States".[83] As observed later by the Appellate Body, 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".[84]

50. In *US – Gasoline*, the Appellate Body reversed the finding of the panel because "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".[85] The Appellate Body clarified the meaning of Article XX(g) by stating that a measure would qualify as "relating to the conservation of natural resources" if the measure exhibited a "substantial relationship" with, and was not merely "incidentally or inadvertently aimed at" the conservation of exhaustible natural resources:

> "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

[79] *Canada – Salmon and Herring*, Panel Report, para. 4.6.
[80] *US – Tuna (Mexico)*, Panel Report, unadopted, para. 5.33.
[81] *US – Tuna (EEC)*, Panel Report, unadopted, para. 5.27.
[82] *US – Automobiles*, Panel Report, unadopted, para. 5.60.
[83] *US – Gasoline*, Panel Report, para. 6.40.
[84] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 15.
[85] *Ibid.*

> 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)".[86] (emphasis added)

51. However, the Appellate Body in *US – Gasoline* made it clear 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)".[87] But this point was not considered any further since, in the appeal proceeding, the parties to the dispute had accepted the "primarily aimed at" test as developed by previous panel reports. The Appellate Body also observed that "[i]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized".[88]

52. Finally, in the *US – Shrimp* case, the Appellate Body, recalling the findings it had reached in *US – Gasoline* on the "relating to" clause, further stated in order to determine whether the US measure at issue and the objective of conserving sea turtles were substantially related:

> "In the present case, we must examine *the relationship between the general structure and design of the measur*e here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles".[89] (emphasis added)

> "(…) Focusing on the design of the measure here at stake [footnote omitted], 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." [90] (emphasis added)

2. "… in conjunction with restrictions on domestic production or consumption"

53. Article XX(g) contains as an additional requirement that the measure at stake be "made effective in conjunction with restrictions on domestic production or consumption". In the *US – Canadian Tuna* case, the panel noted that the United States provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States.[91] The panel could therefore "not accept it to be justified that the United States prohibition of imports of all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980, had been made effective in conjunction with restrictions on United States domestic production or consumption on all tuna and tuna products".[92]

---

[86] *Ibid.*, p. 18.
[87] *Ibid.*, p. 17.
[88] *Ibid.*, p. 16.
[89] *US – Shrimp*, Appellate Body Report, para. 137.
[90] *Ibid.*, para. 141.
[91] *US – Canadian Tuna*, Panel Report, para. 4.11.
[92] *Ibid.*, para. 4.12.

54. In the *Canada – Salmon and Herring* case, the panel examined the expression "in conjunction with" and considered that these terms:

> "[H]ad to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore (...) only be considered to be made effective 'in conjunction with' production restrictions if it was primarily aimed at rendering effective these restrictions".[93]

55. In the *US – Gasoline* case, the Appellate Body decided that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g), including the second requirement, i.e. "made effective in conjunction with restrictions on domestic production or consumption". To reach that conclusion, the Appellate Body interpreted the ordinary meaning of "made effective" and "in conjunction with" in the following terms:

> "[T]he 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'. [footnote omitted] Similarly, the phrase 'in conjunction with' may be read quite plainly as 'together with' or 'jointly with'. [footnote omitted] 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".[94]
>
> "We do not believe, finally, that the clause 'if made effective in conjunction with restrictions on domestic production or consumption' was intended to establish an empirical 'effects test' for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been 'primarily aimed at' conservation of natural resources at all".[95]

56. The requirement of "even-handedness" (quoted above in the *US – Gasoline* case) was recalled and followed by the Appellate Body in the *US – Shrimp* case which held that the measure at stake

---

[93] *Canada – Salmon and Herring*, Panel Report, para. 4.6.
[94] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 19.
[95] *Ibid.*, p. 20.

(Section 609) was an "even-handed measure" and, accordingly, a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp.[96]

IV. APPLICATION OF THE ARTICLE XX CHAPEAU

A. FUNCTION AND SCOPE OF THE PREAMBLE

57. Once a measure satisfies the conditions set by one of the paragraphs of Article XX, the panel or the Appellate Body has turned to the application of the introductory clause (chapeau) of Article XX. The chapeau requires that in order to be justified under one of the paragraphs of Article XX, measures must 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".

58. The *general scope* of the Article XX chapeau has been defined by the Appellate Body in the *US – Shrimp* case. Accordingly, the chapeau is "but one expression of the principle of good faith":[97]

> "The task of interpreting and applying the chapeau is (...) essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ".[98]

59. Concerning the *function* of the Article XX chapeau, in the *US – Gasoline* case, the Appellate Body 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*]'" [99] and that "[t]he 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".[100] Referring then to the negotiating history of that provision, which indicates that the preamble was meant "to prevent abuse of the exceptions of Article [XX]",[101] the Appellate Body noted:

> "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".[102]

60. Similarly, in its report on *US – Shrimp*, the Appellate Body considered that the chapeau of Article XX "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

---

[96] *US – Shrimp*, Appellate Body Report, paras. 143-145.
[97] *Ibid.*, para. 158.
[98] *Ibid.*, para. 159.
[99] Emphasis added. *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 21.
[100] *Ibid.*, p. 23.
[101] *Analytical Index: Guide to GATT Law and Practice*, Vol. I, p. 564 (1995).
[102] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 21.

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".[103]

61. Concerning the relationship between the exceptions in Article XX and the provisions of the rest of the GATT 1994, the Appellate Body in the *US – Gasoline* case indicated that:

> "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".[104]

62. In the *EC – Asbestos* case, the Appellate Body also clarified this relationship by stating:

> "We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to 'adopt and enforce' a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to 'adopt and enforce' measures 'necessary to protect human … life or health'. Evaluating evidence relating to the health risks arising from the physical properties of a product does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly 'like' products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health".[105]

---

[103] *US – Shrimp*, Appellate Body Report, para. 156.
[104] *US – Gasoline*, Appellate Body Report, *DSR 1996*, pp. 16-17.
[105] *EC – Asbestos*, Appellate Body Report, para. 115.

63. Under the Article XX chapeau, three requirements must be satisfied. First, the panel determines whether the measure is *a means of unjustifiable discrimination* (Section B.1), or *a means of arbitrary discrimination* (Section B.2), and if not, the panel proceeds to examine whether the measure is a *disguised restriction on international trade* (Section C). The Appellate Body, in *US – Shrimp* and *US – Shrimp (Article 21.5)*,[106] stated that "[t]here 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".[107] In order for the measure not to be entitled to the justifying protection of Article XX, the existence of only one of these three standards would have to be proven. For instance, in the *US – Shrimp* case, the Appellate Body, after finding that the measure at issue was a means of unjustifiable and arbitrary discrimination between countries where the same conditions prevail, decided that it was not necessary to examine also whether the measure was applied in a manner that constitutes a disguised restriction on international trade.[108]

B. A MEANS OF ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION ?

64. With respect to this requirement, the panel, in its report on *US – Spring Assemblies*, noted that "the Preamble of Article XX made it clear that it was the *application* of the measure and not the measure itself that needed to be examined".[109] This finding was confirmed by the Appellate Body in the *US – Gasoline* case: "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied".[110]

65. In order to determine whether the discrimination was arbitrary or unjustifiable, the Appellate Body in *US – Shrimp* found that such a determination must address not only "the detailed operating provisions of the measure" but also the manner in which the measure "is actually applied".[111] And more recently in the *EC – Asbestos* case, the panel confirmed that "under the first of the alternatives mentioned in the introductory clause of Article XX it is required to examine whether the *application* of the Decree constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".[112] As well, in *US – Shrimp (Article 21.5)*, the panel examined the Guidelines and the actual practice of the United States under these Guidelines.[113] The Panel found, and this was upheld by the Appellate Body,[114] that "Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination".[115]

66. In the *US – Shrimp* case, the panel and later the Appellate Body examined thoroughly the conditions for a measure to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[116] The panel first observed that the US measure at issue discriminated between those countries that had been certified and, consequently, could export shrimp to the US and those non-certified countries that were subject to an import ban.[117] The panel noted that "[p]ursuant to the chapeau of Article XX, a measure may discriminate, but not in an 'arbitrary' or 'unjustifiable' manner".[118] As well in the *EC – Asbestos* case, the panel indicated that "if the

[106] *US – Shrimp (Article 21.5)*, Appellate Body Report, para. 118.
[107] *US – Shrimp*, Appellate Body Report, para. 150.
[108] *Ibid.*, para. 184.
[109] Emphasis added. *United States – Imports of Certain Automotive Spring Assemblies*, Panel Report adopted on 26 May 1983, BISD 30S/107, para. 56.
[110] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 21.
[111] *US – Shrimp*, Appellate Body Report, para. 160.
[112] *EC – Asbestos*, Panel Report, para. 8.226.
[113] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.94.
[114] *US – Shrimp (Article 21.5)*, Appellate Body Report, para. 134.
[115] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.137.
[116] *US – Shrimp*, Panel Report, paras. 7.33-7.61; Appellate Body Report, paras. 161-186.
[117] *Ibid.*, para. 7.33.
[118] *Ibid.*

application of the measure is found to be discriminatory, it still remains to be seen whether it is *arbitrary* and/or *unjustifiable* between countries where the same conditions prevail".[119] Therefore, the determination of unjustifiable discrimination of a measure will be dealt with separately (Section 1) from the one of its arbitrariness (Section 2).

1. "Unjustifiable"

67. In the *US – Gasoline* case, the Appellate Body found that an unjustifiable discrimination would be one that could have been "foreseen" and that was not "merely inadvertent or unavoidable".[120]

68. Two criteria can be identified from the reading of the panel and Appellate Body reports in *US – Shrimp* and *US – Shrimp (Article 21.5)*: first, a serious effort to negotiate with the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal, and second, the flexibility of the measure.

(a) Serious effort to negotiate

69. As part of the process of determining whether the measure had been applied in a manner that constituted a means of "unjustifiable discrimination", the Appellate Body in the *US – Shrimp* case addressed the issue of international negotiations.[121] The relevant finding of the Appellate Body Report reads as follows:

> "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".[122]

The Appellate Body concluded that the United States negotiated seriously with some Members, but not with other Members, including the appellees, that export shrimp to the US: "[t]he effect is plainly discriminatory and, in our view, unjustifiable".[123]

70. As later interpreted by the panel in *US – Shrimp (Article 21.5)* and upheld by the Appellate Body,[124] it appears that the Appellate Body was referring to the negotiation and not the conclusion of an agreement.[125] Consequently, the United States had an obligation to make serious good faith efforts to reach an agreement before resorting to unilateral measures.[126] In the Article 21.5 phase, the panel concluded that the US had the following obligations in order to avoid unjustifiable discrimination:

> "(a) [T]he United States had to take the initiative of negotiations with the appellees, having already negotiated with other harvesting countries (Caribbean and Western Atlantic countries);

---

[119] *EC – Asbestos*, Panel Report, para. 8.226.
[120] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 27.
[121] *US – Shrimp*, Appellate Body Report, para. 166.
[122] *Ibid.*
[123] *Ibid.*, para. 172.
[124] *US – Shrimp (Article 21.5)*, Appellate Body Report, para. 134.
[125] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.63.
[126] *Ibid.*, para. 5.67.

(b) the negotiations had to be with all interested parties ('across-the-board') and aimed at establishing consensual means of protection and conservation of endangered sea turtles;

(c) the United States had to make serious efforts in good faith [footnote omitted] to negotiate; and

(d) serious efforts in good faith had to take place before [footnote omitted] the enforcement of a unilaterally designed import prohibition [footnote omitted]".[127]

(b) Flexibility of the measure

71. In *US – Shrimp*, the Appellate Body considered that the lack of flexibility in taking into account the different situations in different countries amounted to unjustifiable discrimination, and in particular that Section 609, as implemented through the 1996 Guidelines, constituted unjustifiable discrimination insofar as its certification process lacked flexibility.[128]

72. The panel in *US – Shrimp (Article 21.5)* also indicated that the pursuance of negotiations was not necessarily enough, the measure also needed to show flexibility:

> "The approach of the Appellate Body leads us to conclude that it is not solely the fact that the United States negotiated seriously with some Members and less seriously with others which is at the origin of its finding of unjustifiable discrimination in relation to negotiations, even though it would have been sufficient in itself to justify such a conclusion. We believe that another reason for the Appellate Body finding is that the United States, by unilaterally defining and implementing criteria for applying Section 609, failed to take into account the different situations which may exist in the exporting countries. In other words, the United States failed to pass the 'unjustified discrimination' test by applying the same regime to domestic and foreign shrimp".[129]

73. As suggested by the panel's analysis in *US – Shrimp (Article 21.5)*, 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".[130] Therefore the criteria for determining the unjustifiable character of a discrimination as introduced by the Appellate Body in *US – Shrimp*, and further acknowledged in the Article 21.5 phase by the panel, is one of flexibility in the implementation process of the measure at stake. The panel, in the Article 21.5 phase, interpreted the Appellate Body's finding in *US – Shrimp* as meaning 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".[131] The Appellate Body in *US – Shrimp (Article 21.5)* agreed with the approach followed by the panel:

> "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

[127] *Ibid.*, para. 5.66.
[128] *US – Shrimp*, Appellate Body Report, paras. 161-164.
[129] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.46.
[130] Comments made by the Appellate Body in the *US – Shrimp (Article 21.5)* case, para. 141.
[131] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.93.

> unjustifiable discrimination'. We, therefore, agree with the conclusion of the Panel on 'comparable effectiveness'".[132]

2. "Arbitrary"

74. The Appellate Body found in *US – Shrimp* that the measure at issue did not meet the requirements of the chapeau of Article XX relating to arbitrary 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.[133] Therefore, the Appellate Body concluded that the "rigidity and inflexibility" of the application of the measure by the US constituted "'arbitrary discrimination' within the meaning of the chapeau".[134]

75. In its examination of the possible arbitrariness of the implementation of the US measure, the panel in *US – Shrimp (Article 21.5)* took into account "the ordinary meaning of the word 'arbitrary' most suitable in the context of the chapeau of Article XX, i.e. 'capricious, unpredictable, inconsistent'".[135] In its understanding of the *US – Shrimp* Appellate Body report, the panel, in the Article 21.5 phase, found that there was arbitrary discrimination because the US did not take into account the conditions prevailing in the countries concerned.[136] As further examined by the panel in the Article 21.5 phase, what caused the Appellate Body in the *US – Shrimp* case to deem the application of Section 609 as "arbitrary discrimination" was that:

> "(a) It imposed a single, rigid and unbending requirement that countries applying for certification adopt a comprehensive regulatory programme that is essentially the same as the United States' programme; and
>
> (b) that this programme was imposed without inquiring into the appropriateness of that programme for the conditions prevailing in the exporting countries".[137]

76. In *US – Shrimp (Article 21.5)*, the panel also considered that with the new US programme of implementation, the so-called "Revised Guidelines", the US was in a better position to avoid "arbitrary" decisions:

> "A Member seeking certification seems to have the possibility to demonstrate that its programme - even though not requiring the use of TEDs [turtle excluder devices], is comparable to that of the United States. On the face of it, the implementing measure is no longer primarily based on the application of certain methods or standards, but on the achievement of certain objectives, even though the term "objective" may, in this case, have a relatively broad meaning. Some evidence of the actual degree of flexibility of the Revised Guidelines can be found in the authorisation granted to Australia to export shrimp from the Northern Prawn Fisheries and the Spencer Gulf even though Australia as such is not certified under Section 609".[138]

77. The Appellate Body in *US – Shrimp (Article 21.5)* further found that the "provisions of the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the

---

[132] *US – Shrimp (Article 21.5)*, Appellate Body Report, para. 144.
[133] *US – Shrimp*, Appellate Body Report, para. 177.
[134] *Ibid.*
[135] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.124.
[136] *Ibid.*, para. 5.123.
[137] *Ibid.*, para. 5.122.
[138] *Ibid.*, para. 5.124.

United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification".[139]

C. A DISGUISED RESTRICTION ON INTERNATIONAL TRADE ?

78. The question of whether a measure constitutes a disguised restriction on international trade has been studied by several panel and Appellate Body reports, and in particular detail by the panel in the *EC – Asbestos* case. In this case, the panel first recalled that the scope of these words has not been clearly defined: "Under the GATT 1947, panels seem mainly to have considered that a disguised restriction on international trade was a restriction that had not been taken in the form of a trade measure or had not been announced beforehand [footnote omitted] or formed the subject of a publication, or even had not been the subject of an investigation [reference to *US – Springs Assemblies*]".[140] The panel then conducted a thorough analysis of the exact wording of this expression:

> "Referring also to the remark made by the Appellate Body in the same case [reference to *US – Gasoline*] according to which 'the provisions of the chapeau [of Article XX] cannot logically refer to the same standard(s) by which a violation of the substantive rule has been determined to have occurred', we consider that the key to understanding what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', inasmuch as, in essence, any measure falling within Article XX is a restriction on international trade, but the word 'disguised'. In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb 'to disguise' implies an *intention*. Thus, 'to disguise' (*déguiser*) means, in particular, 'conceal beneath deceptive appearances, counterfeit', 'alter so as to deceive', 'misrepresent', 'dissimulate'. [footnote omitted] Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives".[141]

79. Three criteria have been progressively introduced by panels and by the Appellate Body in order to determine whether a measure is a disguised restriction on international trade: *(i)* the publicity test, *(ii)* the consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination, and *(iii)* the examination of "the design, architecture and revealing structure" of the measure at issue.

80. *(i)* In the *US – Canadian Tuna* case, the panel adopted a literal interpretation of the concept of "disguised restriction on international trade" only based on a publicity test. It felt that "the United States' action should not be considered to be a disguised restriction on international trade, noting that the United States' prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such".[142]

81. In the *US – Gasoline* case, the Appellate Body considered however that it was "clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'".[143] The panel in the *EC – Asbestos* case interpreted this sentence as

---

[139] *US – Shrimp (Article 21.5)*, Appellate Body Report, para. 148.
[140] *EC – Asbestos*, Panel Report, para. 8.233.
[141] *Ibid.*, para. 8.236.
[142] *US – Canadian Tuna*, Panel Report, para. 4.8. At the Council meeting where the report was adopted, the representative of Canada said that "Canada did not consider it sufficient for a trade measure to be publicly announced as such for it to be considered not to be a disguised restriction on international trade within the meaning of Article XX of the General Agreement" (quoted in *Analytical Index: Guide to GATT Law and Practice*, Vol. I, p. 565 (1995)). See also the *US – Springs Assemblies* case where the Panel developed the same criteria of publicity, para. 56.
[143] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 23.

implying that a measure that was not published would not satisfy the requirements of the second proposition of the introductory clause of Article XX. The panel noted that the measure at issue (the French Decree):

> "was published in the Official Journal of the French Republic on 26 December 1996 and entered into force on 1 January 1997. We also note that it applies unequivocally to international trade, since as far as asbestos is concerned both importation and exportation are prohibited. In this sense, the criteria developed in *United States – Tuna (1982)* and in *United States – Automotive Springs* have already been satisfied".[144]

The panel further observed that this remark also suggests that the expression "disguised restriction on international trade" covers others requirements than the sole publicity test. [145]

82. *(ii)* In the *US – Gasoline* case, the Appellate Body also considered that 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":

> "'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 (…). 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".[146]

83. This principle was recalled and followed by the panel in the *EC – Asbestos* case:

> "We recall that in *United States – Gasoline*, the Appellate Body considered that 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".[147]

84. *(iii)* Another requirement was taken into account by the Appellate Body in *US – Shrimp* and by the panel in the *EC – Asbestos* case. In *EC – Asbestos*, after finding that the measure at issue met the publicity criterion, the panel examined as an additional requirement the "design, architecture and revealing structure" [148] of the measure as it had already been introduced in *Japan – Alcoholic Beverages*[149] in order to discern the protective application of a measure:

> "However, as the Appellate Body acknowledged in *Japan – Alcoholic Beverages*, the aim of a measure may not be easily ascertained. [footnote omitted] Nevertheless, we note that, in the same case, the Appellate Body suggested that the protective application of a measure can most often be discerned from its design, architecture and revealing structure [footnote omitted]".[150]

---

[144] *EC – Asbestos*, Panel Report, para. 8.234.
[145] *Ibid.*
[146] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 23.
[147] *EC – Asbestos*, Panel Report, para. 8.237.
[148] *Ibid.*, para. 8.236.
[149] *Japan – Alcoholic Beverages*, Appellate Body Report, *DSR 1996*, p. 121.
[150] *EC – Asbestos*, Panel Report, para. 8.236.

85. The panel then concluded that "[a]s far as the design, architecture and revealing structure of the Decree are concerned, we find nothing that might lead us to conclude that the Decree has protectionist objectives".[151] Similarly in the *US – Shrimp (Article 21.5)* case, the panel demonstrated that the measure at issue did not constitute a disguised restriction on international trade by examining the "design, architecture and revealing structure" of the measure.[152]

[151] *Ibid.*, para. 8.238.
[152] *US – Shrimp (Article 21.5)*, Panel Report, para. 5.142.

ANNEX

CASES

I. UNITED STATES – CANADIAN TUNA[1]

A. PARTIES

Complainant: Canada.

Respondent: United States.

B. TIMELINE OF DISPUTE

Panel requested: 21 January 1980.

Panel established: 26 March 1980.

Panel composed: 26 March 1980.

Panel Report circulated: 22 December 1981.

Adoption: 22 February 1982.

C. MAIN FACTS

1. An import prohibition was introduced by the United States after Canada had seized 19 fishing vessels and arrested US fishermen fishing for albacore tuna, without authorization from the Canadian government, in waters considered by Canada to be under its jurisdiction (within 200 miles of the West Coast of Canada). The United States did not recognize this jurisdiction and introduced an import prohibition on tuna and tuna products from Canada as a retaliation under the 1976 Fishery Conservation and Management Act (Section 205). This regulation was intended to ensure that certain stocks of fish were properly conserved and managed and to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species. Furthermore, Section 205 contained provisions designed to discourage other countries from seeking to manage tuna unilaterally and from seizing US fishing vessels which were fishing more than 12 miles off their coasts.[2]

2. On 29 August 1980, following an interim agreement with Canada on albacore tuna fisheries, the United States Trade Representative informed the GATT Secretariat that its authorities had decided to lift the prohibition on imports of tuna and tuna products from Canada. The prohibition was subsequently lifted with effect from 4 September 1980.[3] At a panel meeting on 3 December 1980, Canada requested that the panel continue its work because of the possibility of further embargoes being placed on Canadian fishery products.[4] The United States informed the panel that its authorities doubted the necessity of continuing the case but would continue to cooperate with the panel if the panel so decided.[5] The panel decided to proceed with the case and issued a complete report. On

[1] *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91.
[2] *Ibid.*, para. 4.5.
[3] *Ibid.*, para. 2.7.
[4] *Ibid.*, para. 2.8.
[5] *Ibid.*

26 May 1981, Canada and the Unites States signed the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges which entered into force on 29 July 1981.[6]

D. SUMMARY OF FINDINGS ON ARTICLE XX

3. The panel found that the US import prohibition was contrary to Article XI:1, and neither justified under Article XI:2,[7] nor under Article XX(g). The United States based its arguments concerning the justification for the action taken against imports of tuna and tuna products entirely on Article XX(g).

4. Regarding the Preamble of Article XX, the panel found that the discrimination against Canada might not necessarily have been arbitrary or unjustifiable because the United States had taken similar actions against imports from other countries and for similar reasons. The panel considered also that the US action should not be considered to be a disguised restriction on international trade since the US import prohibition had been taken as a trade measure and publicly announced as such.[8]

5. Regarding paragraph (g) of Article XX, the panel observed that both parties considered tuna stocks as an exhaustible natural resource.[9] The panel however noted that the United States had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States, which was required under the second part of Article XX(g).[10]

II. CANADA – SALMON AND HERRING[11]

A. PARTIES

Complainant: United States.

Respondent: Canada.

B. TIMELINE OF DISPUTE

Panel requested: 20 February 1987.

Panel established: 4 March 1987.

Panel composed: 15 April 1987.

Panel Report circulated: 20 November 1987.

Adoption: 22 March 1988.

C. MAIN FACTS

6. Under the 1970 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. Governmental measures for conservation, management and development of salmon and herring stocks in the waters off British Columbia date back to the early decades of the 20th century. These have led, over the years, to

[6] *Ibid.*, paras. 2.13-.2.14.
[7] *Ibid.*, para. 4.6.
[8] *Ibid.*, para. 4.8.
[9] *Ibid.*, para. 4.9.
[10] *Ibid.*, para. 4.11.
[11] *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted on 22 March 1988, BISD 35S/98.

a series of national and bilateral efforts which have been embodied, *inter alia*, into various bilateral and multilateral treaties and conventions relating to fisheries in these waters. Sockeye and pink salmon and herring fisheries represent the largest share of the West Coast fishery of Canada. These species supply a dominant share of Canada's West Coast processing sector, giving employment to almost five-sixths of the workers in the British Columbia fish processing industry.[12]

7. The United States complained that these measures were inconsistent with Article XI and not justified by Article XX. Canada argued, *inter alia*, that these export restrictions were part of a system of fishery resource management destined at preserving fish stocks, and therefore were justified under Article XX(g).[13]

D. SUMMARY OF FINDINGS ON ARTICLE XX

8. The panel agreed with the parties that salmon and herring stocks were "exhaustible natural resources" and that the harvest limitations were "restrictions on domestic production" within the meaning of Article XX(g).[14]

9. The panel then interpreted the meaning of the terms "relating to" and "in conjunction with".[15] It considered that the purpose of including Article XX(g) in the GATT was to ensure that the commitments under the GATT did not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The panel concluded that a trade measure 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). The panel further determined, concerning the term "in conjunction with" in Article XX(g), that a trade measure could only be considered to be made effective "in conjunction with" production restrictions if it was primarily aimed *at rendering effective these restrictions*.

10. Consequently, the panel examined whether the export prohibitions on certain unprocessed salmon and unprocessed herring maintained by Canada were *primarily aimed at* the conservation of salmon and herring stocks and at *rendering effective the restrictions* on the harvesting of salmon and herring. Canada formulated two arguments: first, that the export prohibitions were not conservation measures *per se* but had an effect on conservation because they helped provide the statistical foundation for the harvesting restrictions and second, that they increased the benefits to the Canadian economy arising from the Salmonid Enhancement Program.[16]

11. On the first argument, the panel noted that Canada had collected statistical data on many different species of fish, including certain salmon species, without imposing export prohibitions on them. Concerning the second argument, the panel noted that the Salmonid Enhancement Program also covered species not subject to export prohibitions and that Canada limited purchases of unprocessed fish only by foreign processors and consumers and not by domestic processors and consumers. In light of all these factors taken together, the Panel found that these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish.[17] The panel concluded therefore that the export prohibitions were not justified by Article XX(g).

[12] *Ibid.*, paras. 2.5-2.6.
[13] *Ibid.*, para. 4.1.
[14] *Ibid.*, para. 4.4.
[15] *Ibid.*, para. 4.6.
[16] *Ibid.*, para. 4.7.
[17] *Ibid.*

III. THAILAND – CIGARETTES[18]

A. PARTIES

Complainant: United States.

Respondent: Thailand.

Third Parties: The European Communities.

B. TIMELINE OF DISPUTE

Panel requested: 5 February 1990.

Panel established: 3 April 1990.

Panel composed: 16 May 1990.

Panel Report circulated: 5 October 1990.

Adoption: 7 November 1990.

C. MAIN FACTS

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

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

14. The WHO indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used additives and flavourings.[19] Moreover, locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. However, the WHO could not provide any scientific evidence that cigarettes with additives were less or more harmful to health than cigarettes without.

---

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

[19] *Ibid.*, para. 52.

D. SUMMARY OF FINDINGS ON ARTICLE XX

15. The panel found that the internal taxes were consistent with Article III:2.[20] However, the import restrictions were found to be inconsistent with Article XI:1 and not justified under Article X1:2(c).[21] The panel concluded further that the import restrictions were not "necessary" within the meaning of Article XX(b).[22]

16. The import restrictions imposed by Thailand could not be considered "necessary" in terms of Article XX(b) because there were alternative measures consistent with the GATT, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.[23] There were various measures consistent with the GATT which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which taken together could have achieved the health policy goals pursued by Thailand.[24] For instance, the panel suggested that a ban on cigarette advertising could curb the demand while meeting the requirements of Article III:4.[25]

IV. UNITED STATES – TUNA (MEXICO)[26]

A. PARTIES

Complainant: Mexico.

Respondent: United States.

Third Parties: Australia; Canada; Chile; Colombia; Costa Rica; the European Communities; India; Indonesia; Japan; Korea; New Zealand; Nicaragua; Norway; Peru; the Philippines; Senegal; Singapore; Tanzania; Thailand; Tunisia and Venezuela.

B. TIMELINE OF DISPUTE

Panel requested: 25 January 1991.

Panel established: 6 February 1991.

Panel composed: 12 March 1991.

Panel Report circulated: 3 September 1991.

Panel Report not adopted.

C. MAIN FACTS

17. Tuna are commonly caught in commercial fisheries using large "purse seine" nets. In the Eastern Tropical Pacific Ocean (ETP), dolphins are known to swim above schools of tuna. Tuna fishermen in the ETP commonly use dolphins to locate schools of tuna, and encircle them

[20] *Ibid.*, paras. 86, 88.
[21] *Ibid.*, paras. 67-71.
[22] *Ibid.*, para. 82.
[23] *Ibid.*, para. 75.
[24] *Ibid.*, para. 81.
[25] *Ibid.*, para. 78.
[26] *United States – Restrictions on Imports of Tuna*, circulated on 3 September 1991, unadopted, DS 21/R.

intentionally with purse seine nets on the expectation that tuna will be found below the dolphins. It was claimed that this technique might lead to incidental taking of dolphins during fishing operations.

18. The US Marine Mammal Protection Act (MMPA) of 1972, as revised, required a general prohibition of "taking" (harassment, hunting, capture, killing or attempt thereof) and importation into the United States of marine mammals, except with explicit authorization. It governed in particular the taking of marine mammals incidental to harvesting yellowfin tuna in the ETP.

19. Under the MMPA, the importation of commercial fish or products from fish caught with commercial fishing technology, which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards, was prohibited. In particular, the importation of yellowfin tuna harvested with purse seine nets in the ETP was prohibited (*primary nation embargo*), unless the competent US authorities established that (i) the government of the harvesting country had a programme regulating takings of marine mammals that was comparable to that of the United States, and (ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such takings by US vessels.[27] To meet this requirement, the exporting country had to prove that the average rate of incidental takings (in terms of dolphins killed each time the purse seine nets are set) was no higher than 1.25 times the average taking rate of US vessels in the same period.[28] In 1991, countries affected by the primary nation embargo were Mexico, Venezuela and Vanuatu.[29] Imports of tuna from countries purchasing tuna from a country subject to the primary nation embargo were also prohibited (*intermediary nation embargo*). In 1991, countries affected by the intermediary nation embargo were Costa Rica, France, Italy, Japan and Panama.[30]

20. Mexico claimed that the import prohibition on yellowfin tuna and tuna products was inconsistent with Articles XI, XIII and III.[31] The United States requested the panel to find that the *direct embargo* was consistent with Article III and, in the alternative, was covered by Articles XX(b) and XX(g). The United States also argued that the *intermediary nation* embargo was consistent with Article III and, in the alternative, was justified by Article XX, paragraphs (b), (d) and (g).[32]

D. SUMMARY OF FINDINGS ON ARTICLE XX

21. The panel found that the import prohibition under the *direct* and the *intermediary* embargoes did not constitute internal regulations within the meaning of Article III, was inconsistent with Article XI:1 and was not justified by Article XX paragraphs (b) and (g). Moreover, the *intermediary* embargo was not justified under either Article XX (b), (d) or (g).[33]

22. The panel found, on the basis of the drafting history, that Article XX(b) did not extend to measures protecting human, animal or plant life outside of the jurisdiction of the country taking the measure.[34] Moreover, the panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their

[27] *Ibid.*, para. 2.5.
[28] *Ibid.*, para. 2.6.
[29] *Ibid.*, para. 2.8.
[30] *Ibid.*, para. 2.11.
[31] *Ibid.*, para. 3.1.
[32] *Ibid.*, paras. 3.6-3.7.
[33] *Ibid.*, paras. 5.38-5.40.
[34] *Ibid.*, para. 5.26.

rights under the GATT.[35] The panel also rejected an extrajurisdictional application of Article XX(g) as well.[36]

23. The panel further noted that even if Article XX paragraphs (b) and (g) were interpreted to apply extrajurisdictionally, the US measures would not meet the requirements set out in these two provisions. In the panel's view, the US measure could not be considered to be necessary within the meaning of Article XX(b) as the United States had failed to demonstrate that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the GATT, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.[37] Concerning Article XX(g), the panel recalled that the United States linked the maximum incidental dolphin-taking rate which Mexico had to meet to the taking rate actually recorded for United States fishermen. The panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins in terms of Article XX(g).[38]

24. Concerning Article XX(d), the panel noted that the United States had argued that the *intermediary* nations embargo was necessary to support the *direct* embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo's effect by exporting to the United States indirectly through third countries. The Panel found that, given its finding that the direct embargo was inconsistent with the GATT, the *intermediary* nations embargo and the provisions of the MMPA under which it is imposed could not be justified under Article XX(d) as a measure to secure compliance with "laws or regulations not inconsistent with the provisions of this Agreement".[39]

V. UNITED STATES – TUNA (EEC)[40]

A. PARTIES

Complainant: The European Economic Community (EEC) and the Netherlands.

Respondent: United States.

Third Parties: Australia; Canada; Colombia; Costa Rica; El Salvador; Japan; New Zealand; Thailand and Venezuela.

B. TIMELINE OF DISPUTE

Panel requested: 5 June 1992.

Panel established: 14 July 1992.

Panel composed: 25 August 1992.

Panel Report circulated: 16 June 1994.

Panel Report not adopted.

[35] *Ibid.*, para. 5.27.
[36] *Ibid.*, para. 5.32.
[37] *Ibid.*, para. 5.28.
[38] *Ibid.*, para. 5.33.
[39] *Ibid.*, para. 5.40.
[40] *United States – Restrictions on Imports of Tuna*, circulated on 16 June 1994, not adopted, DS29/R.

C. MAIN FACTS

25. The facts of this case are similar to the ones described above in the *US – Tuna (Mexico)* case. The MMPA provided that any nation (*intermediary* nation) exporting yellowfin tuna or yellowfin tuna products to the US had to certify and provide reasonable proof that it had not imported products subject to the direct prohibition within the preceding sixth months.[41] After the adoption of a new definition of *intermediary* nation, France, the Netherlands Antilles and the United Kingdom were withdrawn from the list of *intermediary* nations. In October 1992, Costa Rica, Italy, Japan and Spain were still covered by the *intermediary* nation embargo.[42]

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

D. SUMMARY OF FINDINGS ON ARTICLE XX

27. The panel found that the *primary* and the *intermediary* nation embargo did not fall under Article III and were contrary to Article XI:1. It found further that the US measures were not covered by the exceptions in Article XX (b), (d) or (g). On Article XX (b) and (g), the panel found that there was no basis for the contention that Article XX applied only to policies related to the protection of human, animal or plant life and health or to the conservation of natural resources located within the territory of the contracting party,[43] and concluded that the policy pursued within the jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(b) and (g).[44]

28. However, the panel found that measures taken so as to force other countries to change their policies could not be considered "necessary" for the protection of animal life or health in the sense of Article XX(b),[45] or primarily aimed at the conservation of exhaustible natural resources, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g).[46] Concerning Article XX(d), the panel found that since the *primary* nation embargo was inconsistent with Article XI:1, it could not serve as a basis for the justification of the *intermediary* nation embargo.[47]

VI. UNITED STATES – AUTOMOBILES[48]

A. PARTIES

Complainant: The European Communities.

Respondent: United States.

Third Parties: Australia; Japan and Sweden.

[41] *Ibid.*, para. 2.12.
[42] *Ibid.*, para. 2.15.
[43] *Ibid.*, paras. 5.16-5.17, 5.32.
[44] *Ibid.*, paras. 5.20, 5.33.
[45] *Ibid.*, para. 5.39.
[46] *Ibid.*, para. 5.27.
[47] *Ibid.*, para. 5.41.
[48] *United States – Taxes on Automobiles*, circulated on 11 October 1994, not adopted, DS31/R.

B. TIMELINE OF DISPUTE

Panel requested: 12 March 1993.

Panel established: 12 May 1993.

Panel composed: 2 August 1993.

Panel Report circulated: 11 October 1994.

Panel Report not adopted.

C. MAIN FACTS

29. Three US measures on automobiles were under examination: the luxury tax on automobiles ("luxury tax"), the gas guzzler tax on automobiles ("gas guzzler"), and the Corporate Average Fuel Economy regulation ("CAFE").

30. A luxury tax of 10% was imposed on the first retail sale of vehicles over $30,000 (a tax paid by customers).[49] The gas guzzler tax was an excise tax on the sale of automobiles within "model types" whose fuel economy failed to meet certain fuel economy requirements (a tax imposed on manufacturers).[50] The CAFE regulation required a minimum average fuel economy for passenger automobiles (or light trucks) manufactured in the United States, or sold by any importer.[51] For companies that were both importers and domestic manufacturers, average fuel economy was calculated separately for imported passenger automobiles and for those manufactured domestically.

31. The European Communities complained that the regulation had a disproportionate impact on EC cars and that treatment based on fleet averaging was inherently discriminatory, since importers of cars from specialized manufacturers, which tended to be foreign, could not offset the fuel economy of cars below the standard with those above the standards.[52] The European Communities argued that these measures were inconsistent with Article III and could not be justified under Article XX(g) or (d). The United States contended that these measures were consistent with the GATT. However, the United States considered that it was obvious from the facts that, as a central element of US energy conservation policy, the CAFE measures were also measures within the scope of Article XX(g).[53]

D. SUMMARY OF FINDINGS ON ARTICLE XX

32. The panel found that both the luxury tax and the gas guzzler tax were consistent with Article III:2. However, it found the CAFE regulation to be inconsistent with Article III:4, as the separate foreign fleet accounting discriminated against foreign cars and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers (i.e. based on origin), rather than on the basis of factors directly related to the products as such.

33. The panel considered that a policy to conserve gasoline, which is produced from petroleum, an exhaustible natural resource, was within the range of policies covered by Article XX(g).[54] The panel further found that the separate foreign fleet accounting was not justified under Article XX(g) because the measure did not contribute directly to fuel conservation in the US; thus, a measure that

[49] *Ibid.*, para. 2.2.
[50] *Ibid.*, para. 2.5.
[51] *Ibid.*, paras. 2.15-2.16.
[52] *Ibid.*, para. 5.41.
[53] *Ibid.*, para. 3.315.
[54] *Ibid.*, para. 5.57.

did not further the objectives of conservation of an exhaustible resource could not be deemed to be primarily aimed at such conservation.[55] In addition, the panel found that the CAFE regulation could not be justified under Article XX(d) as the underlying measure (the CAFE requirement) was itself inconsistent with the GATT.[56]

VII. UNITED STATES – GASOLINE[57]

A. PARTIES

1. Panel

Complainant: Brazil and Venezuela.

Respondent: United States.

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

2. Appellate Body

Appellant: United States.

Appellees: Brazil and Venezuela.

Third Participants: the European Communities and Norway.

B. TIMELINE OF DISPUTE

Panel requested: 25 March 1995.

Panel established: 10 April 1995.

Panel composed: 28 April 1995.

Panel Report circulated: 29 January 1996.

Notice of appeal: 21 February 1996.

Appellate Body Report circulated: 29 April 1996.

Adoption: 20 May 1996.

C. MAIN FACTS

34. 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.

[55] *Ibid.*, para. 5.61.
[56] *Ibid.*, para. 5.67.
[57] *United States – Standards for Reformulated and Conventional Gasoline*, Panel Report and Appellate Body Report, adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

35. 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.[58] The Gasoline Rule applied to all US refiners, blenders and importers of gasoline.

36. The EPA regulation provided two different sets of baseline emissions standards.[59] 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.

37. 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.[60] 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.[61] The United States appealed the panel report but limited its appeal to the panel's interpretation of Article XX of the GATT 1994.

D. SUMMARY OF FINDINGS ON ARTICLE XX

38. The panel found that imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from sales conditions as favourable as domestic gasoline were afforded by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.[62] The Gasoline Rule was accordingly inconsistent with Article III.

39. The panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of human, animal and plant life or health mentioned in Article XX(b).[63] However, the panel found that the baseline establishment methods were not “necessary” under Article XX(b) since there were other consistent or less inconsistent measures reasonably available to the US for the same policy objective.[64] The panel rejected a justification of the measure under Article XX(d) as the baseline establishment methods were not an enforcement mechanism (to "secure compliance"), but were simply rules for determining the individual baselines.[65] Finally, the panel considered 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).[66] However, the panel found that the less favourable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources.[67] In light of these findings, it was not deemed necessary by the panel to determine whether the measure met the conditions set out in the

[58] *Ibid.*, Panel Report, para. 2.2.
[59] *Ibid.*, paras. 2.6, 2.8.
[60] *Ibid.*, paras. 3.1-3.2.
[61] *Ibid.*, para. 3.4.
[62] *Ibid.*, para. 6.16.
[63] *Ibid.*, para. 6.21.
[64] *Ibid.*, para. 6.28.
[65] *Ibid.*, para. 6.33.
[66] *Ibid.*, para. 6.37.
[67] *Ibid.*, para. 6.40.

chapeau of Article XX.[68] The panel concluded that the Gasoline Rule could not be justified under Article XX(b), (d) or (g). The panel finding was reversed on appeal.

40. The Appellate Body held that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX. It noted that the chapeau addressed not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. Accordingly, the chapeau is animated by the principle that while Members have a *legal right* to invoke the exceptions of Article XX, they should not be so *applied* as to lead to an abuse or misuse.[69]

41. It concluded that the application of the US regulation amounted to unjustifiable discrimination and to a disguised restriction on trade because of two omissions on the part of the United States.[70] First, the United States had not explored adequately means, including in particular cooperation with Venezuela and Brazil, of mitigating the administrative problems that led the United States to reject individual baselines for foreign refiners. Second, the United States did not count the costs for foreign refiners that would result from the imposition of statutory baselines.

VIII. UNITED STATES – SHRIMP[71]

A. PARTIES

1. Panel

Complainant: India, Malaysia; Pakistan and Thailand.

Respondent: United States.

Third Parties: Australia; Colombia; Costa Rica; Ecuador; El Salvador; the European Communities; Guatemala; Hong Kong; Japan; Mexico; Nigeria; the Philippines; Senegal; Singapore; Sri Lanka and Venezuela.

2. Appellate Body

Appellant: United States.

Appellees: India; Malaysia; Pakistan and Thailand.

Third Participants: Australia; Ecuador; the European Communities; Hong Kong, China; Mexico and Nigeria.

B. TIMELINE OF DISPUTE

Panel requested: 9 January 1997 (Malaysia and Thailand); 30 January 1997 (Pakistan) and 25 February 1997 (India).

Panel established: 25 February 1997 and 10 April 1997 (for India).

Panel composed: 15 April 1997.

---

[68] *Ibid.*, para. 6.41.
[69] *US – Gasoline*, Appellate Body Report, *DSR 1996*, p. 21
[70] *Ibid.*, pp. 25-26.
[71] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report and Panel Report adopted on 6 November 1998, WT/DS58.

Panel Report circulated: 15 May 1997.

Notice of appeal: 13 July 1998.

Appellate Body Report circulated: 12 October 1998.

Adoption: 6 November 1998.

C. MAIN FACTS

42. Sea turtles at issue arere characterized as highly migratory species, spending their lives at sea, migrating between their foraging and their nesting grounds. They have been adversely affected by human activity, either directly (exploitation of their meat, shells and eggs), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). In 1998, all species of sea turtles were included in Appendix I of the 1973 Convention on International Trade in Endangered Species ("CITES").[72]

43. The US Endangered Species Act of 1973 ("ESA") lists as endangered or threatened the five species of sea turtles occurring in US waters and prohibits their take within the United States, within the US territorial sea and the high seas. Pursuant to the ESA, the United States required that shrimp trawlers used "turtle excluder devices" (TEDs)[73] in their nets when fishing in areas where there was a significant likelihood of encountering sea turtles.

44. Section 609 of Public Law 101-162 (hereafter "Section 609"), enacted in 1989 by the United States, intended to, *inter alia*, develop bilateral or multilateral agreements for the protection and conservation of sea turtles. Section 609 prohibited that shrimp harvested with technology that might adversely affect certain sea turtles be imported into the United States, unless the harvesting nation was certified to have a regulatory programme for the conservation of sea turtles and an incidental take rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.[74] In practice, countries having any of the five species of sea turtles within their jurisdiction and harvesting shrimp with mechanical means had to impose on their fishermen requirements comparable to those borne by US shrimpers, essentially the use of TEDs at all times, if they wished to be certified and export shrimp products to the United States. The United States issued regulatory guidelines in 1991, 1993 and 1996 for the implementation of Section 609 detailing how to assess the comparability of foreign regulatory programmes with the US programme, as well as the criteria for certification. The United States effectively banned shrimp imports from countries that were not certified as having comparable conservation policies for endangered sea turtles or as coming from shrimp boats equipped with TEDs.

45. The complainants argued that the import prohibition on shrimp and shrimp products was inconsistent with Article XI:1,[75] with Article I:1,[76] and with Article XIII:1 as it restricted the importation of shrimp and shrimp products from countries which had not been certified, while like products from other countries which had been certified could be imported freely into the US.[77] The US claimed that the measures at issue were justified under Article XX(b) and (g) given that these provisions did not contain jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved.[78] The complainants argued to the contrary that

[72] *Ibid.*, Panel Report, para. 2.3.
[73] A TED is a trapdoor installed inside a trawling net which allows shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.
[74] *US – Shrimp*, Panel Report, para. 2.7.
[75] *Ibid.*, para. 7.11.
[76] *Ibid.*, para. 7.18.
[77] *Ibid.*, para. 7.20.
[78] *Ibid.*, para. 7.24.

Article XX(b) and (g) could not be invoked to justify a measure applying to animals outside the jurisdiction of the Member enacting the measure.

46. On appeal, the US raised, *inter alia*, the issue of whether the panel erred in finding that the measure at issue constituted unjustifiable discrimination between countries where the same conditions prevail and, thus, was not within the scope of measures permitted under Article XX of the GATT 1994.[79]

D. SUMMARY OF FINDINGS ON ARTICLE XX

47. The panel ruled that it was equally appropriate to analyse first the introductory provision of Article XX, and only thereafter the specific requirements contained in the paragraphs.[80] This ruling was rejected by the Appellate Body. It indicated that the sequence of steps followed in the *US – Gasoline* case (first, characterization of the measure under Article XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX) reflected not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.[81]

48. The panel had found that the ban imposed by the United States was inconsistent with Article XI.[82] It had concluded that the US ban could not be justified under Article XX as it constituted "unjustifiable" discrimination between countries where the same conditions prevail and thus was not within the scope of measures permitted under Article XX.[83] It had reasoned that allowing such a ban would undermine Members' autonomy to determine their own policies.[84] Since the panel had found that the US measure at issue was not within the scope of measures permitted under the chapeau of Article XX, it did not find it necessary to examine whether the US measure was covered by paragraphs (b) and (g) of Article XX.[85]

49. The Appellate Body further ruled that the measure at stake qualified for provisional justification under Article XX(g), but failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX. The Appellate Body found that the sea turtles involved constituted "exhaustible natural resources" for purposes of Article XX(g),[86] and that Section 609 was a measure "relating to" the conservation of an exhaustible natural resource.[87] It ruled however, with regard to the chapeau, that discrimination resulted not only when countries in which the same conditions prevail were treated differently, but also when the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting countries.[88] Thereby, 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 unilaterally enforcing the import prohibition against the shrimp exports of those Members, was also taken into account.[89]

[79] *US – Shrimp*, Appellate Body Report, para. 98.
[80] *US – Shrimp*, Panel Report, para. 7.28.
[81] *US – Shrimp*, Appellate Body Report, para. 119.
[82] *US – Shrimp*, Panel Report, para. 7.17.
[83] *Ibid.*, para. 7.49.
[84] *Ibid.*, para. 7.51.
[85] *Ibid.*, paras. 7.62-63.
[86] *US – Shrimp*, Appellate Body Report, para. 134.
[87] *Ibid.*, para. 142.
[88] *Ibid.*, para. 165.
[89] *Ibid.*, para. 166.

IX. EUROPEAN COMMUNITIES – ASBESTOS[90]

A. PARTIES

1. Panel

Complainant: Canada.

Respondent: European Communities.

Third Parties: Brazil; the United States and Zimbabwe.

2. Appellate Body

Appellant and Appellee: Canada.

Appellant and Appellee: European Communities.

Third Participants: Brazil and the United States.

B. TIMELINE OF DISPUTE

Panel requested: 8 October 1998.

Panel established: 25 November 1998.

Panel composed: 29 March 1999.

Panel Report circulated: 18 September 2000.

Notice of appeal: 23 October 2000.

Appellate Body Report circulated: 12 March 2001.

Adoption: 5 April 2001.

C. MAIN FACTS

50. Chrysotile asbestos is generally considered to be a highly toxic material, the exposure to which poses significant threats to human health such as risk of asbestosis, lung cancer or mesothelioma.[91] However, due to their special qualities (for instance, resistance to very high temperatures and to different types of chemical attack), asbestos fibres have found wide use in industrial and other commercial applications.[92]

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

---

[90] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report, adopted on 5 April 2001, WT/DS135.

[91] *EC – Asbestos*, Panel Report, para. 3.66.

[92] *Ibid.*, para. 2.2.

> "I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:
>
> - On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;
>
> - on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof (…)".[93]

52. The European Communities argued that in prohibiting the placing on the market and use of asbestos and products containing asbestos, the Decree sought to halt the spread of the risks due to asbestos, particularly for those exposed occasionally and very often unwittingly to asbestos when working on asbestos-containing products.[94] France contended that it could thereby reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma.

53. Canada is the number two producer and number one exporter of chrysotile.[95] Canada did not dispute that chrysotile asbestos caused lung cancer, but made, *inter alia*, a distinction between chrysotile fibres and chrysotile encapsulated in a cement matrix. Canada challenged the Decree insofar as it prohibited, *inter alia*, the use of chrysotile-cement products. Canada argued that the Decree altered the conditions of competition between, on the one hand, substitute fibres of French origin and, on the other hand, chrysotile fibre from Canada. Accordingly, the Decree imposed less favourable treatment to imported asbestos as compared to domestic substitutes for asbestos. However, the European Communities held that there was still a risk of accidental contamination, especially in the case of DIY enthusiasts or professionals working only occasionally in an environment where asbestos was present. Data submitted to the panel showed that such exposure could exceed the statutory limits under ISO 7337,[96] which were themselves higher than those of the WHO or those applied by France before the ban.[97]

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

D. SUMMARY OF FINDINGS ON ARTICLE XX

55. The panel found that chrysotile-fibre products and fibro-cement products were like products with the meaning of Article III:4. The panel further found that the provisions of the Decree relating to the prohibiting of the marketing of chrysotile fibres and chrysotile-cement products violated

---

[93] Decree No. 96-1133 of 24 December 1996 concerning the ban on asbestos, implemented pursuant to the Labour Code and the Consumer Code, *Journal Officiel* of 26 December 1996. Reproduced in Annex I to *EC – Asbestos* Panel report.

[94] *EC – Asbestos*, Panel Report, para. 8.185.

[95] *Ibid.*, para. 3.20.

[96] See International Organization for Standardization, ISO 7337 (1984).

[97] *EC – Asbestos*, Panel Report, para. 8.191.

Article III:4. Nevertheless, the panel decided that the violation of Article III:4 was justified under Article XX(b) and that the measure did not conflict with the chapeau of Article XX.[98]

56. The panel noted that the experts consulted confirmed the health risks associated with exposure to chrysotile asbestos in its various uses and, therefore, that a prohibition of chrysotile asbestos fell within the range of policies designed to protect human life or health (Article XX(b)).[99] The panel also found that there was no reasonable alternative available (e.g. the controlled use of asbestos products as suggested by Canada) to the European Communities.[100] Concerning the chapeau of Article XX, the panel found that the application of the Decree did not constitute arbitrary or unjustifiable discrimination,[101] and that the examination of the design, architecture and revealing structure of the Decree could not lead to conclude that the Decree had protectionist objectives.[102]

57. On appeal, Canada disputed two aspects of the panel's findings: the question of whether the use of chrysotile-cement products posed a risk to human health and whether the measure at issue was "necessary" to protect human life or health.[103] The Appellate Body upheld both findings. It reaffirmed the Panel's margin of discretion in assessing the value of evidence and the weight to be ascribed to that evidence,[104] and found that the panel remained well within the bounds of its discretion in finding that chrysotile-cement products posed a risk to human life or health.[105]

58. The Appellate Body also rejected Canada's arguments against the necessity of the measure. It ruled that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.[106] In order to evaluate whether the measure was necessary, the Appellate Body examined, *inter alia*, whether there was an alternative measure consistent with the GATT 1994, or less inconsistent with it, which a Member could reasonably be expected to employ to achieve its objectives. It ruled that one aspect of the weighing and balancing process comprehended in the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure contributes to the realization of the end pursued. In addition, the Appellate Body noted that the more vital or important the policy pursued, the easier it would be to prove that a measure was necessary to meet the objectives of the policy.[107] In this case, the objective pursued (health) was characterized as "vital and important in the highest degree".[108] It found therefore that the efficacy of the alternative proposed by Canada (the controlled use) was particularly doubtful in certain situations and that it would not allow France to achieve its chosen level of health protection.[109]

[98] *Ibid.*, paras. 8.240-241.
[99] *Ibid.*, para. 8.194.
[100] *Ibid.*, para. 8.221.
[101] *Ibid.*, para. 8.230.
[102] *Ibid.*, para. 8.238.
[103] *EC – Asbestos*, Appellate Body Report, para. 155.
[104] *Ibid.*, para. 161.
[105] *Ibid.*, para. 162.
[106] *Ibid.*, para. 167.
[107] *Ibid.*, para. 172.
[108] *Ibid.*
[109] *Ibid.*, para. 174.

X. UNITED STATES – SHRIMP (ARTICLE 21.5)[110]

A. PARTIES

1. Panel

Complainant: Malaysia.

Respondent: United States.

Third Parties: Australia; Canada; Ecuador; Hong Kong, China; the European Communities; India; Japan; Mexico; Pakistan and Thailand.

2. Appellate Body

Appellant: Malaysia.

Appellee: United States.

Third Participants: Australia; the European Communities; Hong Kong, China; India; Japan; Mexico and Thailand.

B. TIMELINE OF DISPUTE

Panel requested: 12 October 2000.

Panel established: 23 October 2000.

Panel composed: 23 October 2000.

Panel Report circulated: 15 June 2001.

Notice of appeal: 23 July 2001.

Appellate Body Report circulated: 22 October 2001.

Panel Report adopted: 21 November 2001.

C. MAIN FACTS

59. In accordance with Article 21.5 of the DSU,[111] Malaysia requested that the Dispute Settlement Body (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*, adopted on 6 November 1998 (see Part VIII above). The DSB referred the matter to the original panel.

---

[110] *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to article 21.5 by Malaysia*, Appellate Body Report and Panel Report, adopted on 21 November 2001, WT/DS58/AB/RW.

[111] Article 21.5 of the DSU reads as follows: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report".

60. In order to implement the recommendations and rulings of the DSB, the United States 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").[112] These Revised Guidelines replaced the guidelines issued in April 1996 that were part of the original measure at stake. The Revised Guidelines set forth criteria for certification.

61. Malaysia claimed that Section 609, as currently applied continued to violate Article XI:1 and that the United States was not entitled to impose any prohibition in the absence of an international agreement allowing it to do so. The United States did not contend that the implementing measure was compatible with Article XI:1 but that it was justified under Article XX(g). The United States argued that the Revised Guidelines responded to its obligation to remedy all the inconsistencies identified by the Appellate Body under the chapeau of Article XX.[113]

D. SUMMARY OF FINDINGS ON ARTICLE XX

62. The panel was called upon to examine the compatibility of the implementing measure with Article XX(g). It noted that in *US – Shrimp*, the Appellate Body concluded that Section 609 was provisionally justified under Article XX(g). Therefore, since the implementing measure before the panel was identical to the measure examined by the Appellate Body in relation to paragraph (g), the panel held that the implementing measure was provisionally justifiable under Article XX(g).[114]

63. The panel then recalled the Appellate Body's finding in *US – Shrimp* concerning the nature of the chapeau of Article XX:

> "the task of interpreting and applying the chapeau is (…) essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (…) of the GATT 1994".[115]

64. The panel concluded that the recognition that the protection of migratory species was best achieved through international cooperation significantly moved the line of equilibrium towards a bilaterally or multilaterally negotiated solution, thus rendering recourse to unilateral measures less acceptable.[116] On this basis, the panel proceeded to determine whether the line of equilibrium in the field of sea turtle conservation and protection was such as to require the conclusion of an international agreement or only efforts to negotiate. It concluded that the obligation of the United States was an obligation to negotiate, as opposed to an obligation to conclude an international agreement.[117] It also concluded that the US had made serious good faith efforts to negotiate an international agreement.

65. On appeal, Malaysia claimed that the panel erred in finding that the new measure at issue was applied in a manner that no longer constituted a means of "arbitrary or unjustifiable discrimination" under Article XX. Malaysia first 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. The Appellate Body upheld the panel's finding and rejected Malaysia's contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX required the *conclusion* of an international agreement on the protection and conservation of sea turtles.[118] Malaysia also argued that the measure at issue resulted in "arbitrary or unjustifiable discrimination" because of the lack of flexibility of the US measure. The Appellate Body upheld

[112] *US – Shrimp (21.5)*, Panel Report, para. 2.22.
[113] *Ibid.*, para. 5.24.
[114] *Ibid.*, paras. 5.39-5.42.
[115] *US – Shrimp*, Appellate Body Report, para.159.
[116] *US – Shrimp (21.5)*, Panel Report, para. 5.59.
[117] *Ibid.*, para. 5.67.
[118] *US – Shrimp (21.5)*, Appellate Body Report, para. 134.

again the panel's finding and agreed with the reasoning of the panel that conditioning market access on the adoption of a programme *comparable in effectiveness*, allowed for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination".[119]

---

[119] *Ibid.*, para. 144.