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**TRADE-RELATED ENVIRONMENTAL MEASURES
UNDER GATT ARTICLE XX(B) AND (G)**

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Sonia Mara Gabiatti,

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LIST OF ACRONYMS

<i>AB</i>	<i>Appellate Body</i>
<i>BRL</i>	<i>Brazilian Real (R\$)</i>
<i>CAFE</i>	<i>Corporate Average Fuel Economy Regulation</i>
<i>CBD</i>	<i>Convention on Biological Diversity</i>
<i>CFCs</i>	<i>Chlorofluorocarbons</i>
<i>CITES</i>	<i>Convention on International Trade in Endangered Species of Wild Fauna and Flora</i>
<i>Conama</i>	<i>Conselho Nacional do Meio-Ambiente (Brazilian National Environment Council)</i>
<i>CTE</i>	<i>Committee on Trade and Environment</i>
<i>CTESS</i>	<i>Committee on Trade and Environment Special Session</i>
<i>DECEX</i>	<i>Departamento de Comércio Exterior (Brazilian Department of Foreign Trade)</i>
<i>DDT</i>	<i>Dichlorodiphenyltrichloroethane</i>
<i>DSB</i>	<i>Dispute Settlement Body</i>
<i>DSU</i>	<i>Dispute Settlement Understanding</i>
<i>DIY</i>	<i>“Do It Yourself”</i>
<i>EC</i>	<i>European Communities</i>
<i>EEC</i>	<i>European Economic Community</i>
<i>EFTA</i>	<i>European Free Trade Association</i>
<i>EMIT</i>	<i>Environmental Measures and International Trade</i>
<i>EPA</i>	<i>Environmental Protection Agency</i>
<i>ESA</i>	<i>Endangered Species Act</i>
<i>ETP</i>	<i>Eastern Tropical Pacific Ocean</i>
<i>EU</i>	<i>European Union</i>
<i>GATS</i>	<i>General Agreement on Trade in Services</i>
<i>GATT</i>	<i>General Agreement on Tariffs and Trade</i>
<i>ICCAT</i>	<i>International Commission for the Conservation of Atlantic Tunas</i>
<i>ICJ</i>	<i>International Court of Justice</i>
<i>IMF</i>	<i>International Monetary Fund</i>
<i>ITLOS</i>	<i>International Tribunal for the Law of the Sea</i>
<i>ISO</i>	<i>International Standards Organisation</i>

<i>ITO</i>	<i>International Trade Organisation</i>
<i>IUCN</i>	<i>International Union for the Conservation of Nature and Natural Resources</i>
<i>MEA</i>	<i>Multilateral Environmental Agreement</i>
<i>Mercosur</i>	<i>Mercado Común del Sur (Southern Common Market)</i>
<i>MFN</i>	<i>Most-Favoured Nation</i>
<i>MMPA</i>	<i>Marine Mammal Protection Act</i>
<i>NAFTA</i>	<i>North American Free Trade Association</i>
<i>NCPs</i>	<i>Non-Compliance Provisions</i>
<i>NGO</i>	<i>Non-Governmental Organisation</i>
<i>ODS</i>	<i>Ozone-Depleting Substances</i>
<i>PIC</i>	<i>Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade</i>
<i>PPMS</i>	<i>Processes and Production Methods</i>
<i>SCM</i>	<i>Subsidies and Countervailing Measures</i>
<i>SECEX</i>	<i>Secretaria de Comércio Exterior (Brazilian Secretariat of Foreign Trade)</i>
<i>SPS</i>	<i>Sanitary and Phytosanitary Measures</i>
<i>TBT</i>	<i>Technical Barriers to Trade</i>
<i>TED</i>	<i>Turtle Excluding Device</i>
<i>TRIPS</i>	<i>Trade-Related Aspects of Intellectual Property Rights</i>
<i>UN</i>	<i>United Nations</i>
<i>UNCED</i>	<i>United Nations Conference on Environment and Development</i>
<i>UNCLOS</i>	<i>United Nations Conference on the Law of the Sea</i>
<i>UNCTAD</i>	<i>United Nations Conference on Trade and Development</i>
<i>UNEP</i>	<i>United Nations Environment Programme</i>
<i>UNESCO</i>	<i>United Nations Educational, Scientific and Cultural Organisation</i>
<i>UNTS</i>	<i>United Nations Treaty Series</i>
<i>US</i>	<i>United States (of America)</i>
<i>WHO</i>	<i>World Health Organisation</i>
<i>WTO</i>	<i>World Trade Organisation</i>

INTRODUCTION

This dissertation deals with a review of literature and jurisprudence predominantly about how trade-related environmental measures – i.e. measures that restrict international trade to achieve environmental goals, like the necessity to protect human, animal or plant life or health and those related to the conservation of exhaustible natural resources – may be accommodated within the exceptions described in paragraphs (b) and (g) of Article XX of GATT 1994.

The main motive behind this dissertation is to compile the maximum of information on the procedure of applicability of Article XX(b) and (g) and to arrange it in a manner accessible to Law students in general, or to anyone interested in the subject, specially if they do not have any previous knowledge on the topic.

At the present time, the conflict between environmental interests and economic interests is increasing. The applicability of the exceptions provided in Article XX(b) and (g) of GATT make a link between International Economic Law and International Environmental Law to balance economic interests with environmental interests. In this sense, the present essay intends to answer questions such as:

- When did the discussions concerned with trade and its implications on environment under the GATT and WTO begin?*
- What are the main facts and resolutions under the GATT and WTO that have taken into consideration the connection between trade interests and environmental interests?*
- Is a WTO Member allowed to take trade-related environmental measures?*
- Could the exceptions under Article XX(b) and (g) justify the violation of substantive GATT rules?*
- How are the exceptions under Article XX(b) and (g) of GATT applied? What are the criteria for the application of such exceptions?*
- What are the key cases regarding the applicability of Article XX(b) and (g) solved by*

the panel and the Appellate Body?

- *Is there an implied jurisdictional limitation that prohibits a WTO Member from invoking the exceptions under Article XX(b) and (g) outside its territorial jurisdiction?*
- *Could the unilateral measures enacted by a WTO Member be justified under the exceptions under Article XX(b) and (g)?*
- *Why are MEAs recommended by the WTO as a better solution to transboundary environmental problems? Does the MEAs' system conform with the WTO system?*

To answer the questions listed above the essay was organised in three chapters:

- *Chapter 1 aims to present a brief historic review of the linkage between trade and environment through GATT 1947 and GATT 1994/World Trade Organisation. The information described in chapter 1 is important in introducing the discussion involving trade interests and environmental interests in the context of GATT 1947 and of the WTO and to present how such issues have been conducted so far by GATT 1947 and WTO. Chapter 1 provides therefore a retrospective of the main facts in connection with the discussion on trade and environment.*
- *Chapter 2 intends to discuss the applicability of Article XX(b) and (g) of GATT 1994. The exceptions under Article XX(b) and (g) are an alternative provided by GATT to conform environmental interests with economic interests. Such exceptions are managed by WTO Members to justify restrictions on international trade or, in other terms, to conform commercial interests with environmental interests. Chapter 2 was arranged in conformity with the method established by the Panels and the Appellate Body to apply Article XX(b) and (g) to address a defence of a GATT-inconsistent measure which consists firstly in that the party invoking an exception under Article XX has to prove the inconsistent measure comes within the scope of one exception and that the measure then also complies with the chapeau of Article XX. Chapter 2 also intends to present a description of the modus operandi in conformity with the development of the jurisprudence and doctrine of WTO dispute resolution system emerging from the first conflicts brought before GATT 1947, such as Tuna I and II cases and including a recent case as well the so called Brazil – Retreaded Tyres.*

- *Chapter 3 aims to discuss the extra-territorial scope of Article XX(b) and (g). WTO Members have enacted unilateral trade-related environmental measures to protect natural exhaustible resources beyond their territorial borders. The effects of such measures usually have extra-territorial impact and, as a result, conflicts have arisen between WTO Members. WTO Members attempt to justify their unilateral measures with extra-territorial consequences under the exceptions of Article XX(b) and (g). MEAs are consequently pointed out by the WTO as a better solution to transboundary environmental problems. Chapter 3 aims also to discuss the relationship between the MEAs system and the GATT/WTO system.*

Each chapter has an introduction, discussion of delimited matters and a conclusion. Since each chapter contains a conclusion circumscribed to its own subject, and in order to avoid repetition, the general conclusion aims to sum up the discussions about the role of the WTO in the enforcement of trade related environmental measures.

The dissertation therefore ends with a general conclusion explaining the debate on how environmental policies are mainly considered by environmentalist advocates while the WTO system focuses on the accommodation of trade-related environmental measures within Article XX(b) and (g) of GATT 1994. It is followed by attachments with a summary of selected cases regarding the applicability of Article XX(b) and (g) and the Chile – Swordfish case to demonstrate the risk of conflicting judgements by WTO dispute settlement system and others international dispute settlement as the Tribunal for the Law of the Sea (ITLOS).

CHAPTER 1

A BRIEF HISTORIC REVIEW OF THE LINKAGE BETWEEN TRADE AND ENVIRONMENT THROUGH GATT 1947 AND THE GATT 1994/WORLD TRADE ORGANISATION

1.1 Introduction

This chapter introduces contextual discussions concerned with trade and its implications on environment, more specifically as a brief to evidence when the environmental issues had entered in the rounds of negotiations under the GATT 1947 and later under the WTO. First it looks back at the creation of the GATT in the end of 1947. Secondly, the establishment in the 1970s of the EMIT group, the Tokyo Round Negotiations. Thirdly, the establishment in the 1980s of the Work Group on the Export of Domestically Prohibited Goods and other Hazardous Substances, the beginning of the Uruguay Trade Negotiations in 1986, the *Brundtland Report* in 1987, in which the term “sustainable development” was created. Fourthly, the first convened EMIT group in preparation to the Rio Earth Summit, the repercussion of the landmark *Tuna – Dolphin I case*, the establishment of the WTO and the fiftieth anniversary of the GATT. The chapter also looks at the 2001 Doha Ministerial Declaration (the so called “Green Round Negotiations”) and later WTO conferences. It then provides a retrospective of the main facts under the GATT 1947 and WTO in connection with discussions on trade and environment.

1.2 Environmental issues in discussion under the WTO/GATT

On 30 October 1947 the General Agreement on Tariffs and Trade (GATT) was opened for signatures and entered into effect on January 1948. The GATT created an international

¹ “Like all other international regimes created in the postwar years (...) the trade regime was first and foremost a response to World War II. It reflected the widespread view that the post-World War I order had failed the test of the economic crisis of the late 1920s. The authors of the new order were determined not to repeat the mistakes of Versailles and the early 1920s.” (Young 1997:250)

trade regime purporting to reduce tariffs and to establish a code of conduct concerning international trade. On 21 November 1947 the Havana Conference on Trade and Employment was opened, the structure for the International Trade Organisation (ITO) was the topic of elaboration during that conference. However, the ITO Charter never entered into force with US Congress neither having formally rejected the ITO nor having ratified it. As the GATT 1947 did not require parliamentary approval, it remained in effect from January 1948 to January 1995.² The initial rounds of negotiation under the GATT 1947 did not focus on environmental concerns, with most parties delaying the dialogue on trade and environment. Nevertheless, many environmental treaties³ were formalised meanwhile and some important conferences took place. Thus, GATT⁴ entered into force throughout a time when the interest for environmental policy-making was growing.⁵

² “GATT was originally part of a draft charter, the Havana Charter, for an International Trade Organisation, the third leg of the Bretton-Woods post-war order along with the IMF and the World Bank.” (Rajamani 2006:25)

³ “The Charter of the International Trade Organization, which was to provide the institutional home for GATT but never entered into force, specially allowed countries to take measures pursuant to an intergovernmental agreement relating to the conservation of fisheries, migratory birds, or wild animals.” (DiMento 2003:182)

⁴ “The World Trade Organization was established in 1995.” (Lowenfeld 2003:25-26) And also: “Because de GATT existed the US Senate had no reason to ratify the Havana Charter establishing the ITO, which consequently failed to enter in force.” (Young 1997:251)

⁵ The Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish and the International Convention for the Regulation of Whaling, both in 1946; the International Convention for the Northwest Atlantic Fisheries and the Convention for the Establishment of an International American Tropical Tuna Commission, both in 1949; the International Convention for the Protection of Birds in 1950; the International Union for the Conservation of Nature and Natural Resources (the World Conservation Union – IUCN) was established in 1947-8; the Inter-American Conference on Conservation of Renewable Natural Resources in 1948; the International Conference on the Protection of Nature and the Scientific Conference on the Conservation and Utilisation of Resources promoted by UNESCO in 1949.

⁶ “It was often been said that the GATT was written at a time before policy-makers thought about environment. This was a convenient story for trade officials who were trying to explain why various (usually hypothetical) environmental laws would violate trade rules. It was also a convenient story for reform-minded NGOs seeking to ‘green’ the GATT by adding new provisions. The story, however, is untrue. The GATT was written at a time of revived interest in international environmental challenges. This is reflected most clearly in the environmental treaties of that era.” (Charnovitz and Steve 1998:98-116 *apud* Sampson and Whalley 2005:415-6)

⁷ “Interaction between international trade and the environment is as old as trade itself. Awareness that the interaction has implications in public policy terms is more recent. Nevertheless, it dates back at least to the trade provisions in the 1933 Convention on Fauna and Flora.” (GATT 1992:19-39 *apud* Sampson and Whalley 2005:19)

During the 1970s and 1980s, the relationship between economic growth, social development and the environment was addressed at the Stockholm Conference and continued to be examined. Between 1971⁸ and 1991, environmental policies began to have an increasing impact on trade, and with increasing trade flows, the effects of trade on the environment have also become more evident.⁹

At the November 1971 meeting of the GATT Council of Representatives, it was agreed that a Group on Environmental Measures and International Trade (also known as the “EMIT Group”) should be established aiming to discuss the relations between trade and environmental issues. This group would only convene at the request of Contracting Parties, with participation being open to all. However the EMIT Group was never convened before 1991.¹⁰

⁸ “In 1972, the UN held a Conference on the Human Environment in Stockholm. During the preparations in 1971, the Secretariat of the General Agreement on Tariffs and Trade (GATT) was asked to make a contribution. The Secretariat therefore prepared a study under its own responsibility. Entitled ‘Industrial Pollution Control and International Trade’, the study focused on the implications of environmental protection policies on international trade. It reflected the concern of trade officials at the time, that such policies could become obstacles to trade as well as constitute a new form of protectionism (i.e. ‘green protectionism’). In 1971, GATT Director-General Olivier Long presented the study to GATT members (or the CONTRACTING PARTIES – written in capital letters – as they were officially called). He urged them to examine what the implications of environmental policies might be for international trade. In the discussions that followed, a number of GATT members suggested that a mechanism be created in GATT for the implications to be examined more thoroughly.” (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm)

⁹ “Presumably, the complex relationship and conflict between environment and trade did not emerge before the nineties because neither trade nor international regimes had matured sufficiently to make the relationship and the conflict inescapable. In a real sense, the emergence of the trade/environment linkage is a result of the remarkable success achieved by both trade negotiations and those who created international environmental regimes.” (Young 1997:249-250)

¹⁰ “In 1971, a Group on Environmental Measures and International Trade (The ‘EMIT’ group) had been established to consider the connections between these issues (reference to sustainable and environmental protection). However, this group had never met and was convened for its first meeting in 1991, with some suggestion that this was done only as a procedural attempt to move the issue off the main agenda.” (French 2005:203)

During 1973-1979, when the Tokyo Round¹¹ of trade negotiations took place, the question about to which degree environmental measures – in the form of technical regulations and standards – could impose obstacles on trade was taken up. The Tokyo Round Agreement on Technical Barriers to Trade,¹² also known as the “Standards’ Code”, was then negotiated. Amongst other things, it called for non-discrimination in the preparation, adoption and application of technical regulations and standards, as well as for their transparency.

In 1982, a number of developing countries expressed their concern at the fact that products prohibited in developed countries on the grounds of environmental hazards, or for health or safety reasons, continued to be exported to them. With limited information on those products, they were unable to make informed decisions regarding their import. At the 1982 Ministerial Meeting of GATT Contracting Parties, it was decided to bring under control the export of products prohibited domestically, on the grounds of harm to human, animal, plant life or health, or the environment. This re-

¹¹ “Beginning with the Tokyo Round, the GATT regime turned to more complex issues that required subsequent implementing interpretation and continuing international vigilance to ensure that the principal goals were achieved. Dispute resolution became increasingly important in this round, and the parties’ inability to modify the agreement led to fragmentation of the trade regime as new agreements were created separate from the GATT itself. Moreover, many countries counted on increased institutional strength of the GATT to curb the ability of the more powerful members (in particular the United States) to act unilaterally.” (Young 1997:251)

¹² “(...) the committee administering the Technical Barriers to Trade Agreement (which deals with regulations, standards, testing and certification procedures) is where governments share information on actions they are taking and discuss how some environmental regulations may affect trade.” (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm) And also: “The WTO Agreement on Technical Barriers to Trade seeks to ensure that product specifications, whether mandatory or voluntary (known as technical regulations and standards), as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), do not create unnecessary obstacles to trade. In its preamble, the Agreement recognizes countries’ rights to adopt such measures to the extent they consider appropriate – for example, to protect human, animal or plant life or health, or the environment. Moreover, members are allowed to take measures to ensure that their standards of protection are met. (This is known as adopting ‘conformity assessment procedures’.) Among the agreement’s important features are: non-discrimination in the preparation, adoption and application of technical regulations, standards, and conformity assessment procedures; avoiding unnecessary obstacles to trade; harmonizing specifications and procedures with international standards as far as possible; the transparency of these measures, through governments notifying them to the WTO Secretariat and establishing national enquiry points.” (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm#scm)

sulted in the establishment in 1989 of a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances.¹³

From 1986 to 1994, during the GATT Uruguay Round¹⁴ of negotiations, trade-related environmental issues were taken up once again. Modifications were made to the Standards' Code, and certain environmental issues were addressed in the General Agreement on Trade in Services (GATS),¹⁵ the Agreements on Agriculture, Sanitary and Phytosanitary Measures (SPS),¹⁶ Subsidies and Countervailing Measures (SCM),¹⁷

¹³ "(...) creation, in 1989, of a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances." (Consulted 22 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm)

¹⁴ "The preambular references to sustainable development and environmental protection were late additions to the negotiations of the 1986-93 GATT Uruguay Round. (...) The majority parties had wanted to postpone discussion of environmental issues to a later point." (French, 2005:203)

¹⁵ "Negotiated during the 1986-94 Uruguay Round, the General Agreement on Trade in Services (GATS) contains a 'general exceptions' clause, Article XIV, similar to GATT Article XX. The GATS article starts with an introduction ('chapeau') that is identical to that of GATT Article XX. Addressing environmental concerns, paragraph (b) allows WTO members to adopt policy measures that would normally be inconsistent with GATS if this is 'necessary to protect human, animal or plant life or health' [identical to GATT Article XX(b)]. As under GATT, this must not result in arbitrary or unjustifiable discrimination and must not constitute protectionism in disguise." (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm#scm)

¹⁶ "Adopted during the 1986-94 Uruguay Round, the WTO Agriculture Agreement seeks to reform trade in agricultural products, and provide a basis for market-oriented policies. In its preamble, the agreement reiterates members' commitment to reform agriculture in a manner that protects the environment. Under the agreement, domestic support measures with minimal impact on trade (known as 'green box' policies) are allowed and are excluded from reduction commitments – they are listed in Annex 2 of the Agreement. Among them are expenditures under environmental programmes, provided that they meet certain conditions. Again, the exemption enables governments to capture 'positive environmental externalities'. A separate agreement on food safety and animal and plant health standards (the Sanitary and Phytosanitary Measures Agreement or SPS) sets out the basic rules. It allows countries to set their own standards. But it also says regulations must be based on science. They should be applied only to the extent necessary to protect human, animal or plant life or health. And they should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail." (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm#scm) and http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm)

¹⁷ "The Agreement on Subsidies, which applies to non-agricultural products, is designed to regulate the use of subsidies. Under the Agreement, certain subsidies referred to as 'non-actionable' are generally allowed. Amongst the non-actionable subsidies that had been provided for under Article 8 were subsidies used to promote the adaptation of existing facilities to new environmental requirements [Article 8.2(c)]. However, this provision expired in its entirety at the end of 1999. It was intended to allow members to capture 'positive environmental externalities' when they arose." (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm#scm)

and Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁸

In 1987, the World Commission on Environment and Development produced a report entitled *Our Common Future* (also known as the *Brundtland Report*), in which the term “sustainable development” was coined. The report identified poverty as one of the most important causes of environmental degradation, and argued that greater economic growth, fuelled in part by increased international trade, could generate the necessary resources to combat what had become known as the “pollution of poverty.”¹⁹

In 1991, a dispute between Mexico and the United States, regarding a US embargo on the import of tuna from Mexico caught by using nets which resulted in the incidental killing of dolphins, heightened attention on the linkages between environmental protection policies and trade. Mexico claimed that the embargo was inconsistent with GATT rules. The panel ruled in favour of Mexico based on a number of different arguments.²⁰ Although the report of the panel was not adopted by the parties involved in that dispute, its ruling was heavily criticised by environmental groups who

¹⁸ “The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) refers explicitly to the environment in Section 5, which deals with patents. It says (in paragraphs 2 and 3 of Article 27 – Arts 27.2 and 27.3 for short – of Section 5) that members can make certain inventions ineligible for patenting: To protect human, animal or plant life or health, to avoid serious harm to the environment. A member can exclude an invention from patentability if it believes the invention has to be prevented (within its territory) for these and certain other objectives. Plants and animals. Micro-organisms have to be eligible for patenting. So do non-biological and microbiological processes for the production of plants or animals. Invented plant varieties have to be also eligible for protection either by patenting, or by an effective system specially created for the purpose (‘sui generis’), or a combination of the two. Otherwise, plants and animals do not have to be eligible for patenting. These provisions are designed to address the environmental concerns related to intellectual property protection. The TRIPS Agreement allows members to refuse to patent inventions that may endanger the environment (provided their commercial exploitation is prohibited as a necessary condition for the protection of the environment). For ethical or other reasons, they can also exclude plants or animals from patentability, subject to the conditions described above.” (*Ibid.*)

¹⁹ Consulted 22 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm.

²⁰ See attachments for a summary of this case.

felt that trade rules were an obstacle to environmental protection.²¹

In 1991, members of the European Free Trade Association (EFTA)²² requested that the Director-General of GATT convene the EMIT group as soon as possible. Its activation was necessary, they stated, in order to create a forum within which trade-related environmental issues could be addressed. Reference was made to the upcoming 1992 United Nations Conference on Environment and Development (UNCED), and to the need for GATT 1947 to contribute in this regard.²³

Given the developments within the GATT 1947 and within the environmental fora, the reactivation of the EMIT group was met with a positive response. Despite the initial reluctance of developing countries to have environmental issues discussed in the context of GATT 1947, they eventually agreed to start a structured debate on the subject.

In accordance with its mandate of examining the possible effects of environmental protection policies on the operation of the GATT 1947, the EMIT group focused on the effects of environmental measures – such as eco-labelling schemes – on international trade, the relationship between the rules of the multilateral trading system, and the trade provisions contained in Multilateral Environmental Agreements (MEAs) – such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – and the transparency of national environmental regulations with an impact on trade. The activation of the EMIT group was

²¹ “The panel found in favour of Mexico and declared the US law to be GATT-illegal. This decision came as a shock to environmental groups around the world. The more radical environmental groups were able to capitalize on the decision by launching a vituperative anti-GATT campaign. Yet even the mainstream environmental groups were deeply troubled, it was not that the US law was GATT-consistent. Almost everyone conceded that the law was too arbitrary to meet GATT rules. The problem was that the panel issued a broad, rather careless, decision whose logic seemed to question the validity of environmental laws and treaties.” (Charnovitz 1998:98-116 *apud* Sampson and Whalley 2005:420)

²² At the time, Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

²³ “Why, after 20 years of EMIT’s inactivity, did EFTA make the request? EFTA referred to the upcoming 1992 United Nations Conference on Environment and Development (UNCED), and said GATT should contribute. In addition, there were a few new developments in both trade and the environment in those 20 years.” (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm)

followed by further developments in environmental fora.²⁴

In 1992, the UNCED, also known as the Rio Earth Summit,²⁵ drew attention to the role of international trade in poverty alleviation and in combating environmental degradation. *Agenda 21*, the programme of action adopted at the conference, addressed the importance of promoting sustainable development through international trade, amongst other means. The concept of “sustainable development” had definitively established a link between environmental protection and development at large.

The World Trade Organisation (WTO) was established in 1994 by the Marrakech Agreement and entered into force in January of 1995. WTO Members recognised that:

(...) their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.²⁶

In April 1994, a Ministerial Decision on Trade and Environment was adopted²⁷ and also

²⁴ *Ibid.*

²⁵ “The contribution which the WTO could make to environmental protection was recognized at the United Nations Conference on Environment and Development (UNCED – the Earth Summit) in 1992, which stated that an open, equitable and non-discriminatory multilateral trading system has a key contribution to make to national and international efforts to better protect and conserve environmental resources and promote sustainable development. Among the most important recommendations of the UNCED to the GATT at the time was to implement the results of the Uruguay Round.” (Consulted 21 May 2008 on: http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/13erwi_e.htm)

²⁶ “As a result, the preamble to the Marrakesh Agreement Establishing the World Trade Organization, refers to the importance of working towards sustainable development. It states that WTO members recognize: ‘that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living (...) while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.’ The fact that the first paragraph of the preamble recognizes sustainable development as an integral part of the multilateral trading system illustrates the importance placed by WTO members on environmental protection.” (Consulted 21 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm)

²⁷ “In Marrakesh in April 1994, ministers also signed a ‘Decision on Trade and Environment’ which states that: ‘There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.’ The decision also called for the creation of the Committee on Trade and Environment.” (*Ibid.*)

called for the establishment of a Committee on Trade and Environment (CTE).²⁸ A broad-based mandate was agreed upon for the CTE, consisting of identifying the relationship between trade measures and environmental measures in order to promote sustainable development and making appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, complying with the open, equitable and non-discriminatory nature of the system. The work programme of the CTE is contained in the Ministerial Decision and covers a broader range of issues than those previously addressed by the EMIT group. The CTE is composed of all WTO Members and a number of observers from intergovernmental organisations.²⁹

The CTE first convened in early 1995 to examine the different items of its mandate. In preparation for the Singapore Ministerial Conference³⁰ in December 1996, the

²⁸ “At the Ministerial Conference of Marrakesh in 1994, which closed the Uruguay Round, a decision was taken to establish a permanent Committee on Trade and Environment (CTE), which would be open to all member States of the WTO. In justifying the need for such a committee, express mention was made not only of the WTO Agreement preamble, but also the 1992 Rio Declaration and Agenda 21, as well as references to follow-up work undertaken within the GATT, such as in the EMIT group.” (French 2005:203)

²⁹ “At the Ministerial Meeting, which held in Marrakesh in 1994, the GATT agree to charter a new Committee on Trade and Environment (CTE). The CTE was asked to look at most of the trade and environment issues, but no effort was made to broaden participation beyond that in the previous GATT group. For example, governments were not asked to send environment ministry officials (although some countries did). Representatives from international organization – such as UNEP – were allowed to attend the meetings, but they were not allowed to speak. The most serious deficiency, however, was the unwillingness of the WTO to allow input from NGOs. NGO participation might have helped to lubricate the North-South friction that paralyzed the CTE.” (Charnovitz 1998:98-116 *apud* Sampson and Whalley 2005:422)

³⁰ “In the Singapore Ministerial Declaration in relation to trade and environment, the Committee on Trade and Environment has made an important contribution towards fulfilling its Work Programme. The Committee has been examining and will continue to examine, inter alia, the scope of the complementarities between trade liberalization, economic development and environmental protection. Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development. The work of the Committee has underlined the importance of policy coordination at the national level in the area of trade and environment. In this connection, the work of the Committee has been enriched by the participation of environmental as well as trade experts from Member governments and the further participation of such experts in the Committee's deliberations would be welcomed. The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.” (Consulted 26 May 2008 on: http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm)

CTE summarised the discussions which it had held since its establishment, as well as the conclusions reached in a report presented at the Conference. Since then, it has met approximately three times a year. It has held a number of information sessions with MEA secretariats to deepen Members' understanding of the relationship between MEAs and WTO rules, and organised a number of public symposia for non-governmental organisations (NGOs). The CTE performance has been disappointing and interests groups and environmentalists pointed out the lack of transparency by the GATT given that many key GATT documents were deemed confidential. Since the creation of CTE, the WTO has improved the relationship with the civil society: formal meetings between non-governmental organisations and the WTO secretariat have been taking place and WTO website was created giving access to documents that were previously deemed confidential.

³¹ "The history of the CTE since 1994 has been mixed. It has certainly galvanised much debate within the WTO and elsewhere, and has focused attention upon certain core issues. Its most substantive output was a report for the first Ministerial Conference in Singapore in 1996. Little consensus was reached; the report primarily highlighted the continuing divergences in opinion that existed between the vast majority of member States. In that respect, the 1996 report was very much an interim report containing no definitive conclusions and reflecting a clear diversity of viewpoints. Since 1996, the CTE has continued to meet regularly to consider its work programme, and though there has been much discussion, actual progress has been limited" (French, 2005:204-205). Also: "As directed by the Marrakesh Ministerial Decision, the CTE submitted reports on the progress on all items of its work programme to the 1996 Ministerial Conference in Singapore, the 1998 Ministerial Conference in Geneva and the Ministerial Conference in Seattle in 1999, the 2001 Ministerial Conference in Doha." (Consulted 27 May 2008 on: http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief11_e.htm)

³² "The CTE met only three times in 1997 and failed to produce any substantive output. (...) Although the CTE's performance has been disappointing, the WTO has taken other steps in a positive direction to improve its relationship with civil society. The most significant advance has been a new disclosure policy that releases many more documents to the public. The WTO also set up a web site for easy access to documentation. In order to improve the flow of information to, and from, NGOs, the WTO Secretariat started holding symposia on sustainable development. A two-day symposium in March 1998 provided opportunities for about 150 NGOs to discuss issues with experts, governmental delegates, and WTO staff. This symposium was a cutting-edge civil society consultation that included individuals from NGOs, corporations, law firms, and universities. In addition, the WTO gave NGOs observer status ante the Ministerial Conference in 1996 and 1998" (Charnovitz 1998:98-116 *apud* Sampson and Whalley 2005:423-424). "Several WTO symposia have been held with representatives of civil society in recent years on the trade and environment interface. The most recent one in July 2001 featured a working session on trade and environment, one of ten topics discussed in a public event entitled 'Issues Facing the World Trading System'." (Consulted 27 May 2008 on: http://www.wto.org/english/thewto_e/minist_e/min01_e/brief11_e.htm)

The WTO Ministerial Conference was held in Geneva, Switzerland in May 1998. This conference celebrated the fiftieth anniversary of the establishment of GATT 1947, which in actuality came into effect in 1948. It was noted that protectionism has been diminished: trade has become an engine of economic growth and a respected international organisation, the WTO, was created in the meanwhile. On the other hand, the WTO was criticised by environmentalists who believed that trade liberalisation could be harmful to the environment, especially when a country's environmental policies are either weak or non-existent. The WTO, they say, should not focus only in its fight against protectionism, but also help governments to manage the effects of the impact of the trade liberalisation on people and nature.

The Seattle Ministerial Conference took place in 1999 under intensive anti-globalisation protests, with the WTO being criticised for striking down labour standards and environmental rules.³³ Environmental issues have remained controversial in the WTO basically for two reasons. The first is that some developing countries fear that environmental measures may be used – deliberately or not – to create barriers to their exports. They also argue that they need economic growth to raise their own environmental standards. The second is that the work in the WTO and in its Committee on Trade and Environment suggests the risk of conflict arising between provisions in multilateral environmental agreements that permit trade measures and WTO rules.

It was agreed at the Doha Ministerial Conference³⁴ that took place in November 2001 to launch negotiations on certain issues related to trade and the environment. These negotiations were conducted in a Committee established for this purpose, the

³³ "The Road to Seattle". *Corporate Watch Magazine*, 9 (Autumn 1999), available at <http://www.corporatewatch.org.uk>.

³⁴ "There are widely differing views on the outcome of the Doha Ministerial. While some believe the Doha Agreements indicate that the WTO is turning a 'distributive organization', others argue that the Doha Agreements are a disaster for developing countries as the agenda for future trades talks reflects the interests of industrial countries alone." (Rajamani 2006:29)

Committee on Trade and Environment Special Session (CTESS).³⁵ The CTE³⁶ was also requested to give particular attention to three items of its work programme, namely:

- (i) the relationship between market access and environmental benefit,
- (ii) relevant aspects of the TRIPS Agreement, and
- (iii) environmental labelling.

In addition, the CTE³⁷ and the Committee on Trade and Development were asked to act as a forum in which the environmental and developmental aspects of the negotiations launched at Doha could be debated. Moreover, the 2001 Declaration of the Ministerial Conference in Doha, Qatar, provides a mandate for negotiations on a range of subjects and further work.³⁸ The original mandate had been refined by work at Cancun in 2003, Geneva in 2004 and Hong Kong in 2005.

The Ministerial Conference in Cancun, Mexico, in September 2003 recalled the progress made by the Special Session of the Committee on Trade and Environment in developing a common understanding of the concepts contained in its mandate in para. 31 of the Doha Ministerial Declaration, reaffirming the commitment to these negotiations. It was furthermore agreed that the CTESS should invite the secretariats of the multilateral environmental agreements (MEAs), the United Nations Environment

³⁵ The CTESS has been established to deal with the negotiations (mandate contained in paragraph 31 of the Doha Ministerial Declaration).

³⁶ "More recently, the 2001 Doha Ministerial Declaration has quickened the pace of CTE discussions. The Declaration contained a number of issues that have now come to the CTE for consideration. In the first place, the CTE, in special session, is the body mandated by the Trade Negotiations Committee with negotiating the environmental aspects of the Doha trade round. The inclusion of substantive negotiations on environmental issues within the WTO must be broadly welcomed as a positive move forward; the paragraph 31 of the Doha Ministerial Declaration, which contains the environmental negotiation mandate, expressly seeking 'to enhanc[e] the mutual supportiveness of trade and environment. Nevertheless, the scope of the environmental negotiations is strictly limited to a few discrete topics.'" (French, 2005:2005)

³⁷ The CTE deals with the non-negotiating issues of the Doha Ministerial Declaration [paras. 32 (focus on 3 items), 33 (environmental reviews) and 51 (forum on sustainable development)].

³⁸ "Nevertheless, the negotiations are again also limited in scope, with no mention being made of NGOs. As a document prepared by the WTO secretariat in 2002 notes, 'It would be inappropriate to allow NGOs to participate directly as observers in the proceedings of the CTE (...) primary responsibility for informing the public and establishing relations with NGOs lies at the national level'. Similar sentiments have been made in the other WTO bodies. At the present moment, NGO participation thus continues to be indirect and subject to severe restraint.'" (French 2005:206)

Programme (UNEP) and the United Nations Conference on Trade and Development (UNCTAD) to participate in its meetings, though limited to the duration of the negotiations as established in paragraph 31 of the Doha Ministerial Declaration. All those advances have been contested by Shaffer in his research, as he concludes that the CTE was established to protect trade concerns from potential environmental incursions as a reaction to the perception of environmental groups' growing success in promoting environmental regulation.³⁹

The Ministerial Conference in Hong Kong on environmental negotiations in December 2005 has once more reaffirmed the mandate in para. 31 of the Doha Ministerial Declaration. Deadlines were set out for the ongoing negotiations but so far the Doha round of negotiation about environmental questions and its implication in international trade has not been concluded. Among some of the topics in discussion are the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements, the information exchange, observer status, trade barriers on environmental goods and services, and fisheries subsidies.⁴⁰

³⁹ Thomas 2004:10 *apud* Holder and Lee 2007:311.

⁴⁰ "The work programme of the Doha Declaration: (...) Trade and environment (pars. 31-33). **New negotiations.** *Multilateral environmental agreements* Ministers agreed to launch negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements. The negotiations will address how WTO rules are to apply to WTO members that are parties to environmental agreements, in particular to clarify the relationship between trade measures taken under the environmental agreements and WTO rules. So far no measure affecting trade taken under an environmental agreement has been challenged in the GATT-WTO system. *Information exchange.* Ministers agreed to negotiate procedures for regular information exchange between secretariats of multilateral environmental agreements and the WTO. Currently, the Trade and Environment Committee holds an information session with different secretariats of the multilateral environmental agreements once or twice a year to discuss the trade-related provisions in these environmental agreements and also their dispute settlement mechanisms. The new information exchange procedures may expand the scope of existing co-operation. *Observer status.* Overall, the situation concerning the granting of observer status in the WTO to other international governmental organizations is currently blocked for political reasons. The negotiations aim to develop criteria for observership in WTO. *Trade barriers on environmental goods and services* Ministers also agreed to negotiations on the reduction or elimination of tariff and non-tariff barriers to environmental goods and services. Examples of environmental goods and services are catalytic converters, air filters or consultancy services on wastewater management. *Fisheries subsidies* Ministers agreed to clarify and improve WTO rules that apply to fisheries subsidies. The issue of fisheries subsidies has been studied in the Trade and Environment Committee for several years. Some studies demonstrate these subsidies can be environmentally damaging if they lead to too many fishermen chasing too few fish. Negotiations on these issues, including concepts of what are the relevant environmental goods and services, take place in 'special sessions' of the Trade and Environment Committee. Negotiations on market access for environmental goods and services take place in the Market Access Negotiating Group and Services Council 'special sessions'." (Consulted 26 May 2008 on: http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#environment)

1.3 Chapter conclusion

In conclusion, GATT entered into force without any mention of environmental aspects in spite of the increasing general interest in environmental issues. The assumption was that the environmental protection policies on international trade could hamper trade as well as constitute a new form of protectionism – in this case the so called “green protectionism”. In the beginning of 1970s the EMIT Group was established to examine the implications of environmental policies vis-à-vis international trade. The group was however never put in operation. Then in the next decade the term “sustainable development” was coined, providing a nexus between environmental protection and development. The EMIT Group was eventually convened for the first time in the 1990s and, notwithstanding the opposition of several developing countries, interaction between trade and environment policies was at large universally acknowledged, as the panel decision on *Tuna – Dolphin I case* in 1991 and increasing protests against the GATT (“GATTZILLA monster”) by environmentalists and other groups evidence.⁴¹ Furthermore, the creation of the WTO by means of the Marrakech Declaration, which incorporated concerns on raising the standards of living and the concept of sustainable development within the international trade organisations. WTO has been since more sensitive to environmental protection and improving the participation of the public through observers such as NGOs as well as disclosing formerly “classified” documents, expanding opportunities to discuss the relation between trade and environment by the civil society. The role of the WTO in helping to address environmental problems through trade is now much broader, just like the world’s environmental agenda has also expanded its interest in all directions.

In 2001, the Doha Round of negotiations began. In a speech at Yale University on 24 October 2007, the Director-General Pascal Lamy called them The Green Rounding. It was the first ever round of negotiations to encourage members to conduct environmental reviews at the national level. WTO members were mandated to explore

⁴¹ Cf. note 148 for more details about how anti-GATT protesters had posters of a giant monster called as GATTZILLA printed out to express their disapproval.

the relationship between WTO rules and international environmental treaties, to make clean technology (e.g. biodiesel, solar panels, air filters etc.) accessible to the poor countries, they should not penalise environmental goods through tariffs, to reduce fisheries subsidies, i.e. they must accomplish the entire Doha Round in order to “green” the WTO even further. Notwithstanding, this movement aiming at “greening” the WTO by means of Doha’s development objectives has been disapproved by some environmental advocates that suppose they are doomed to remain aspirational language rather than materialised deeds.⁴²

⁴² For example: WTO does not offer a satisfactory response to the trade-environment challenge (cf. Richason and Wood 2006:394). There has been little progress in the CTE on the need for rules to enhance positive interaction between trade and environment (Birnie and Boyle 2002: 702-3).

CHAPTER 2
**APPLICABILITY OF ARTICLE XX(B)
AND (G) OF GATT 1994**

2.1 Introduction

This chapter will discuss the rules provided for in GATT 1994, especially Article XX(b) and (g), allowing WTO Members to adopt trade-restrictive measures aimed at protecting the environment, subject to certain specified conditions. Certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby have an impact on WTO rights of other Members. They may violate basic trade rules (substantive rules), such as the non-discrimination obligation (Articles I and III of GATT) and the prohibition of quantitative restrictions (Article XI). Under WTO rules, as confirmed by WTO jurisprudence, Members can adopt trade-restrictive measures aimed at protecting the environment and human health, subject to certain specified conditions that otherwise would be considered GATT-inconsistent measures. This chapter discusses:

- Article XX of GATT 1994: general exceptions, paras. (b) and (g);
- Article XX(b): necessity to protect human, animal or plant life or health;
- Article XX(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption measures are made effective in conjunction with restrictions on domestic production or consumption;
- Criteria for the application of the introduction part of Article XX (the so called *chapeau*)

Summaries of key cases regarding the applicability of Article XX(b) and (g) can be found as attachments to this essay (cases 1 to 8).

2.2. Article XX of GATT 1994 – General exceptions, paras. (b) and (g)

Article XX paras. (b) and (g) provide reconciliation between trade obligations and environmental interests implemented because of environmental policies. Environmental interests embrace the protection of human, animal and plant life or health and, in addition, the conservation of exhaustible natural resources. Such exceptions allow Members, under specific conditions, to give priority to environmental goals over trade liberalisation and rules on market access.

The exceptions under Articles XX(b) and (g) are of particular relevance to environmental and human health protection.⁴³ Article XX(b) and (g) are grounds for justification related to the protection of environmental interests for measures that are otherwise inconsistent with the provisions of GATT 1994. Such exceptions may be invoked to justify GATT-inconsistent measures.

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;

...

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

...

The panels and the Appellate Body established a method to apply Article XX to address a defence of GATT-inconsistent measures. The defence of the GATT-inconsistent measure involves issues such as burden of proof, the sequence of steps for application of Article XX, the policy choice and fulfilment of the requirements of paragraphs in Article XX as well as its introductory clause known as *chapeau*.

⁴³ “Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to environmental and human health protection: Articles XX(b) and (g) allow WTO members to justify GATT-inconsistent measures if these are either necessary to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources, respectively.” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm)

In relation to the burden of proof, the rule is that the party who asserts the affirmative of a particular claim or defence has to prove it. In the context of applicability of Article XX, the party invoking such exceptions bears the burden of proving that the GATT-inconsistent measure – i.e. the challenged measure – meets the requirements contained in that [Article XX] provision.⁴⁴

Further, the party invoking an exception under Article XX has to prove first that the inconsistent measure comes within the scope of one of the prescribed exceptions and also that the measure complies with the *chapeau* of Article XX.⁴⁵

The sequence of steps as cited was not pacific between the panel and the Appellate Body. The understanding of a panel, *a priori*, was the reverse process, i.e. first to analyse the requirements of the *chapeau*. Apparently, the panel did not see the necessity to establish that sequence of steps; the panel supported that asseveration stating all conditions contained in the introductory clause apply to any exception in Article XX.

However, the Appellate Body disagreed with the panel and reasoned that the sequence of steps in applying Article XX is: 1) to verify whether the GATT-inconsistent

⁴⁴ “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: 1) that the inconsistent measure comes within the scope of one exception; and 2) 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.’” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFD%2FDOCUMENTS%2F%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

⁴⁵ “The defending party must demonstrate that the measure: first falls under at least one of the ten exceptions – paras. (a) to (j) – listed under Article XX; and second 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 characterisation of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX.’” (*Ibid.*)

measure falls within one of the exceptions under Article XX; and 2) then confirm whether the measure also meets the requirements of the *chapeau*. This approach, in accordance to Appellate Body reasoning, is fundamental to prevent the abuse or misuse of the listed exceptions in Article XX. Moreover, a GATT-inconsistent measure that falls within one of the exceptions listed in Article XX does not automatically meet the requirements of the *chapeau* of Article XX.⁴⁶

The harmonisation of the sequence of steps regarding the applicability of Article XX between the panels and the Appellate Body was reached in the *EC – Asbestos case*. The panel in that case recognised the sequence of steps: 1) first, to examine whether the measure falls within the scope of one of the listed exceptions in the Article XX; and 2) then to consider whether the challenged measure satisfied the conditions of the *chapeau* of Article XX.⁴⁷

Therefore, the correct sequence of steps in defence of a GATT-inconsistent measure is to verify whether the challenged measure meets the criteria of one of the Article XX exceptions and after that to verify whether it also fulfils the requirements of the *chapeau* of Article XX, the introductory clause. This approach is justified since the

⁴⁶ “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.’ The Appellate Body said: ‘The sequence of steps indicated above [reference to the *US – Gasoline case*] 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. 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 [...]. When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies.’ [...] 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*.” (*Ibid.*)

⁴⁷ “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.” (*Ibid.*)

role of the *chapeau* is to analyse the *manner* in which the measures are applied, i.e. the application of measures, not whether the measures themselves are as such justified under some paragraphs of the Article XX.⁴⁸ In order for a GATT-inconsistent measure to fall under one of the exceptions in paras. (b), (d) or (g) of Article XX it must meet the requirements contained in those provisions.

Under Article XX(b), for a GATT-inconsistent measure to be justified, it must be shown: 1) that the policy in respect of the measure is designed to protect human, animal, or plant life or health; 2) that the GATT-inconsistent measure is *necessary* to fulfil the policy objective; and 3) that the GATT-inconsistent measure was applied in conformity with the requirements of the introductory clause of Article XX (the *chapeau*).

Under Article XX(d), for a GATT-inconsistent measure to be justified, the party must show: 1) that the measure must be designed to *secure compliance* with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; 2) that the measure must be *necessary* to secure such compliance.⁴⁹

Finally, under Article XX(g), the GATT-inconsistency test follows three-steps: 1) the measure is concerned with the conservation of exhaustible natural resources; 2) the measure must be related to the conservation of exhaustible natural resources; and 3) the measure must be effective in conjunction with restrictions on domestic production or consumption. Moreover the GATT-inconsistent measure must as always be in conformity with the requirements of the introductory clause of Article XX.

The applicability of Article XX urges that the policy goal must be identified within the policies described in GATT 1994 – i.e. to protect human, animal or plant life or health, or to secure compliance with laws or regulations which are not inconsis-

⁴⁸ Cf. Trebilcock and Howse 2005:530-34.

⁴⁹ “In the *Korea – Various Measures on Beef* case, the Appellate Body noted that the party invoking para. (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 Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.” (*Ibid.*)

tent with the provisions of the GATT 1994, or to conserve exhaustible natural resources – after that, the requirements under Article XX(b), (d) and (g) must be fulfilled, i.e. the elements of *necessity* for paras. (b) and (d), or of *relation to* and *in conjunction with* for para. (g).⁵⁰

2.2.1 Article XX(b): necessity to protect human, animal or plant life or health

Article XX(b) allows a Member to give priority to public health or environmental policies over trade liberalisation objectives,⁵¹ since that measure is necessary to achieve those goals⁵² within the meaning of Article XX(b).

Important decisions reached by the Panel of GATT and the Appellate Body of WTO in cases brought before them, such as in *US – Gasoline*, *Thailand Cigarettes*, *EC – Asbestos*⁵³ and *Brazil – Retreaded Tyres* cases established concepts and approaches to interpretation and applicability of the Article XX(b) that resulted in the “necessity test”.

⁵⁰ “The first step in the application of Article XX exceptions is necessity 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. 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), or of relating to and in conjunction with for paragraph (g).” (*Ibid.*)

⁵¹ “In *Thailand’s – Cigarettes* case the Panel examined whether Thailand’s import prohibition of cigarettes – inconsistent with Article XI of the GATT 1947 – was justified under Article XX(b) and ruled: “The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalisation; however, for a measure to be covered by Article XX(b) it had to be ‘necessary’.” (*Apud* Bossche 2006:604)

⁵² “At the same time, we agree with the European Communities that the importance of human life and health in and of itself is not sufficient to establish that a measure is necessary for the purposes of Article XX(b). [...] Rather, we are required to assess whether the challenged measures, i.e. the specific measures chosen by Brazil in order to address this important objective, is necessary. In making this assessment, we must consider in particular the trade-restrictiveness of the challenged measure and its contribution to the achievement of the objective, in light of the availability to Brazil of any alternative measures.” (Cf. Panel Report in *Brazil – Retreaded Tyres* case, para. 7.210)

⁵³ With *EC – Asbestos* case for the first time an “environmental” measure passed the necessity test. Cf. note 44.

The “necessity test”⁵⁴ is an approach developed to determine if a GATT-inconsistent measure may still be justified under the exception prescribed in Article XX(b). That procedure permits to identify the necessity of the measures that are otherwise inconsistent with the provisions of GATT 1994. The “necessity test” consists of two parts: 1) the policy objective pursued by the GATT-inconsistent measure must be the protection of life or health of humans, animals or plants; and 2) the measure must be necessary to fulfil those policies objectives.⁵⁵

There are some examples of the policies’ objectives pursued by the measures recognised as dealing with Article XX(b) – i.e. measures that fulfilled the first element of the “necessity test” – such as: policies against the consumption of cigarettes,⁵⁶ to protect dolphin life and health,⁵⁷ to reduce air pollution resulting from the consumption

⁵⁴ “When deciding whether or not an otherwise GATT-inconsistent measure can be saved under an Article (a), (b) or (d) exception, panels must determine whether or not ‘necessary’ to fulfill the legitimate objectives listed under the respective paragraphs. Several GATT and WTO panels have interpreted the term ‘necessity’ within the context of relevant Article XX exceptions. However, the exact scope and meaning of the necessity test as interpreted by GATT and, later, by WTO tribunals remain unclear.” (Bernasconi-Osterwalder *et al.* 2006:149)

⁵⁵ “The Panel in *US – Gasoline case* stated that the US as the party invoking Article XX(b) had to establish: ‘1) That the policy in respect of the measures for which the provisions was invoked fell within the range of policies designed to protect human, animal or plant life or health; and: 2) That the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objectives.’” (Bossche 2006:603)

⁵⁶ “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 liberalisation.” (*Ibid.*)

⁵⁷ “In the two *Tuna* disputes, the panel and the parties accepted – implicitly in *US – Tuna (Mexico)*, explicitly in *US – Tuna (EEC)* – 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).’” (*Ibid.*)

of gasoline,⁵⁸ to reduce the risk posed by asbestos fibres,⁵⁹ to reduce the incidence of life-threatening diseases such as dengue fever and malaria from the risks posed by the accumulation of waste tyres.⁶⁰

While WTO members have autonomy to determine their own environmental policies, their environmental objectives⁶¹, and their environmental legislation. However their autonomy is still restricted by the need to respect the requirements of the

⁵⁸ “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).” (*Ibid.*)

⁵⁹ “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.’ The panel subsequently found that ‘the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health [...]’, 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.’ 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,’ 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.’ (*Ibid.*)

⁶⁰ “We first recall that we have found the protection of human, animal, and plant life and health against risks arising from the accumulation of waste tyres to be an important objective. Specifically, we have found that the objective of protecting human life and health against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree.” (Cf. Panel Report in *Brazil – Retreaded Tyres* para. 7.210. Consulted 7 May 2008 on: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm)

⁶¹ “Environmental policies covered by Article XX/ WTO members’ autonomy to determine their own environmental objectives has been reaffirmed on a number of occasions (e.g. in *US – Gasoline*, *Brazil – Retreaded Tyres*). The Appellate Body also noted, in the *US – Shrimp case*, that conditioning market access on whether exporting members comply with a policy unilaterally prescribed by the importing member was a common aspect of measures falling within the scope of one or other of the exceptions of Article XX. In past cases, a number of policies have been found to fall within the realm of these two exceptions: policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing risks to human health posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tyres [under Article XX(b)]; and policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air [under Article XX(g)].” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

GATT.⁶²

The application of the “necessity test” does not take into consideration the necessity of the policy objective as such but rather “the necessity of the measure to achieve those objectives”.⁶³ Therefore, the conditions set out in Article XX(b) do not question the necessity of the environmental policies adopted by a WTO member. The policies must however be implemented through measures consistent or at least justifiable with GATT provisions.⁶⁴

It was also noted in the *EC – Asbestos case* that a WTO member is not compelled

⁶² “In the *US Gasoline case* the Appellate Body stated: ‘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 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 co-ordinating 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.’” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on:

http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFD%2FDOCUMENTS%2F%2F%2FCTE%2FW%203%2FEDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

⁶³ “The Panel stated in the *US – Gasoline case*: ‘It was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that the imported gasoline be effectively prevented from benefiting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product. It was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX(b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement.’” (Bossche 2006:605)

⁶⁴ “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 noted that it was the measure and not the policy goal that had to meet the requirements under Article XX. The panel noted in the *US – Gasoline case* 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.’” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on:

http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFD%2FDOCUMENTS%2F%2F%2FCTE%2FW%203%2FEDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

when setting health policies to take into consideration the majority scientific opinion if acting in good faith. Thus, in determining the “necessity” of a GATT-inconsistent measure it is not necessary to take into account scientific evidences, i.e. it is not necessary to investigate first the risks exhaustively.⁶⁵ The second element of the “necessity test” will be achieved if the GATT-inconsistent measure is “necessary” to fulfil policies’ objectives designed to protect human, animal or plant life or health.

The meaning of the word “necessary” was carefully studied by the Appellate Body in the *Korea – Various Measures on Beef* case. It was observed that the scope of the word “necessity” is not limited to what is “indispensable” or “absolutely necessary” or “inevitable”. Measures considered “indispensable” or “absolutely necessary” or “inevitable” to secure the implementation of the policies’ objectives certainly fulfil the requirements of Article XX(d), however other measures also may fall within the ambit of this exception. The term “necessity” refers to a range of degrees of necessity, so within those degrees it may mean from “indispensable” to “making a contribution to”. After all these considerations, it was concluded that the meaning of “necessary” is located significantly closer to the pole “indispensable” than to the opposite pole of sim-

⁶⁵ “Appellate Body stated: ‘In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respect opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the “preponderant” weight of the evidence.’” (Bossche 2006:607). Also: “In its reasoning on ‘necessity’ and least-trade-restrictiveness, the Appellate Body placed considerable emphasis on examining ‘reasonably available alternatives’, in light of existing scientific evidence, as the basis of its finding on the applicability of paragraph (b) of Article XX. The Appellate Body also accepted that a country could seek to halt the spread of a highly risky product while allowing the sue of less risk products. Stated differently, a country may single out a product and adopt measures to address its health risks, without first exhaustively investigating the risks posed by substitutes.” (Bernasconi-Osterwalder *et. al.* 2006:81)

ply “making a contribution to”.⁶⁶

To determine the degree of “necessity”, the Appellate Body in *Korea – Various Measures on Beef* case examined situations where the claim may be that the measure is indispensable, i.e. where the measure is the only available and situations where a Member may be able to justify its measure as necessary within the meaning of Article XX(d). The Appellate Body concluded that a measure with relatively slight impact upon imported products might more easily be considered as “necessary” than a measure with intense or broader restrictive effects.⁶⁷ The range of degrees of necessity in Article XX(d) may be adopted to determine the “necessity” in Article XX(b)⁶⁸. The approach to identify the “necessity” requirement is the same in both paragraphs (b) and (d) of the Article XX.

In *EC – Asbestos* case the Appellate Body recalled the findings of the *Korea-Beef* case and considered the extent to which the alternative measure contributed to the realisation of the end pursued and the importance of the value sought by the measure in

⁶⁶ “*Korea – Various Measures on Beef*, Appellate Body Report, 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].’ (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on:

http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDDDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

⁶⁷ *Ibid.*

⁶⁸ “In accordance with pre-WTO/GATT cases and *Korea – Beef*, the Appellate Body reaffirmed that a Member was free to choose its level of protection (*EC – Asbestos* AB report, paragraph 174). It also implicitly concluded that the balancing test laid out in *Korea – Beef*, with respect to Article XX(d), was also applicable under Article XX(b).” (Bernasconi-Osterwalter *et al.* 2006:150)

issue.⁶⁹ Further in the *EC – Asbestos case*, it was examined whether it would have “a less trade-restrictive measure” reasonably available to obtain the level of protection⁷⁰ pursued. Moreover, other Members cannot challenge the level of protection chosen – they can only argue that the measure is clearly designed and apt to achieve that level of health protection.⁷¹

WTO Members can establish their environmental objectives and choose a high level of protection but they must prove that the measure chosen is necessary to achieve those objectives, meaning that there does not exist an alternative measure reasonably available being “less-trade restrictive”.⁷² It was also noted that there was some evolution in the interpretation of the “necessity” requirement from the “less-

⁶⁹ “We indicated in the *Korea – Beef* that one aspect of the weighing and balancing process [...] comprehended in the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure contributes to the realisation of the end pursued. In addition, we observed, in that case, that “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to accept as “necessary” measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by the asbestos fibres. The value pursued is both vital and important in the highest degree.” (Appellate Body Report, *EC – Asbestos case*, para.172)

⁷⁰ “[...] It is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a “halt” to the spread of asbestos-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection.” (Appellate Body Report, *EC – Asbestos case*, para.168, *apud* Holder and Lee 2007:273)

⁷¹ Cf. Bossche 2006:605.

⁷² “In this instance, we have found that the challenged measure, being an import ban, was by design as trade-restrictive as can be in respect of the products that it covers, i.e. retreaded tyres. We note that the European Communities argued that this, in itself, made it ‘impossible to consider the challenged measure as “necessary”.’ [...] We do not exclude, however, that there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective.” (*Brazil – Retreaded Tyres*, Panel Report, para. 7.211. Consulted 7 May 2008 on: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm)

inconsistent”⁷³ approach to “less-trade restrictive” one.⁷⁴

Therefore, a GATT-inconsistent measure is considered necessary – i.e. the measure is located significantly closer to the meaning of the “indispensable” than to the opposite pole of simply “making a contribution to” and may be justified – only if there are no alternative measures consistent with the GATT or being less trade-restrictive⁷⁵ and reasonably available.⁷⁶ The determination of whether the measure is “necessary” under Article XX(b) or (d) also involves a weighing and balancing process⁷⁷, considerations of a series of factors such as the contribution made by the measure, the importance of the common interests or values protected, and the impact of the measure

⁷³ “*Thailand – Cigarettes case*. ‘The panel concluded [...] that the import restriction 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.’” (*Apud* Bossche 2006:604)

⁷⁴ “[...] instead of the requirement in *Thailand–Cigarettes case* that the alternative measure needs to be GATT-consistent or less inconsistent, the Appellate Body in *EC – Asbestos [case]* puts forward another requirement, namely, that the alternative measure must be less trade-restrictive than the measure at issue. In summarising the test under Article XX(b), the Appellate Body held in the *EC – Asbestos [case]*: “The [...] question [...] is whether there is an alternative measure that would achieve the same end that is less restrictive of trade than a prohibition.” (*Ibid.* 2006:607)

⁷⁵ “The ‘least-trade-restrictive approach’ has been a major focus of criticism, mainly by those that claim that it fails to give adequate consideration to societal values other than trade.” (Bernasconi-Osterwalder *et al.* 2006:149)

⁷⁶ “The Panel recalls the Appellate Body’s statement that a ‘necessary’ measure is located significantly closer to the pole of ‘indispensable’ than to the opposite pole of ‘simply ‘making a contribution to’. As we have determined above, an import ban on retreaded tyres has the potential to reduce the amount of waste tyres generated on Brazil’s territory and, hence, can contribute to the realisation of the stated objective, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres. Moreover, our examination of the alternatives identified by the European Communities suggests that no alternative measure is reasonably available that could avoid the generation of the specific risks arising from imported retreaded tyres. Alternatives that would involve management or disposal of the tyres once imported do exist, but raise their own concerns, either because they lead to the type of risks that Brazil seeks to avoid in the first place (unsafe stockpiling and emissions from incineration) or because they would not meet the level of protection sought by Brazil. The safest methods (material recycling) are useful but insufficient on their own to absorb the entire amount of waste from end-of-life tyres.” (Cf. Panel Report in *Brazil – Retreaded Tyres*, para. 7.212. Consulted 7 May 2008 on: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm)

⁷⁷ “In relation to *Korea – Beef*: (...) The Appellate Body created a three factor balancing test for deciding whether or not a measure is necessary when it is not per se indispensable. The three factors to be considered are: (i) the contribution made by the (non-indispensable) measure to the legitimate objective; (ii) the importance of the common interests or values protected; and (iii) the impact of the measure on trade. (...) the weighing and balancing process also established the answer to the question of whether or not there was an alternative, less trade restrictive, measure that would achieve the same end as the contested measure.” (Bernasconi-Osterwalder *et al.* 2006:149-50)

on trade. A member can only be reasonably expected to employ an alternative measure when that measure is at least as effective in achieving the policy objective pursued.⁷⁸ An alternative measure that is merely theoretical in nature may not be considered reasonably available in situations where the Member is not able to take an alternative measure or in situations where the measure imposes an undue burden on that Member such as by resulting in prohibitive cost or substantial technical difficulties.⁷⁹

A GATT-inconsistent measure that satisfies the “necessity test” was already explained, such a measure also has to be justified under the requirements of the introductory clause (chapeau) of Article XX.

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

The purpose of Article XX(g) is to allow WTO members to take GATT-inconsistent measures to protect and conserve exhaustible natural resources that fall within any of its requirements.

A consistent theory on the applicability of Article XX(g) was developed by the Appellate Body in the *US – Gasoline case* and the *Shrimp – Turtle case*. Three conditions must be satisfied to determine if the GATT-inconsistent measure falls under this exception: 1) the measure must involve the conservation of “exhaustible natural resources”; 2) it must “relate to” the conservation of exhaustible natural resources; and

⁷⁸ “An alternative measure may be found not to be ‘reasonably available,’ however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a ‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.” (*Ibid.*, para. 7.158)

⁷⁹ “*US–Gambling* (which involved the GATS), the Appellate Body found that an alternative measure that is merely theoretical in nature, may not be considered reasonably available (*US – Gambling* AB report, paragraph 308). This would include situations where the responding Member is not capable of taking an alternative measure or situations where the measure imposes an undue burden on that Member (e.g. prohibitive cost or substantial technical difficulties).” (Bernasconi-Osterwalder *et al.* 2006:150)

3) the measure must be made “effective in conjunction with” the restrictions on domestic production or consumption.

A GATT-inconsistent measure with the aim of protecting exhaustible natural resources can be provisionally justified if it attends the three requirements of Article XX(g), as listed above. However, fulfilling those requirements is not enough to guarantee the validity of that measure.⁸⁰ A fourth element is requested for the measure to be declared lawful: that is, the measure must comply further with the conditions of the *chapeau* of Article XX. A measure could *a priori* be previously justified under the exception of para. (g) of Article XX but could still not meet the requirements of the introductory clause, the *chapeau*, of that Article.⁸¹

To satisfy the first requirement a GATT-inconsistent measure must therefore involve the conservation of “exhaustible natural resources”.

Measures recognised by a panel and the Appellate Body as dealing with the conservation of exhaustible natural resources are: the conservation of tuna stocks,⁸² of

⁸⁰ “In the report of the 1998 *Shrimp – Turtle case*: “Although provisionally justified under Article XX(g) [...], if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses – the ‘chapeau’ – of Article XX.” (Holder and Lee 2007:275)

⁸¹ “Article XX(g) is an important GATT-exception designed to allow WTO members to take action to conserve exhaustible natural resources. It contains four separate requirements: (i) that the measures for which the provision is invoked concern ‘exhaustible natural resources’; (ii) that the measures are related to the ‘conservation’ of those resources; (iii) that the measures are made effective in conjunction with restriction on domestic production or consumption; and (iv) that the measures are applied in conformity with the requirements of the *chapeau* of Article XX.” (Birnie and Boyle 2002:702)

⁸² “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.’ In the *Canada – Salmon and Herring case*, the panel agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources.’ In *US – Tuna (Mexico) case* the parties and the panel seem to have implicitly agreed that dolphins are an exhaustible natural resource, whereas in *US – Tuna (EEC) case* 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.’ (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on:

http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

salmon and herring stocks,⁸³ of petroleum,⁸⁴ of clean air⁸⁵ and of sea-turtles.⁸⁶

The meaning of “exhaustible natural resources” involves “non-living, living, renewable and non-renewable resources”.⁸⁷ The reasoning of including “living” natural resources is that in spite of their capacity of reproduction they can become “exhaustible”.⁸⁸ So, if the living natural resources sought to be conserved by a GATT-

⁸³ Cf. footnote 32 above.

⁸⁴ “In *US – Automobiles case* 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).’ (*Ibid.*)

⁸⁵ “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 case*]. 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).’ (*Ibid.*)

⁸⁶ “In the *US – Shrimp case* the parties disagreed as to whether sea turtles could be considered ‘exhaustible nature resources’ within the meaning of para. (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.’ (*Ibid.*)

⁸⁷ “The application of Article XX(g) is restricted to measures relating to the conservation of ‘exhaustible natural resources’. This term has been scrutinized by both pre-WTO panels and by the Appellate Body in cases involving biological resources such as fish stocks or endangered turtles, and in cases involving non-living resources such as clean air. The Appellate Body has interpreted the term ‘exhaustible natural resources’ to include living, renewable and non-renewable resources.” (Bernasconi-Osterwalder *et. al.* 2006:79) And also: “Interestingly, the phrase ‘exhaustible natural resources’ under Article XX(g) has been interpreted broadly to include not only ‘mineral’ or ‘non-living’ resources but also living species which may be susceptible to depletion, such as sea turtles. To support this interpretation, the Appellate Body noted, in the *US – Shrimp case*, that modern international conventions and declarations made frequent references to natural resources as embracing both living and non-living resources. Moreover, in order to demonstrate the exhaustible character of sea turtles, the Appellate Body noted that sea turtles were included in Appendix 1 on species threatened with extinction of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (‘CITES’).” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

⁸⁸ “In the report of the 1998 *Shrimp – Turtle I case*. ‘Textually, Article XX(g) is not limited to the conservation of ‘mineral’ or ‘non-living’ natural resources. The complainants’ principal argument is rooted in the notion that ‘living natural resources’ are ‘renewable’ and therefore cannot be ‘exhaustible’ natural resources. We do not believe that ‘exhaustible’ natural resources and ‘renewable’ natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though, in principle, capable of reproduction and, in the sense, ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as ‘finite’ as petroleum, iron and other non-living resources.’” (Holder and Lee 2007:274)

inconsistent measure are “exhaustible”, that measure can be justifiable under Article XX (g). Moreover, the living natural resources do not need to be rare or potentially “exhaustible”. Almost all living or non-living natural resources can be protected under Article XX (g), especially those undertaken by a multilateral trade.⁸⁹ Therefore, the “exhaustibility” of a living natural resource is unquestionable if it is protected by a multilateral treaty.⁹⁰

The term “exhaustible natural resources” described in the Article XX(g) must be interpreted in accordance to the concerns of the protection and conservation of the environment.⁹¹ The term “natural resources” is not static in its content and it has been interpreted by the concept of evolutionary interpretation of terminology.⁹²

The second element of Article XX(g) – “relating to” the conservation of exhaustible natural resources relies on the relationship between the GATT-inconsistent measure and the policy goal it intends to serve. The measure has to be primarily or essentially aimed at the conservation of an exhaustible natural resource to be considered as “relating to” conservation within the meaning of Article XX(g).

The first application of the “relating to” clause was made in *Canada - Salmon and Herring case*. The panel decided to examine the meaning of “relating to” in the light of

⁸⁹ “The first issue that must be addressed under article XX(g) is whether the particular trade measure concerns the conservation of exhaustible natural resources. The Appellate Body has taken a generous view of this matter: a ‘resource’ may be living or non-living, and it need not be rare or endangered to be potentially ‘exhaustible’. Thus, dolphins, clean air, gasoline, as sea turtles all qualify. Under this expansive interpretation, virtually any living or non-living resource, particularly those addressed by multilateral environmental agreements, would qualify.” (Birnie and Boyle 2002:709)

⁹⁰ “In the report on the 1998 *Shrimp – Turtle case*. The exhaustibility of sea turtles would in fact have been very difficult and controversial since all of the seven recognised species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (‘CITES’). The list in Appendix 1 includes ‘all species threatened with extinction which are or may be affected by trade.’ (Holder and Lee 2007:275)

⁹¹ “In the report on the 1998 *Shrimp – Turtle case*. 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 the contemporary concerns of the community of nations about the protection and conservation of the environment.” (*Ibid.* 2007:274)

⁹² Cf. Louka 2006:390, the term “natural resources” has been modified gradually as species have changed over time as well as the environment, with some species that were considered renewable in past times are now regarded as endangered and have therefore lost their status as renewable. Such changes are to be taken into account when interpreting Article XX(g).

the context in which Article XX(g) appears in the GATT and of the purpose of that provision.⁹³

Article XX(g) does not establish how the GATT-inconsistent measure must be related to the conservation of exhaustible natural resources.⁹⁴ It is therefore questionable whether any relationship with conservation is enough for a trade GATT-inconsistent measure to meet the requirements of Article XX(g) or whether a particular relationship is required.

It remains doubtful whether Article XX(g) has the commitment to secure the implementation of the conservation of exhaustible natural resources. The purpose of including Article XX(g) as part of the GATT has *not* widened the scope for measures serving trade policy purposes but merely ensured that the commitments under GATT do not hinder the pursuit of policies for the conservation of exhaustible natural resources.⁹⁵

A measure does not have to be necessary⁹⁶ or essential to the conservation of an exhaustible natural resources, it has to be “primarily aimed” at the conservation of an

⁹³ Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002, p. 16. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2FEDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203.

⁹⁴ “GATT Panel in *Canada-Herring and Salmon case* observed that: Article XX(g) does not state how the trade measures are to be related to the conservation... This raises the question of whether any relationship with conservation... [is] sufficient for a trade measure to fall under Article XX(g) or whether a particular relationship... [is] required/... The Panel noted some of the subparagraphs of Article XX state that the measure must be ‘necessary’ or ‘essential’ to the achievement or 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 has not widened the scope for measures serving trade policy purposes but merely to ensure that the requirements 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 exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered ‘relate to’ conservation within the meaning of Article XX(g). [...] Appellate Body in *US – Gasoline*. All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be ‘primarily aimed at’ the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g).” (Bossche 2006:611-12)

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* Also: “The meaning of ‘relating to’: The Appellate Body has made clear distinction between the term ‘necessary’, used in paragraph (b), and the term ‘relating to’, used in paragraph (g).” (Bernasconi-Osterwalder *et al.* 2006:80)

exhaustible natural resources to be considered as “relating to” conservation within the meaning of Article XX(g). A GATT-inconsistent measure must therefore be “primarily aimed” at the conservation of exhaustible natural resources to be considered as “relating to” conservation and for it to fall as such under Article XX(g).

The meaning of “primarily aimed” was progressively complemented by introducing new elements to determine whether a measure was “related to” the conservation of exhaustible natural resources⁹⁷. A restrictive trade measure supported by “unpredictable conditions” cannot be considered as being “primarily aimed”.⁹⁸ When a WTO Member establishes a measure to force other ones into changing their policies and the effectivity of that measure is conditioned by whether the changes could occur, such measure cannot be “primarily aimed” at the conservation of exhaustible natural resources.⁹⁹ A measure that does not promote the objectives of conservation of an exhaustible resource cannot be considered as being “primarily aimed” at such conservation of exhaustible natural resources.¹⁰⁰ A measure to be considered to be “related to” the conservation of natural resources must demonstrate a “substantial relationship” with it. It is insufficient to be “merely incidentally” or “inadvertently aimed” at the

⁹⁷ “In the *US – Tuna (Mexico)*, *US – Tuna (EEC)*, *US – Automobiles*, *US – Gasoline* and *US – Shrimp* cases, 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.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002 p. 17. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&cardoc=3&popTitle=WT%2FCTE%2FW%2F203)

⁹⁸ “In the *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.’” (*Ibid.*)

⁹⁹ “In the *US – Tuna (EEC)* case 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).’” (*Ibid.*)

¹⁰⁰ “In the *US – Automobiles* case 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).’” (*Ibid.*)

conservation of exhaustible natural resources.¹⁰¹

The meaning of “relating to” in the Article XX(g) is that a GATT-inconsistent measure can be justified to protect exhaustible natural resources if that measure exhibits a “substantial relationship” with, and is not “merely incidentally” or “inadvertently aimed” at the conservation of exhaustible natural resources.¹⁰²

Even though the conclusion that the meaning of “relating to” is “primarily aimed”, this meaning brought doubts as to whether the interpretation of “related to” is correct, because the terms are not synonymous and “primarily aimed” is not treaty language.¹⁰³ Besides that, to attend to the requirement “relating to” is not easy. The WTO Members have difficulty in revealing that a GATT-inconsistent measure is directly connected with the policy of conservation of exhaustible natural resources.¹⁰⁴

The third element of Article XX(g) is “made effective in conjunction with re-

¹⁰¹ “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’. 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’. (...) 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’. 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.’” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002 p. 17. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFD%2FDOCUMENTS%2FCTE%2FCTE%2FW%203%2FEDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

¹⁰² “Article XX(g) requires ‘a close and real’ relationship between the measure and the policy objective. The means employed, i.e. the measure, must be reasonably relate to the end pursued, i.e. the conservation of an exhaustible natural resource. A measure may not be disproportionately wide in its scope or reach in relation to the policy objective pursued.” (Bossche 2006:613)

¹⁰³ “Cf. Appellate Body in the *US – Gasoline case*. ‘Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase ‘primarily aimed at’ is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).’” (*Ibid.* 2006:612)

¹⁰⁴ “The second ‘related to’ element of Article XX(g) has proved more difficult to apply. Although a trade measure does not have to be ‘necessary’ (as in Article XX(b)) to natural resource conservation, the WTO/GATT panels have interpreted ‘relating to’ to mean that it must be ‘primarily aimed at’ conservation. Thus phrased, this requirement has proved a difficult obstacle. The question arises whether the ‘primarily aimed at’ interpretation of ‘related to’ is correct. Certainly, these phrases are not synonymous. The ‘primarily aimed at’ requirement seems to be an unwarranted amendment of Article XX.” (Birnie and Boyle 2002:709)

restrictions on domestic production or consumption”. To interpret and give the ordinary meaning in the context of that subparagraph, the Appellate Body in the *US – Gasoline case* stated that “made effective” means that the act or regulation that restricts the trade to protect the exhaustive natural resources must be “in force” and that “made effective in conjunction with restrictions on domestic production or consumption” means that the act or regulation must be in force in conjunction with restrictions not just in respect to imported products, but also with respect to domestic ones. In short, the third element of Article XX(g) is an “even-handedness” requirement.¹⁰⁵ Also, the terms “made effective in conjunction with restrictions on domestic production” should not be interpreted to establish an empirical effects test, because it is generally difficult to determine causation and a substantial period of time may have to elapse before effects of the measure can be observed.¹⁰⁶

The measure in force – government act or regulation – must impose restriction on imported and domestic products in such a manner that they are treated in even-handedness. Even so, Article XX(g) does not require imported and domestic products to be treated equally, but requires that they have an even-handedness treatment.¹⁰⁷

¹⁰⁵ “Appellate Body in *US – Gasoline case*: the ordinary meaning of ‘made effective’ when used in connection with a measure –a government act or regulation– may be seen to refer to such measure being ‘operative’, as ‘in force’, or as having ‘coming into effect’. Similarly, the phrase ‘in conjunction with’ may be read quite plainly as ‘together with’, or ‘jointly with’. 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 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.’ (Bossche 2006:613)

¹⁰⁶ “In *US – Reformulated Gasoline*, the Appellate Body further explained that the requirement that the measure be ‘made effective in conjunction with restrictions on domestic production or consumption’ should not be interpreted to establish an empirical ‘effects test’ (US – Reformulated Gasoline AB report, section III.C). The Appellate Body gave two main reasons for its decision: that it is generally difficult to determine causation and that a substantial period of time may have to elapse before effects of the measure can be observed.” (Benasconi-Osterwalder *et.al.* 2006:80)

¹⁰⁷ “The Appellate Body in *US – Gasoline case*: ‘There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment –constituting real, not merely formal, equality of treatment– it is difficult to see how inconsistency with Article III:4 would have arisen in the first place.’” (Bossche 2006:613)

Therefore, the third element of Article XX(g) is the requirement of “even-handedness”. If this requirement is not met, the measure cannot be accepted as primarily or even substantially for implementing a conservationist goal.

After the GATT-inconsistent measure is previously justified under para. (g) of Article XX, it is necessary to comply with the introductory clause of Article XX, the *chapeau* as referred in point 2.3.4.

2.2.3 Criteria for the application of Article XX (*chapeau*)

The *chapeau* is an introductory clause for the exceptions described under Article XX. Even if a measure falls within one of the listed exceptions in Article XX, it will still be illegal under the *chapeau* if it constitutes an arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade. The *chapeau* examines the manner in which the measure is applied¹⁰⁸ but not the meas-

¹⁰⁸ “The introductory clause of Article XX (its *chapeau*) emphasizes the manner in which the measure in question is applied. Specifically, the application of the measure must not constitute a ‘means of arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’. The *chapeau* requires that the measure does not constitute an abuse or misuse of the provisional justification made available under one of the paragraphs of Article XX, that is to say, is applied in good faith. In *Brazil – Retreaded Tyres*, the Appellate Body recalled that the *chapeau* serves to ensure that members’ right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, not as a means to circumvent one member’s obligations towards other WTO members. In other words, Article XX embodies the recognition by WTO members of the need to maintain a balance between the right of a member to invoke an exception and the rights of the other members under the GATT/WTO jurisprudence has highlighted some of the circumstances which may help to demonstrate that the measure is applied in accordance with the *chapeau*. These include relevant coordination and cooperation activities undertaken by the defendant at the international level in the trade and environment area, the design of the measure, its flexibility to take into account different situations in different countries as well as an analysis of the rationale put forward to explain the existence of a discrimination (the rationale for the discrimination needs to have some connection to the stated objective of the measure at issue).” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

ure itself.¹⁰⁹ The objective and purpose of the *chapeau* of Article XX is to avoid the misuse or abuse at the exceptions listed in Article XX.¹¹⁰

A relevant conclusion made by the Appellate Body in the *US – Gasoline*¹¹¹ case and reaffirmed in the *Shrimp – Turtles cases* and the *Brazil – Retreaded Tyres* case¹¹² was that the nature and quality of the “discrimination” at issue in the *chapeau* of Article XX is

¹⁰⁹ “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’. 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’. (...) 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’. 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.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002 p. 17. Consulted, 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&cundoc=3&popTitle=WT%2FCTE%2FW%2F203)

¹¹⁰ “The main goal of the *chapeau* [...] is to prevent the abuse of the exception of Article XX; it is, in fact, ‘one expression of the principle of good faith’. The *chapeau* reflects the necessity to strike a balance between these competing rights.” (Cf. Richason and Wood 2006:400)

¹¹¹ “As we stated in *United States – Gasoline case*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.” Appellate Body report of *US – Gasoline case*, 23: “The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would be true if the finding were one of inconsistency with some other substantive rule of the General Agreement. The provisions of the *chapeau* cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that the path would be both to empty the *chapeau* of its contents and to deprive the exception in paragraphs (a) to (j) of the meaning. Such recourse would also further and separate question arising under the *chapeau* of Article XX, as to whether the inconsistency was nevertheless justified.” (Bossche 2006:618-9)

¹¹² “Brazil recalls the Appellate Body’s explanation that the standard of discrimination contemplated in the *chapeau* of Article XX is different from the standard of discrimination in the treatment of products under other substantive obligations of the GATT 1994 [...] The Panel agrees that, as clarified by the Appellate Body, the ‘nature and quality’ of the discrimination referred to in the *chapeau* of Article XX is different from the discrimination in the treatment of products that might already have been found to be inconsistent with one of the substantive obligations of the GATT 1994. In this instance, the initial violation identified in relation to this measure is a prohibition or restriction on importation within the meaning of Article XI. This type of measure (an import ban in this instance), does not necessarily ipso facto result in discrimination, as an inconsistency with Articles I or III would. Thus, any discrimination alleged to exist in the application of the measure would arise, in this case, in addition to the restriction that is inherently present in the measure by its very nature.” (*Brazil – Retreaded Tyres case* Panel Report, para. 7.228 and 7.229)

different from the discrimination avoided by Articles I, III or XI¹¹³ (substantive obligations) of GATT 1994. The provisions of the *chapeau* do not mention the same standards of a substantive obligation to determine whether a measure is valid under the GATT. To apply the same standards would be to empty the *chapeau* of its substance and to refuse the exceptions listed in Article XX of their meaning.

Under Article XX *chapeau*, three requirements must be satisfied: first, to determine whether the measure is a means of unjustifiable discrimination, or a means of arbitrary discrimination, and if not, to examine whether the measure is a disguised restriction on international trade.¹¹⁴ The interpretation and application of the *chapeau* must be made by taking into account the balance between the right of a Member to

¹¹³ “At the core of the GATT-WTO system are two non-discrimination principles: the most-favoured nation (MFN), established in Article I of the GATT, and the national treatment principle, established in Article III. Article I, the most favoured nation clause, requires WTO Members to grant to the products of other Members treatment no less favourable than that accorded to the products of any other country. The MFN principle extends to customs, duties and rules connected with importation and exportation. Article III, the National Treatment principle, stipulates that once goods have entered a market, they must be treated no less favourably than equivalent domestically produced goods (in terms, for example, of local taxes and rules regulating the selling and distribution of goods). Article XI addresses the elimination of quantitative restrictions introduced by countries on the importation or exportation of products. It prohibits such restrictions with the objective of encouraging countries to convert them into tariffs, a more transparent and less trade-distorting instrument. The General Exceptions of the GATT, Article XX, comprises various conditional exceptions to the GATT obligations, including Articles I, II, III and XI.” (Richardson and Wood 2007:395) In the same line: “Very basically, the GATT imposes a non-discrimination framework that requires (subject to certain exceptions) that all imports from WTO members be treated no less favourably than imports from other members (the ‘most favoured nation’ principle, found in Art. I) and that all imported products be treated no less favourably than domestic ‘like’ products (the ‘national treatment’ principle, found in Article III). If a regulatory measure falls foul of these basic GATT principles, attention turns to whether the measure can be expected from censure under Art. XX.” (Holder and Lee 2007:272) And also: “In the first *Shrimp* ruling the Appellate Body reconstructed the normative hierarchy of the WTO by creating parity between the environmental exceptions included in Article XX and the substantive obligations of the GATT (e.g., Articles I and III). (...) a failure to comply with one of the general obligations of the GATT cannot, in itself, prevent a Member from invoking Article XX successfully, because such interpretation would deprive Article XX of any practical meaning, denying the idea that Article XX environmental exceptions have an independent value. The Appellate Body’s general ruling was embedded in a new framework for interpreting Article XX, based on two-tiered test model. According to this model, to be accorded the protection of Article XX a measure must not only come under one of the particular exceptions listed in Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX – the *chapeau*.” (Richardson and Wood 2007: 400)

¹¹⁴ “The Appellate Body, in *US – Shrimp* and *US – Shrimp* (...) 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.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002 p. 17. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.¹¹⁵

The ordinary meaning of discrimination involves treating similar situations differently, while the *chapeau* of Article XX prohibits it. To identify whether the application of a measure results in an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, it is necessary to observe if three conditions are met: first, if the application of the measure results in discrimination; second, if the discrimination is arbitrary or unjustifiable in character; and third, if the discrimination occurs between countries where the same conditions prevail.¹¹⁶ The measures adopted by a Member with environmental purposes must not constitute “arbitrary discrimination” or “unjustifiable discrimination” between countries where the same conditions prevail.¹¹⁷

The *chapeau* of Article XX does not prohibit discrimination *per se*, but rather, “arbitrary” and “unjustifiable” discrimination. Thus, a measure may discriminate, but

¹¹⁵ “The *chapeau* was inserted at the head of the list of ‘General Exceptions’ in Article XX to ensure that this balance is struck and to prevent abuse. The interpretation and application of the *chapeau* in a particular case is a search for the appropriate line of equilibrium between the right of Members to adopt and maintain trade-restrictive legislation and measures that pursue certain legitimate societal values or interests and the right of other Members to trade. The search for this line of equilibrium is guided by the requirements set out in the *chapeau* that the application of the trade-restrictive measure may not constitute an arbitrary or unjustifiable discrimination between countries where the same condition prevails or a disguised restriction on international trade.” (Bossche 2006:616)

¹¹⁶ “The first two elements (‘arbitrary’ and ‘unjustifiable’ discrimination), both of which relate to the existence of discrimination, will be considered together in light of the close relationship between them. The existence of a ‘disguised restriction on international trade’ is then considered separately. (ii) Arbitrary or unjustifiable discrimination. [...] As clarified by the Appellate Body in previous rulings, a measure should be considered to be applied in a manner which constitutes a means of ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’, if three conditions are met: (a) First, the application of the measure results in discrimination; (b) Second, the discrimination is arbitrary or unjustifiable in character; (c) Third, this discrimination occurs between countries where the same conditions prevail. [...] We will therefore first consider whether Brazil’s application of its import ban on retreaded tyres results in discrimination. If that is the case, then we will need to consider whether such discrimination is ‘arbitrary or unjustifiable’ the same conditions prevail.” (*Brazil – Retreaded Tyres*, Panel Report, para. 7.225 to 7.227) And also: “In order for a measure to be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, three elements must exist: First, the application of the measure must result in discrimination; Second, the discrimination must be arbitrary or unjustifiable in character; Third, this discrimination must occur between countries where the same conditions prevail.” (Bossche 2006:619)

¹¹⁷ “Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” (Birnie and Boyle 2002:698)

not in an arbitrary or unjustifiable manner.¹¹⁸

Therefore, to determine whether the application of a measure is “arbitrary”¹¹⁹ two factors are relevant within the meaning of *chapeau*, namely “rigidity” and “inflexibility”,¹²⁰ and the fact that the measure is imposed without inquiring into its appropriateness for the conditions prevailing in the exporting countries. The application of a measure is considered unjustifiable when that discrimination is “foreseen”, not merely “inadvertent” or “unavoidable”. Moreover, to determine whether the application of a measure is unjustifiable, it is necessary to take into consideration the negotiation ef-

¹¹⁸ “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. 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. The panel noted that “[p]ursuant to the chapeau of Article XX, a measure may discriminate, but not in an ‘arbitrary’ or ‘unjustifiable’ manner’. As well in the *EC – Asbestos case*, the panel indicated that “if the 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.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002 p. 17. Consulted 5 May 2008 on:

http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

¹¹⁹ Cf. comments in relation to *US – Shrimp case*: “The measures were also ‘arbitrary’ because of their informality, lack of transparency and absence of procedural protections, e.g. the absence of appeal or review rights.” (Ball and Bell 2000:108)

¹²⁰ Cf. comments in relation to *US – Shrimp case*: “(...) The US failed to show that the measures were not an ‘arbitrary or unjustified discrimination between countries where the same conditions prevail’. First, (...) the US, rules forced importing states to adopt US policy without any flexibility of approach. In short, the US only looked to see whether the importer states required the fitting of ‘turtle excluder devices’ (TEDs), as required in the US, rather than authorising comparable measures.” (*Ibid.* 2000:108)

fort¹²¹ and the flexibility criteria.¹²²

The discrimination results not only when countries in which the same conditions prevail are treated differently, but also when the application of the measure is applied in a rigid and inflexible manner and without any regard for the different conditions

¹²¹ Cf. comments in relation to *US – Shrimp case*. “(...) the US also failed to engaged the importing states in serious negotiations for an international treaty on sea turtle conservation before imposed trade sanctions. This was in violation of several important statements emphasising multilateralism, including Principle 12 of the Rio Declaration. (...) the US had provided different levels of support through technology transfer to different countries, affecting the ability of all states to comply on equal terms [absence of flexibility]” (*Ibid.* 2000:108)

¹²² “The Appellate Body noted in the *US – Gasoline case* that the *chapeau*, by its express terms, not so much questions the measure or its specific contents as such, but rather the manner in which that measure is applied. Pursuant to the *chapeau* of Article XX, a measure may discriminate, but not in an “arbitrary” or “unjustifiable” manner. To determine whether a measure has been applied in an *unjustifiable* manner, two requirements have been identified in the panel and Appellate Body reports in *US – Shrimp* and *US – Shrimp (Article 21.5)*: first, whether a serious effort to negotiate has been made by the Member country adopting the measure, and second, whether the measure is flexible. Concerning the determination of whether the measure has been applied in an *arbitrary* manner, the Appellate Body considered in the *US – Shrimp case* that the ‘rigidity and inflexibility’ in the application of a measure constitutes ‘arbitrary discrimination’ within the meaning of the *chapeau*.” (Consulted 20 May 2008 on: www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf) And also: “[7.257] We first observe that definitions of ‘arbitrary’, as set out in *The Shorter Oxford English Dictionary*, provide some guidance as to the ordinary meaning of the term: ‘arbitrary 1 Dependent on will or pleasure; 2 Based on mere opinion or preference as opp. to the real nature of things; capricious, unpredictable, inconsistent; 3 Unrestrained in the exercise of will or authority; despotic, tyrannical.’ [...] [7.258] In *US – Shrimp (Article 21.5 – Malaysia)*, the Panel similarly considered “the ordinary meaning of the word ‘arbitrary’, i.e. ‘capricious, unpredictable, inconsistent’. [...] In the same case, the Appellate Body highlighted two factors that it found, in that case, to be relevant to an assessment of whether the measure was arbitrary within the meaning of the *chapeau* of Article XX, namely ‘rigidity and inflexibility’ of the application of the measure; and the fact that the measure is imposed without inquiring into its appropriateness for the conditions prevailing in the exporting countries. [...] [7.259] As to the term ‘unjustifiable’, definitions set out in *The Shorter Oxford English Dictionary*, provide some guidance on its ordinary meaning: ‘unjustifiable Not justifiable, indefensible.’ [...] ‘justifiable 2 Able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible.’ [...] [7.260] Read in the context of the *chapeau* of Article XX, these definitions suggest, overall, the need to be able to ‘defend’ or convincingly explain the rationale for any discrimination in the application of the measure. [...] [7.261] In its ruling on *US – Gasoline*, the Appellate Body found that discrimination that could have been ‘foreseen’ and that was not ‘merely inadvertent or unavoidable’ would be unjustifiable. [...] Two specific elements for the justification of discrimination can also be identified in the Panel and Appellate Body reports in *US – Shrimp* and *US – Shrimp (Article 21.5 – Malaysia)*: first, a serious effort to negotiate with the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal, and secondly, the flexibility of the measure. These examples provide useful illustrations on what might render discrimination ‘unjustifiable’ within the meaning of the *chapeau* of Article XX.” (*Brazil – Retreaded Tyres case* Panel Report, para: 7.257 to 7.261, WT/DS332IR, WTO website)

between countries.¹²³ The meaning of the formula “discrimination between countries where the same conditions prevail” involves not only discrimination between exporting countries where the same conditions prevail but also discrimination between an importing *and* exporting countries where the same conditions prevail.¹²⁴

A measure to avoid illegality should be set up in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in any Member State. A Member must therefore take into account different conditions that may occur in the territory of other Members.¹²⁵ This does not imply however that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every* individual Member State.¹²⁶ Therefore, Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and involving in *every* individual Member State.

In order to avoid discrimination, a Member must also use diplomacy before en-

¹²³ Cf. the Appellate Body in the *Shrimp – Turtle case*. “It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to ‘require’ other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other members. We believe that discrimination results not only countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries. Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification [...] adopt a comprehensive regulatory program that is essentially the same as the United States’ program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is a little or not flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute ‘arbitrary discrimination’ within the meaning of the *chapeau*.” (Bossche 2006:619)

¹²⁴ “The WTO Appellate Body found that the measure constitute ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade’. It noted the US could have avoided the discrimination involved in the baseline rules in two ways: either by imposing statutory baselines on both domestic produces and importers, or by making individual baselines available to all.” (Birnie and Boyle 2002:701)

¹²⁵ Cf. 1998 *Shrimp – Turtle case*. “[...] The Appellate Body concluded that the US measures were an ‘unjustifiable discrimination’ because they imposed on an exporting WTO member the adoption of ‘identical regulatory requirements to those applied by the United States [...] the United States established ‘a rigid and unbending standard’. The US measures failed to take into account ‘different conditions’ that may occur in the territory of the other state members of WTO.” (*Apud* Louka 2006:391)

¹²⁶ “It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each 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 realised.” (Bossche 2006:603)

gaging in the imposition of any measure with environmental purposes and effects on international trade.¹²⁷ Yet, if a Member does not enter into negotiations with all affected Members, that would also constitute ground for discriminatory behaviour.¹²⁸ Besides, the Member must pursue the possibility of entering into co-operative arrangements with the governments of other Members.¹²⁹

Even if all those steps have been taken, an unjustifiable discrimination within the meaning of *chapeau* could yet occur if a Member does not make serious efforts in good faith¹³⁰ to negotiate a multilateral solution before resorting to unilateral measures. While a Member has an obligation to negotiate in good faith aiming at an interna-

¹²⁷ Cf. *1998 Shrimp – Turtle Case*. “[...] The failure of the United States to use diplomacy, before engaging in the imposition of unilateral measures, and the failure to enter into negotiations with the affected states constituted the basis of discriminatory behaviour.” (*Apud* Louka 2006:391)

¹²⁸ Cf. *Shrimp – Turtle case* Appellate Body report, para. 169: “Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved.” (*Apud* Bossche 2006:621). And also: “In the *US – Shrimp case*, the Appellate Body was of the view that rigidity and inflexibility in the application of the measure (e.g. by overlooking the conditions in other countries) constituted unjustifiable discrimination. It was deemed not acceptable that a member would require another member to adopt essentially the same regulatory programme without taking into consideration that conditions in other members could be different and that the policy solutions might be ill-adapted to their particular conditions. In order to implement the panel and Appellate Body recommendations, the United States revised its measure and conditioned market access on the adoption of a programme comparable in effectiveness (and not essentially the same) to that of the United States. For the Appellate Body, in *US – Shrimp* (Article 21.5), this allowed for sufficient flexibility in the application of the measure so as to avoid “arbitrary or unjustifiable discrimination.” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

¹²⁹ Cf. *US – Gasoline Case*. “[...] According to Appellate Body, the United States had not pursued the possibility of entering into co-operative arrangements with the governments of Venezuela or Brazil to conclude that these governments would not co-operate. [...] The Appellate Body concluded that U.S omission to co-operate with the governments of Venezuela and Brazil and to take and account the costs imposed on foreign refiners by its gasoline programs amounted to an unjustifiable discrimination and a disguised restriction to trade in violation of the chapeau of Article XX.” (*Apud* Louka 2006:388)

¹³⁰ “The Appellate Body has closely linked the question of co-operation to the specific inquiry on arbitrary or unjustifiable discrimination pursuant to the chapeau of Article XX. Several questions have arisen in the assessment of what constitutes good faith efforts to co-operate and what is actually involved in co-operation (e.g. capacity building, financial assistance and technology transfer).” (Benasconi-Osterwalder *et al.* 2006:83)

tional agreement, it does not have any obligation to reach an agreement.¹³¹

Unilateral measures with environmental purposes affecting the jurisdiction of other Members were considered illegal under the *chapeau* of Article XX, as understood by the panel in the first *Shrimp – Turtle case*.¹³² Yet, the Appellate Body declared that a unilateral action can be justifiable under the *chapeau* when the multilateral approach fails to produce desirable results.¹³³ The GATT/WTO system beyond doubt gives preference to multilateral solutions rather than unilateral measures.¹³⁴ Inter-governmental co-

¹³¹ Cf. 2001 *Shrimp – Turtle case*. “[...] The Panel viewed the obligation of the United States, as imposed by the 1998 *Shrimp – Turtle* decision, as an obligation to negotiate in a good faith an international agreement rather than as an obligation to conclude an agreement with Malaysia – in order to avoid a characterisation of the turtle protective measure as arbitrary or discriminatory – would amount to giving Malaysia in effect a veto power over whether the United States can fulfil its obligations under the WTO. The Appellate Body concurred with the panel that the efforts of the United States regarding the negotiation of agreement with Malaysia were serious and good faith efforts on the basis of ‘active participation and financial support to the negotiations’. Thus, the Appellate Body concluded that a commitment to an, in principle, multilateral method would give ground to unilateral action when the multilateral approach fails to produce desirable results.” (*Apud* Louka 2006:393)

¹³² “The Panel ruled that measures (such as unilateral trade embargoes) which undermine the WTO multilateral trading system must be regarded as not within the scope of measures permitted under the *chapeau* of Article XX, a formulation similar to the one used by the *Tuna* Panels. [...] It noted that the interpretation of the *chapeau* should not be governed by the narrow goal of maintaining the multilateral trading system, emphasising the importance of the idea of sustainable development in that context.” (Richardson and Wood 2006:400)

¹³³ “In relation to the *Shrimp – Turtle* decision [...] the Appellate Body not totally condemned unilateral action to declare it illegal ‘per se’ as the GATT panels had done. The Appellate Body stated only that ‘[...]he unilateral character...heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability’. This leaves some room, albeit small, for unilateral measures to protect the environment beyond national jurisdiction. If, for example, the US measures in the *Shrimp – Turtle case* had been tailored carefully to meet due process concerns and were suited to conditions in other countries, and especially if the countries concerned had spurned offers of negotiation or refused to negotiate in good faith, it is conceivable that unilateral measures to protect turtles would not be arbitrary or unjustifiable and would have been upheld. Of particular interest is the Appellate Body’s emphasis on good faith as a principle of international law. If, in a given case, a state were to spurn environmental controls and refuse to enter into negotiations over the depletion of resources beyond national jurisdiction, it would be deemed to be in breach of the principle of good faith, and unilateral measures might be justified.” (Birnie and Boyle 2002:712)

¹³⁴ “[...]f every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concern, the complaining parties argued, the multilateral trade system would cease to exist. [...] The fact that a measure is adopted unilaterally does not immediately lead to the conclusion that it is a threat to the multilateral trading system; the fear that the system could be disrupted if every member state applied by examination of the measure itself [...] all (GATT/WTO) passages quoted looked to multilateral solutions, international consensus, and similar expressions, as opposed to the exercise of unilateral restraints.” (Lowenfeld 2003:320-2) And also: “The Appellate Body (reference to *US – Shrimp case*) also acknowledged that, ‘as far as possible’, a multilateral approach is strongly preferred” over a unilateral approach. But, it added that, although the conclusion of multilateral agreements was preferable, it was not a prerequisite to benefit from the justifications in Article XX to enforce a national environmental measure.” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

operation is fundamental to set up multilateral agreements by offering each country opportunities to be heard or to respond to any argument and to explain and defend its reasons. The negotiating process increases better solutions to conflicts and offers great chances to change policies with minimal risks of protectionist abuses.

Nevertheless, a GATT-inconsistent measure which formally is justifiable under one of the exceptions under the paragraphs of Article XX would constitute a misuse or abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.¹³⁵

In order to determine whether a measure is a disguised restriction on international trade, three aspects must be considered: first, the publicity test; second, the consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination; and third, the examination of the design, architecture and revealing structure of the measure challenged.¹³⁶ These three aspects must be considered together.

The publicity test imposes the obligation to give publicity for a measure, i.e. the measure must be announced in some way, e.g. published in the Official Journals. However passing the publicity test does not confirm whether the measure is or is not a dis-

¹³⁵ The Appellate Body in *US – Gasoline case*. “Arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that ‘disguised restriction’ includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of ‘disguised restriction’. We consider that ‘disguised restriction’, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.” (Bossche 2006:623)

¹³⁶ “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.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

guised restriction.¹³⁷ It is also necessary to consider whether the application of the measure results in arbitrary or unjustifiable discrimination on international trade, i.e. in deciding whether the application of a measure results in an disguised restriction on international trade – all criteria to determine the existence of arbitrary or unjustifiable discrimination may be taken into account, e.g. the negotiation effort and the flexibility criteria.¹³⁸ The examination of the structure of the challenged measure may reveal that a measure previously justified under the *chapeau* of Article XX is actually a

¹³⁷ “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’. (...) 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’’. The panel in the *EC – Asbestos case* interpreted this sentence as 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’. The panel further observed that this remark also suggests that the expression ‘disguised restriction on international trade’ covers other requirements than the sole publicity test.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

¹³⁸ “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. 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.’” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203) Cf. also Appellate Body in *US – Gasoline case*. “[...] the kinds of consideration pertinent in deciding whether the application of a particular measure amounts to ‘arbitrary or unjustifiable discrimination’, may also be taken into account in determining the presence of a ‘disguised restriction’ on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exception to substantive rules available in Article XX.” (Bossche 2006:622)

disguised restriction.¹³⁹ A measure which is provisionally justified under Article XX will still be considered to constitute a disguised restriction on international trade if the design, architecture or structure of the measure at issue reveals that this measure does not pursue the legitimate policy objective on which the provisional justification was based but, in fact, pursues trade-restrictive – i.e. protectionist – objectives.¹⁴⁰ In general, if an environmental measure does result in protectionism, it may be a “disguised restriction on international trade” and cannot be justified under the introductory clause of Article XX.¹⁴¹

2.3 Chapter conclusion

The exceptions under Article XX(b) and (g) are applicable when a violation of substantial obligations – such as of Articles I, III, and XI of GATT – is alleged. When such a violation

¹³⁹ “(...) 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’ of the measure as it had already been introduced in *Japan – Alcoholic Beverages* 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]’. 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’. 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.” (Note by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. Consulted 5 May 2008 on: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFD%2FDOCUMENTS%2FT%2FWT%2FCTE%2FW203%2FEDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203)

¹⁴⁰ Cf. the Panel in *EC – Asbestos* case: “[...] a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is fact only a disguise to conceal the pursuit of trade-restrictive objectives. However, as the Appellate Body acknowledged in *Japan – Alcoholic Beverages* the aim of a measure may not be easily ascertained. 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.” (Bossche 2006:623)

¹⁴¹ “*The design of the measure* (...), an environmental measure may not constitute a ‘disguised restriction on international trade’, i.e. may not result in protectionism. In past cases, it was found that the protective application of a measure could most often be discerned from its ‘design, architecture and revealing structure’. For instance, in *US – Shrimp* (Article 21.5), the fact that the revised measure allowed exporting countries to apply programmes not based on the mandatory use of TEDs, and offered technical assistance to develop the use of TEDs in third countries, showed that the measure was not applied so as to constitute a disguised restriction on international trade.” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

takes place, a WTO member may still be exempted from GATT rules since the trade-related environmental measure falls under one of the two exceptions related to the protection of the environment i.e. in paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines but may still be necessary to protect human, animal or plant life or health [paragraph (b)] or relating to the conservation of exhaustible natural resources [paragraph (g)].

GATT Article XX on General Exceptions consists of two cumulative requirements. For a GATT-inconsistent environmental measure to be justified under Article XX, a member must demonstrate:

- first, that its measure falls under at least one of the exceptions [e.g. paragraphs (b) to (g), two of the ten exceptions under Article XX] and, then,
- that the measure also satisfies the requirements of the introductory paragraph (the *chapeau* of Article XX), i.e. that it is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not “a disguised restriction on international trade”.

In order for a trade-related environmental measure to be eligible for an exception under Article XX paragraphs (b) and (g), a member has to establish a connection between its stated environmental policy goal and the measure at issue. The measure needs to be either:

- necessary for the protection of human, animal or plant life or health [paragraph (b)], e.g. policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing risks to human health posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tyres;
- or relating to the conservation of exhaustible natural resources [paragraph (g)], for example: policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air.

To be justified under Article XX(b) a GATT-inconsistent measure must be shown:

- 1 that the policy in respect of the measure is designed to protect human, animal, or plant life or health;
- 2 that the GATT-inconsistent measure is necessary to fulfil the policy objective; and
- 3 that the GATT-inconsistent measure was applied in conformity with the requirements of the introductory clause of Article XX.

Determining whether a measure is “necessary” to protect human, animal or plant life or health under Article XX(b) involves a weighing and balancing process and considerations of a series of factors such as:

- the contribution made by the measure;
- the importance of the common interests or values protected; and
- the impact of the measure on international trade.

If this *a priori* analysis provides a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

Under Article XX(g) the GATT-inconsistency follows three-steps:

- 1 the measure is concerned with the conservation of exhaustible natural resources;
- 2 the measure must be related to the conservation of exhaustible natural resources; and
- 3 the measure must be effective in conjunction with restrictions on domestic production or consumption.

Moreover, the GATT-inconsistent measure must always be in conformity with the extra requirements of the introductory clause of Article XX. The measure has to be primarily or essentially aimed at the conservation of an exhaustible natural resource to be considered as relating to conservation within the meaning of Article XX(g). For a measure to be “relating to” the conservation of natural resources, a substantial relationship between the measure and the conservation of exhaustible natural resources

needs to be established. And for a measure to be considered “made effective in conjunction with restrictions on domestic production or consumption”, an act or regulation restricting international trade to protect the exhaustive natural resources must be in force and restrict both imported products and domestic production and consumption products, i.e. the even-handedness requirement must be respected.

The introductory clause of Article XX (its *chapeau*) emphasises the manner in which the measure in question is applied. Specifically, the application of the measure must not constitute a “means of arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade”. The trade-related environmental measure must be applied in good faith in order to protect legitimate interests.

CHAPTER 3
EXTRA-TERRITORIAL SCOPE OF ARTICLE XX(B) AND (G)
VERSUS MEAS AS A BETTER SOLUTION TO TRANSBOUNDARY
ENVIROMENTAL PROBLEMS AND THE RELATIONSHIP BETWEEN
THE MEAS SYSTEM AND THE GATT/WTO SYSTEM

3.1 Introduction

Unilateral trade-related environmental measures enacted by a State to force other States to change their environmental policies in order to avoid environmental degradation are generally not permitted, or in other words, they are only acceptable in drastic cases where other better solutions do not exist. The WTO has ordinarily suggested multilateral environmental agreements as a solution for this sort of conflict. This chapter provides a brief explanation on the extra-territorial scope of Article XX(b) and (g) within GATT 1947 and WTO/GATT 1994 jurisprudence. The chapter also reviews the concept of MEAs, in which environmental problems MEAs are recommended as the best solution, the main types of trade measures embodied in the MEAs, main features of MEAs, and a comparison with the dispute settlement in light of the WTO, and later concerns on conflicts between MEA provisions and WTO/GATT, as well as the possibility to justify trade-related environmental measures in a MEA under paragraphs (b) or (g) of Article XX.

3.2 Extra-territorial scope of Article XX(b) and (g)

Article XX does not explicitly put jurisdictional limitation but the question arises whether there is an implied jurisdictional limitation that prohibits a WTO Member from invoking the general exceptions outside the territorial jurisdiction of that mem-

ber taking the measure.¹⁴² Two kinds of conflicts arise often within the WTO system, the “inward-oriented” type and the “outward-oriented” type.¹⁴³ The first one is a conflict that involves trade related measures which aim at the protection of domestic health, safety or domestic resource conservation (as discussed above) and the second one lies on extra-territorial motivation, that is, when the goals of the trade-related environmental or health measures also or predominantly lie outside the territory of the regulating state.

The *Tuna – Dolphin case* for the first time involved the discussion on validation of a measure taken by a Member (unilateral State action) to protect resources outside its jurisdiction and it was decided by a GATT panel (under the 1947 GATT) in 1991.¹⁴⁴ The main fact behind the *Tuna – Dolphin I case* was the ban by the United States prohibiting the importation of yellow fish tuna caught by using methods that also incidentally tend to kill dolphins based on the grounds of the US Marine Mammal Protection Act (MMPA). The *Tuna – Dolphin II case* involved an embargo of tuna products from countries that processed tuna caught by the offending countries. In both *Tuna – Dolphin cases*, the GATT panel analysed whether such embargoes could be justified under Articles XX(b) and (g).

¹⁴² “The General Agreement on Tariffs and Trade (GATT) does not explicitly address the subjects of jurisdiction or extraterritoriality. Article (b) allows Members to take measures to protect life and health. It does not expressly limit the application of that provision territorially, nor does it set forth nationality requirements. Similarly, Article XX(g) allows Members to adopt policies relating to the protection of exhaustible natural resources, without limiting that the protection in terms of the location of the natural resource. These comments pertain to both the 1947 and 1994 versions of GATT.” (Benasconi-Osterwalder *et al.* 2006:239)

¹⁴³ “Statement about *inward-oriented* and *outward-oriented*: Inward-oriented that is, governmental measures whose objective is the protection of a domestic ecological unit or the health and safety of the local population. The second type of conflict [outward-oriented] is characterised by an *extra-territorial* motivation. These conflicts are triggered by trade measures whose objective lies outside the territory of the regulating state; the target of such measures can be an ecological asset that is located within the borders of another state but has a global significance (e.g. the Brazilian tropical forest) [It is not clear the meaning of the “global significance”, could it be “economic significance rather than environmental?], a common access resource (e.g., the high seas) or a migratory species e.g., sea turtles). (...) *Outward-oriented* disputes raise (...) question: the freedom of WTO members to respond with trade measures to environmental policies of their trading partners, which they find problematic—even if these policies are otherwise consistent with the WTO rules. These trade measures are usually triggered by a production externality, taken place outside the borders of the importing country.” (Richardson and Wood 2006:396)

¹⁴⁴ Cf. Birnie and Boyle 2002:706 and Louka 2006:386.

The ban imposed by the United States failed the necessary test of Article XX(b) because other reasonable alternative measures could be used by the United States to pursue environmental protection. Moreover, the United States could not force other Members to change their environmental policies by a unilateral measure.¹⁴⁵ In relation to Article XX(g), the GATT panels concluded that unilateral measures to force other countries to change conservation policies did not meet the standards on “related to” and “in conjunction with”. The GATT panels then rejected the ban to the importation of tuna, because a Member cannot prohibit the importation of products by justifying that the process of the export country is incompatible with the process preferred by the import country.¹⁴⁶

Considering the extra-territorial scope of Article XX(b) and (g), the *Tuna – Dolphin I case* panel concluded that a Member could take a GATT-inconsistent measure under those provisions only if it was limited within its “territorial jurisdiction”.¹⁴⁷

¹⁴⁵ “They reject the US argument that ‘necessity’ means ‘need’, stating that ‘necessary’ means that other reasonable alternative exists an that ‘a contracting party is bound to use, among the measures available to it, that which entails the least degree of inconsistency’ with the GATT. A trade measure taken to force other countries to change their environment policies, and that would be effective only if such changes occurred, could not be considered ‘necessary’ within the meaning of Article XX (b).” (Birnie and Boyle 2002:708)

¹⁴⁶ “The GATT panel rejected the US argument on the grounds that Article III(1) and (4) permit only regulations relating to products as such. Since the MMPA regulations concerned harvesting techniques which could not possibly affect tuna a product, the ban on tuna could not be justified.” (*Ibid.* 2002:708)
See also: “The GATT and WTO disputes that raised questions related to extra-territoriality generally involved measures based on processes and production methods (PPMs) that were not related to the product (referred to a non-product-related PPM-base measures.” (Benasconi-Osterwalder *et al.* 2006:238)

¹⁴⁷ “It noted that Article XX(b) should no be used to protect life or health outside the jurisdiction to the state adopting the measure. The panel first stated that the GATT was silent with respect to jurisdictional limitations of measures and thus decided to look into the drafting history of GATT Article XX. From history, it concluded that the drafters wanted to limit the application of Article XX (b) to the protection of life and health within the jurisdiction of the importing state (Id. at paragraph 5.26). The panel also found that Article XX should no be interpreted broadly and that to justify the US measure under Article XX(b) of the GATT would allow a party to unilaterally determine life or health protection policies from which other parties could not deviate without jeopardising their trading rights guaranteed by the GATT (Id. at paragraph 5.27). For largely the same reason, the panel rejected justification under Article XX(g) as well ((Id. at paragraph 5.30-5.34). With respect to paragraph (g), the panel also added that this paragraph was intended to permit GATT parties to take measures primarily aimed at rendering effective restriction on production and consumption (as stipulated in paragraph (g)) within their jurisdiction because a country only effectively control production and consumption was under its jurisdiction (Id. at paragraph 5.31). It is important to note that while the panel speaks the ‘extra-jurisdictional application’ (see, e.g., Id. at paragraph 5.32) of Articles XX(b) and (g), this does not mean that the importing state is enacting or enforcing laws outside of its jurisdiction. Rather, the panel uses the term ‘extra-jurisdictional’ to refer to a measure that, although enacted and enforced within the importing state’s territory, is intended to protect something outside the territory of the importing state.” (*Ibid.* 2006:243)

This decision provoked a storm of protest from environmentalists since it limited the scope of environmental policy and, in their opinion, also undermined the basic principles of environmental law.¹⁴⁸

The *Tuna – Dolphin II case* panel concluded that environmental policies could be enforced as “extra-territorial restrictions” but only against states’ own nationals and vessels¹⁴⁹. The *Tuna – Dolphin II case* panel concluded that the Article XX(b) and (g) may have “extra-territorial, but not extra-jurisdictional effect”.¹⁵⁰ Again the decision was contested by environmentalists because the panel decision did not take into consideration differences between areas of national jurisdiction and areas in the global commons, e.g. no state could use trade measures to protect ocean resources or the atmosphere since those resources lay outside the jurisdiction of all states.¹⁵¹

¹⁴⁸ Cf. the release of the speech of the Director-General Pascal Lamy at the Yale University on 24 October 2007: “(...) The GATT had just taken its *Tuna – Dolphin* decision, and much discussion was taking place in the United States on the relationship between trade and the environment in the run-up to NAFTA. I still recall how anti-GATT protesters had papered Washington with posters of a giant monster, a gorilla, better known as ‘GATTZILLA’, walking all over the White House and pouring DDT.” (Consulted 28 May 2008: http://www.wto.org/english/news_e/sppl_c/sppt9_e.htm)

¹⁴⁹ “In contrast to the previous report, however, *US–Tuna/Dolphin II* found that there was no valid reason to support the conclusion that Article XX(g) of the GATT applied only to policies related to the conservation of exhaustible natural resources located within the territory of the party invoking the provision (Id. at paragraph 5.20). The panel cited previous GATT cases, the concept of national jurisdiction, and Article XX(e)’s provision relating to the products of prison labour as examples of ways in which countries are allowed to enact measures relating to things located or actions taken outside of its territorial jurisdiction (Id. at paragraph 5.15–5.17). Based on these considerations, the panel found that US policy at issue, although it aimed at conserving dolphins outside its territory, fell within the range of policies covered by paragraph (g) of Article XX (Id. at paragraph 5.20). However, it restricted this finding exclusively to conservation based on the US’ exercise of jurisdiction over its own nationals and vessels (Id. at paragraph 5.17). Thus, although *US–Tuna/Dolphin II* extended the scope of measures falling within the scope of Article XX(g), it did so to a very limited extent.” (Bernasconi-Osterwalder *et al.* 2006:245)

¹⁵⁰ “The extra-territorial application of Article XX(b) and (g) is supported by analysis based on the norms of treaty interpretation under the Vienna Convention on Treaties, Article 31 (1) of which requires that treaties be interpreted ‘in good faith in accordance with the ordinary meaning [of] the terms of the Treaty in their context. Together with the ‘context’, the parties should take into account ‘any relevant rules of international law applicable in the relations between the parties’. It is well established as a matter of international law that states have an obligation to prevent damage to both the environment of other states and areas beyond the limits of national jurisdiction. Thus, it should be beyond doubt that paragraphs (b) and (g) of Article XX permit national measures designed to protect extra-territorial resources.” (Birnie and Boyle 2002:708)

¹⁵¹ Cf. Charnovitz 1998:98–116, *apud* Sampson and Whalley 2005:421. Also: “But it (GATT) did not consider not even hypothetical situations that there could be circumstances where a country could employ trade restrictions to influence environmental policies beyond its jurisdiction where this was necessary to protect a global resource pursuant to an international environmental agreement and where there was a direct causal connections between the measure and the environmental objective pursued.” (Bell and McGillivray 2000:107)

On the contrary, *US – Shrimp Turtle* case gave extra-territorial scope to Article XX(g) and the Appellate Body approach in that case was substantially different from the earlier interpretations of GATT panels.¹⁵² The Appellate Body refused to address the question of whether or not there is an implied jurisdictional limitation in Article XX. Rather, it found that migratory species present in US waters provided a nexus for a GATT-inconsistent measure to be saved under Article XX(g). However, the US measures were declared as unjustifiable and arbitrary discrimination under the *chapeau*, thus the measures were not saved by Article XX.

So far, based on the Appellate Body decision, a WTO Member may enact measures to protect migratory species present in its territory independently of the extra-jurisdictional powers. Some scholars doubt whether a WTO Member may enact measures to protect resources located exclusively within the borders of another WTO Member, i.e. located beyond its territory (e.g. the Brazilian tropical forests).¹⁵³

The WTO/GATT jurisprudence does not allow any WTO Member to enact domestic environmental laws that may have impacts outside its jurisdictional limits, unless the WTO Member has made good efforts to negotiate with all countries af-

¹⁵² "In fact, the US restrictions on the harvesting of tuna would now pass Article XX(g) with flying colours. Dolphins clearly are an exhaustible natural resource; the import ban on tuna harvested by methods that kill dolphins clearly is related to the purpose of cutting dolphin mortality; and the requirements protecting dolphins also apply to US vessels and fishermen. Also important, the Appellate Body in the *Shrimp – Turtle case* gave clear extra-territorial scope to Article XX(g): It applies without distinction to exhaustible resources beyond areas of national jurisdiction as well as to domestic resources" (Birnie and Boyle 2002, p. 710). Also: "(...) *US – Shrimp case*, the Appellate Body accepted as a policy covered by Article XX(g) one that applied not only to turtles within the United States waters but also to those living beyond its national boundaries. The Appellate Body found that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)

¹⁵³ "Based on the Appellate Body's decision, migratory species occurring *within* the territory of the Member enacting the measures may be protected independent of any jurisdictional power the Member has over national and vessels. However, the extent to which Members can protect resources located *solely outside* their jurisdictional boundaries remains uncertain." (Bernasconi-Osterwalder *et al.* 2006:252). See footnote 102 and also: "Perversely from the point of view of international environmental protection, the worldwide movement toward free trade can compromise national sovereignty exercised to achieve environmental goals. It does so by allowing challenges to environmental laws that aim to have impacts outside the individual nation-state. This applies to both the extraterritorial reach of domestic law and the laws of regions, such as the European Community. In world organisations, the WTO, formerly the General Agreement on Tariffs and Trade (GATT), allows members to challenge domestic environmental laws of other nations using the argument that they create artificial barriers to trade." (DiMento 2003:49)

affected by the trade-environmental measure and also the goals of such measure must be legitimate, i.e. the measure must be justified under Article XX(b) or (g), before any unilateral measure may be enacted.

3.3 The relationship between the MEAs system and the GATT /WTO system

Multilateral Environmental Agreements (MEAs) are agreements between sovereign states designed to address shared environmental problems such as ozone depletion,¹⁵⁴ climate change or biodiversity loss.¹⁵⁵ It has been widely recognised by both environmental and trade policy-makers that multilateral solutions to transboundary environmental problems, whether regional or global, are preferable to unilateral solutions. Resort to unilateralism runs the risk of arbitrary discrimination and disguised protectionism, which could damage the multilateral trading system. UNCED has strongly endorsed the negotiation of MEAs to address global environmental problems. Agenda 21 of the 1992 Rio Conference states that measures should be taken to avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing trans-border or global environmental problems should, as far as possible, be based on international consensus. MEAs help to address measures to regulate trade in environmentally harmful products, for example, to control the production of harmful products, trans-boundary movement and use of

154 “*Stratospheric Ozone Depletion*. In the past several years, scientific evidence has established a strong link between the depletion of the ozone layer and the release into the atmosphere of chlorine and bromine-laden chemicals such as chlorofluorocarbons (CFCs), halons, and carbon tetrachloride. The ozone layer acts as a shield to protect the earth from the harmful effects of ultraviolet radiation and further depletion may lead to increases in the incidences of skin cancer, loss of biodiversity, and crop damage. The major MEA dedicated to halting the depletion of the ozone layer by encouraging restrictions on the production and consumption of ozone depleting substances (ODS) is the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).” (Caldwell 2001:39-40)

155 “*Loss of Biodiversity*. The extinction of plant and animal species throughout the world is occurring at a rapid rate and on a wide scale basis. Increases in world population growth, deforestation, and unsustainable harvesting of plant and animal wildlife have contributed to a severe weakening in the fragility of the Earth’s delicate balance of biological diversity. The loss of species not only has profound impacts on the evolutionary process, but may also inhibit the development of medical and chemical discoveries of immeasurable value. In addition to a multitude of regional agreements, the United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity (Biodiversity Convention) are the two most prominent MEAs dedicated animal species, and habitat.” (*Ibid.* 2001:40)

these products; to remove economic incentives that motivate environmental devastation; and to rise the participation and observance of MEA rules by states. The relationship between MEAs and WTO rules is addressed by the Marrakesh Declaration in items 1 and 5 and also in the Doha Declaration paragraph 31(i) and (ii).¹⁵⁶

The main types of trade measures embodied in the MEAs are trade bans, export and import licenses, notifications requirements and packaging as well as labelling requirements. Examples of MEAs embracing trade measures are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Montreal Protocol on Substances that Deplete the Ozone Layer, Kyoto Protocol, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemical And Pesticides in International Trade (PIC), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal.¹⁵⁷ The MEAs cited above provide for the imposition of trade sanctions, the Montreal Protocol adopts trade controls that are more restrictive as to non-parties MEAs; CITES allows punitive trade restrictions to be imposed on non-complying parties; and the Basel Convention prohibits exports and imports of hazardous and other wastes by parties to the Convention to and from non-party states.

¹⁵⁶ “*Item 1.* The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs). [...] *Item 5.* The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in MEAs.” (Marrakesh Declaration) Also: “[...] *Paragraph 31(i).* The relationship between existing WTO rules and specific trade obligations set out in MEAs. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question. (ii) Procedures for regular information exchange between MEA Secretariat and the relevant WTO committees, and the criteria for the granting of observer status.” (Doha Declaration)

¹⁵⁷ “An increasing number of MEAs use trade mechanisms to achieve their objectives. In certain MEAs, such as the Basel Convention, trade Measures serve to discourage or prohibit the transfer from one nation to the other of hazardous waste. Like Basel Convention, the Convention on International Trade in Endangered Species (CITES) also sanctions the use of trade measures to achieve its objectives. The CITES aims to ensure that the international trade in specimens of species of wild fauna and flora does not threaten the conservation status of the species concerned. Thus, trade in certain species is prohibited or carefully regulated. Other MEAs use a variety of trade and economic measures to encourage states to become parties to the agreement. The Montreal Protocol and Kyoto Protocol, dealing with ozone depletion chemicals and fossil fuels respectively, use trade measures in this way.” (Richason and Wood 2006:397)

The WTO has endorsed the MEAs to solve extra-territorial conflicts¹⁵⁸ because they have improved international co-operation and are considered as the best and most effective way for governments to implement environmental policies with consequences beyond its territories or when involving global issues. Generally, the MEAs' focus is to avoid disputes rather than dispute settlement by using methods such as reporting, monitoring, on-site visits, and transparency. Also, MEAs use incentives such as financial assistance, training programs and access to technology to encourage compliance. When a dispute emerges, MEAs tend to rely on co-operative and facilitative methods, rather than coercive methods, to motivate compliance.¹⁵⁹ Most of the disputes are limited to disagreements arising from the interpretation or application of the MEAs and reflect technical or economic incapacity to fulfil MEAs rather than deliberate breach. If conciliation is not reached, it means that the conflict will persist and the dispute may be submitted to compulsory dispute settlement, usually by the International Court of Justice (ICJ) or an arbitrator chosen by the disputing parties, depending on what MEAs provisions address. The majority of MEAs do not impose a binding adjudication process on the parties. Ordinarily, MEAs foresee compulsory conciliation by request of any party to a conflict and then a commission may be created to solve the conflict. Its decision is usually not binding, unless otherwise agreed.

As stated before, MEA dispute settlement regimens often reflect technical or economic incapacity to fulfil the MEAs, thus, to avoid conflicts a special procedure has been developed: the so called non-compliance provisions (NCPs). Non-compliance provisions involve advice, conciliation, or friendly solutions and assistance to States to reach compliance and avoid disputes rather than resorting to judicial dispute settlement. The NCPs mechanism does not establish any exclusive authority in favour of the MEAs' bodies, i.e. the compliance provisions may be invoked by the non-complying MEA state,

¹⁵⁸ "In the *Shrimp-Turtle* decision the Appellate Body clearly upholds the right of WTO members to legislate for the protection of natural resources beyond national boundaries, provide they do so pursuant to a MEA." (Birnie and Boyle 2002:707)

¹⁵⁹ "After dispute arises, MEAs tend employ 'managerial' model, rather than an 'ad-judicatory' model." (Dunoff 2001:64)

by a competent executive body of the MEA, or, eventually, by another MEA state.¹⁶⁰ On the other hand, the WTO regime refers to a compulsory dispute settlement and provides exclusive jurisdiction for the WTO adjudicating bodies¹⁶¹ and only the governments of WTO Members are entitled to initiate such dispute settlement proceedings. Comparison of the NPCs¹⁶² procedure and the WTO dispute settlement system makes it possible to perceive some differences: while the NCPs are characterised as multilateral, consensual facilitative and progressive, the WTO dispute settlement system features are bilateral, adversarial, confrontational and backward-looking. MEAs usually contain mechanisms that are neither adjudicatory nor legislative, in other words, the MEAs do not have any compulsory dispute settlement mechanism that produces binding decisions, this being the main reason why this mechanism has been criticized by some scholars as

¹⁶⁰ “Several possibilities might trigger the acting of such a committee. Review can be initiated either by the complaint of a party against another, or by the secretariat of the MEA in any situation where it suspects a party of non-compliance. It has also been very common under the Montreal Protocol to initiate the review through self-reporting by a party defaulting on its obligations despite its best efforts to the contrary. It might further be possible to authorize the standing or implementation committee to start a review at its own initiative if, upon its own periodic review of the secretariat’s analytical summaries of information provided by the parties, the committee concludes that there is evidence of possible non-implementation or non-compliance and provided neither a party, nor the convention secretariat on its own, has taken the necessary steps to bring the case formally before the standing or implementation committee. If the committee finds that the party will not be in compliance despite best efforts, it issues recommendations in the form of a report and submits them to the Conference of the Parties to decide on the steps to bring the state back into compliance [...] If a committee finds that a party has not made a sufficient effort to meet its obligations, or if it is otherwise warranted by the circumstances, the committee may recommend punitive action against the non-complying party.” (Marceau and González-Calatayud 2001:77-78)

¹⁶¹ “The situation is different with the WTO Agreement, where Article 23 of the DSU provides that WTO related disputes can be debated only before the WTO adjudicating bodies (panel, Appellate Body or arbitration under Article 25 of the DSU). It also seems clear that before the WTO adjudicating bodies only WTO violations can be the object of claims (which is distinct from stating that only the WTO Agreement can be invoked, argued, or interpreted by panels and the Appellate Body when examining a claim of WTO violation). Moreover, recommendations of panels and the Appellate Body through their quasi-automatic adoption by the DSB, are bindings and if not respected may lead to sanctions.” (*Ibid.* 2001:78)

¹⁶² “Non-compliance procedures are characterized by their non-controversial and technical assistance oriented nature. They are normally administered by a special, dedicated institutional mechanism, such as a standing or implementation committee. The size and composition of the committee may vary, but in general, they should try to reflect an ‘equitable geographical distribution’ (e.g., Montreal Protocol) or an adequate representation of those members most likely to be affected by the MEA (e.g., proposals for the committee of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal).” (*Ibid.* 2001:76)

being weaker than the WTO dispute settlement system.¹⁶³ Another point of view expresses that, despite its highly juridical dispute resolution system, the WTO¹⁶⁴ is still not able to give satisfactory solutions to all sorts of conflicts, such as those reflecting conflicts between trade and environment policies.

Serious concerns have been expressed by some WTO Members with respect to the consequences of trade provisions in MEAs for those countries that are members of the WTO but are not parties to the MEAs¹⁶⁵ since the majority of the trade restrictions of the MEAs are specifically directed at non-parties of MEAs. So, if a non-party to a MEA does not have access to the dispute settlement provisions of the MEA, the WTO Member that is not party to MEA may still require the establishment of a panel according to the WTO dispute settlement understanding (DSU). If there is a conflict between two countries under a MEA and under a WTO agreement and both parties decide to negotiate under the terms of the MEA's dispute settlement mechanism, but one of the parties concomitantly refers the case to the dispute settlement body of the WTO aiming at the establishment of a panel as well, there is no conflict of jurisdiction between dispute settlement under MEAs and WTO dispute resolution system because only courts,

¹⁶³ "The rather weak status of MEAs within the international trade regime, together with their painful negotiations, dependance on voluntary adherence, and frequently weak enforcement, are obvious limitations when compared with the strength of the WTO system." (Holder and Lee 2007:311)

¹⁶⁴ "WTO dispute resolution is the most fully judicialized international dispute system. But, like all bodies, WTO panels have certain areas of competence. They are quite good at the legal enterprise of treaty interpretation. But they are not and cannot be very good at resolving larger questions regarding the nature and functions of the trade regime. To overburden dispute resolution with issues that it cannot adequately resolve risks undermining that system." (Dunoff 2001:68)

¹⁶⁵ "Non-parties to the MEAs will undoubtedly represent the majority of the potential challenges to the trade measures of the MEAs. This is due to the unlikelihood of a country that has voluntarily joined the MEA and agreed to the trade measures of the agreement, to later challenge its terms in the GATT/WTO regime forum. A party to the GATT/WTO regime who has come a party to the MEA, has essentially consensually waived their GATT/WTO rights in those areas in which the MEA applies. In addition, the majority of the trade restrictions of the MEAs are specifically directed at non-parties." (Caldwell 2001:46)

tribunals, and some arbitration bodies can exercise jurisdiction.¹⁶⁶ The dispute settlement under MEAs would still be undermined by the WTO Dispute Settlement Understanding because the latest is most judicialized dispute system. Let's suppose a dispute under a MEA and under a WTO agreement, and one party refers the case to the dispute settlement body of the WTO and also another one under the terms of the MEA's dispute settlement that imposes a binding adjudication process on the parties by International Court of Justice (ICJ). In such a situation, there could be an overlap of jurisdictions taking into consideration that WTO dispute settlement has jurisdiction over GATT violations. The *Chile – Swordfish* case illustrates the risk of conflicting judgments from the WTO dispute settlement system and the International Tribunal for the Law of the Sea (ITLOS).¹⁶⁷ In that dispute, Chile enacted swordfish conservation measures, by regulating gear and limiting the level of fishing by denying new catching permits. Chile also prohibited the utilisation of its ports for the landing and service to the EU long-liners and factory ships that disregarded the minimum conservation standards. The EC challenged these measures as being contrary to its WTO rights in accordance with Article V of GATT, which provides for the free transit of goods along the members' territories. Chile asserted that the WTO does not limit state sovereignty over its ports and demanded that the EC enact and enforce conservation measures for its fishing operations in the high seas, in accordance with recommendations from the United Nations Division for Ocean Affairs and in accordance with the Law of the Sea Convention (LOSC). Chile replied to the EC's WTO challenge by initiating the dispute settlement

¹⁶⁶ "A word of caution is necessary. Often the debate focuses on 'overlapping jurisdiction of the WTO and MEAs.' However, a conflict of jurisdiction can only arise if there are two bodies actually exercising 'jurisdiction,' a concept not applicable to all types of dispute settlement. The question of jurisdiction is a question about the applicable law, which is why only a dispute settlement institution basing its decision on law and not on political, economic or other non-legal consideration can have 'jurisdiction' in a legal sense. Furthermore, jurisdiction refers to the competence of a body to decide an issue. If the body renders its decision *ultra vires* (outside its competence) the decision is not valid from a legal point. Jurisdiction is thus a concept of limiting the powers of a body and of restricting it to a legal decision. Therefore only courts, tribunals or sometimes also arbitration bodies can exercise jurisdiction and a conflict of jurisdiction can only arise if two such bodies are involved, but not other methods of dispute settlement are used." (Krajewski 2001:98)

¹⁶⁷ For further details cf. attachments (case 9).

provisions of LOSC and invited the EC to the International Tribunal for the Law of the Sea (ITLOS). The EC finally agreed to formation of an arbitral tribunal according to the LOSC to settle the matter.

So far, there has never been a formal dispute between the WTO system and a MEA system, however, with a considerable number of MEAs in force, the concerns are rising. The CTE has observed that of the approximately 200 MEAs currently in force, only 14 contain trade provisions.¹⁶⁸

A possible source of conflict between trade restrictions contained in MEAs and WTO rules could be violation by MEAs of the Most Favoured Principle,¹⁶⁹ the National Treatment (two non-discrimination principle in Articles I and III of the GATT), and the prohibition on quantitative restrictions (established in Article XI)¹⁷⁰ pursuing prohibition of quotas, embargoes and licensing schemes on imported or exported products. Yet, trade restrictions in MEAs can take into consideration the process and production methods¹⁷¹ and extra-territorial application to enforce trade restrictions and, in consequence, could be subject to challenge by non-parties to MEAs and could be held invalid under WTO regime. Furthermore, a WTO Member could eventually invoke a MEA to justify a trade restriction with environmental goals under Article XX(b) or (g) of

¹⁶⁸ For more information on MEAs containing trade provisions cf. "Matrix on Trade Pursuant to Selected Multilateral Environmental Agreements." Note by the Secretariat. Document WT/CTE/W/160/Rev.4, TN/TE/S/5/14 March 2007.

¹⁶⁹ "The MFN principle entitles all GATT/WTO members to equal treatment of their like products and therefore, a member may argue that they are not receiving equal MFN treatment when their products are subject to the trade restrictions of the MEA." (Caldwell 2001:47)

¹⁷⁰ "The import restrictions that do not satisfy national treatment and MFN, and the export restrictions of the MEAs that take the form of bans, embargoes, prohibitions etc. of trade, are potentially vulnerable to challenge as quantitative restrictions under Article XI of GATT." (*Ibid.* 2001:47)

¹⁷¹ "[...] a regulatory measure should be closely related to the end product as an end product and not to the process and production methods (PPMs) by which the product was manufactured. Thus, import restrictions in MEAs that restrict the use of certain substances in products may be challenged as violations of national treatment as a result of their PPM-based distinction of like products. The Montreal Protocol's use of trade measures to distinguish products based on whether they contain ozone depleting substances (ODS) is arguably such a PPM-based distinction. The Protocol's plan to distinguish products based on whether or not they were made with ODS is problematic." (*Ibid.* 2001:47)

GATT 1994.¹⁷² On the other hand, there are different opinions by expert commentators on the possibility of conflicts between MEAs and GATT 1994 rights and obligations. Some scholars do not believe in such a conflict since Article XX(b) and (g) allow a broad range of trade environmental measures provided that such measures are not applied in an arbitrary and unjustifiable manner or as a disguised restriction on international trade.¹⁷³ Furthermore, the real question is about what kind of a role MEAs should have in the interpretation of WTO rules in specific cases. The enterprise to anticipate by drafters of interpretation addressing how WTO law and MEA provisions should interact probably would fail since each dispute is different and involves different matters as of WTO law as the MEA stipulates. WTO rules and MEAs should be interpreted in a complementary manner. For example, a MEA could provide evidence of a wide range of international consensus on a fact relevant to a dispute, such as whether a species is endangered and requires protection under Article XX(g);¹⁷⁴ a MEA, could provide definitions of terms circumscribed, but undefined, in the GATT treaty or in other WTO treaties¹⁷⁵ or assist a panel in interpreting requirements described in some treaty at issue.¹⁷⁶

¹⁷² “So far, trade measures taken by WTO members pursuant to MEAs or pursuant to recommendations by MEAs institutional bodies have not been challenged at the WTO. For instance, in the context of the non-compliance mechanism under the Montreal Protocol, the Meeting of the Parties, prior to the recommendation of the Implementation Committee, decided to impose a combination of measures, consisting *inter alia* of restrictions on Russia’s trade in controlled substances to deal with Russia’s non-compliance. Also, under the Convention on International Trade in endangered Species of Wild Fauna and Flora (CITES), trade suspensions have been adopted against dozens of parties and non-parties and such measures have never been challenged. Finally, there are recommendations from the contracting parties of the International Convention for the Conservation of Atlantic Tunas (ICCAT) to ban imports of certain fish species and their products from other contracting parties.” (Marceau and González-Calatayud 2001:72)

¹⁷³ “We would be sceptical of the claim that the fulfilment of a State’s obligations under, for example, CITES or Basel Convention on Hazardous Wastes could not be achieved except in conflict with these disciplines on protective discrimination. In case of GATS and TRIPs, the situation is a bit more complicated because the exceptions or limitations are stated in a more complex fashion: but in these cases as well, it is far from clear that trade measures based on MEAs would *ever* fail justification under the relevant provisions of these treaties.” (Trebilcock and Howse 2005:546)

¹⁷⁴ “The CITES played such a role in the *Shrimp/turtle* dispute.” (*Ibid.* 2005:47)

¹⁷⁵ “[...] ‘exhaustible resources’ in Article XX(g) in the *Shrimp/turtle* dispute.” (*Ibid.* 2005:547)

¹⁷⁶ “A MEA [...] could provide evidence of whether trade action in response to environmental practices or policies is justified as ‘necessary’ under Article XX; for instance, where a WTO Member has been found in non-relevant MEA, it may be easier to find that unilateral trade measures are ‘necessary’ within the meaning of XX(b) than where the matter has not yet been given an opportunity to resolve itself within the framework of the MEA. [...] the emphasis that the AB [Appellate Body] in *Shrimp/turtle* placed on serious effort to negotiate a MEA” (*Ibid.* 2005:547)

The WTO has suggested a solution to conflicts between WTO law and MEA provisions being that the WTO Members and parties of MEAs should themselves, through negotiations, resolve the issue by negotiation process.

3.4 Chapter conclusion

The Appellate Body refused in Tuna cases and Shrimp-Turtle cases to address the question of whether or not there is an implied jurisdictional limitation in Article XX(b) and/or (g). In a later case, *Shrimp-Turtle II case*, the Appellate Body did not decide whether there are or are not “implicit” jurisdictional or territorial limits on XX(g) but it did verify whether the trade-related environmental measure acted in response to a global environmental problem could be met by the requirements of Article XX (g).

The MEA is acknowledged by WTO as the best way to achieve goals of the trade-related environmental measures with extra-territorial motivation, such as to protect the ozone layer or endangered migratory species. Unilateral measures must be carefully addressed in certain situations being very necessary as a legal and legitimate response.

A WTO Member may invoke a MEA with environmental goals to justify a trade restriction, i.e. a violation of substantial GATT rules, under Article XX(b) or (g) of GATT 1994. A trade-related environmental measure applied in accordance with a MEA may be easily justified under Article XX provided that it involves the international community, i.e. many countries with identical environmental goals, where the principle of good faith is corroborated.

As conflicts between MEA provisions and WTO/GATT laws can eventually occur and any possibility of a previous solution in this case would be uncertain, the more realistic solution is negotiations as have been suggested by the WTO in spite of strong criticism by environmentalists.

GENERAL CONCLUSION

The expert commentators, usually being pro-environmentalists, frequently condemn the modus operandi of the World Trade Organisation in relation to how environmental policies are considered as being in a conflict with liberal trade policies. Mostly, the criticism falls on the Dispute Settlement Understanding procedure because, according to that point of view, the interpretation and applicability of law by the panel and Appellate Body is a very narrow interpretation as in relation to WTO law as Public International law. Consequently, the WTO dispute resolution system decisions tend to undermine the efficacy of the environmental policies. However, everyone recognised the strong power of the WTO dispute resolution system which is considered the most highly juridical one in the field of International Law since its composition is a combination of compulsory jurisdiction, automatic right of appeal, legally binding results, and provisions for sanctions in cases of non-compliance. Most environmentalists would prefer that the WTO's power would be better managed in favour of the environmental policies. Some pro-environmentalists alternatively support the establishment of the World Environmental Organisation based on the model set by the WTO. Others believe that the easiest track to follow and most feasible solution in this case would be a new kind of approach by the WTO in the sense of further prioritizing trade-related environmental measures adopted by its Members at the expense of a more liberal view of world trade.

Furthermore, it has been also noted that the decisions reached by the WTO resolution system after the GATT was emended in 1994 that the WTO has demonstrated a stronger willingness to incorporate environmental considerations into the legal sphere of the WTO.

With the creation of the Committee on Trade and Environment it was stipulated as an aim to make "international trade and environment policies mutually supportive". The WTO has been investigating the relationship between trade policies and environmental policies, making efforts to facilitate the access to developing and less developing countries in the world market mainly by the elimination of trade barriers such as tariffs, quotas, and export and import licensing requirements, and by the elimination of non-trade barriers, for example, the "green tariffs".

The WTO Members are mandated to enact their own environmental policies but the trade-related environmental measures must be lawful, in other words, such measures may be saved by Article (b) or (g) exceptions if they meet the requirements of the listed exceptions and are not applied in a misuse manner, i.e. which resulted as an arbitrary or unjustifiable discrimination or yet as a disguised restriction according to the chapeau.

WTO Members recognise that the WTO is not an environmental protection agency and that does not aspire to become one. Its competence in the field of trade and environment is mainly limited to trade policies and to the trade-related aspects of environmental policies which have a significant effect on trade.

ATTACHMENTS

SUMMARY OF CASES REGARDING THE APPLICABILITY OF ARTICLE XX(B) AND (G)

A brief description of the relevant facts of the cases mentioned in this essay is provided below. The main facts and matters discussed in each case consider the issues concerned with paras. (b) and (g) of GATT Article XX as well as the *chapeau* of that same Article.¹⁷⁷ It is important to observe that despite the fact that the Panel and Appellate Body decisions are not binding, except in relation to those WTO Members involved in a specific dispute, they have been considered to solve new cases brought to the Dispute Settlement Body.¹⁷⁸ Therefore, it is fundamental to be acquainted with these background cases or at least the main facts and issues discussed in each of them for understanding the implementation of those exceptions under Article XX, especially paras. (b) and (g), as a tool to put into effect environmental policies harmonised with the rules of international trade.

Even though the application of such exceptions is criticised by pro-environmentalists, no better tool to harmonise the conflicts between environmental interests and trade interests has come into existence yet. The following summaries embrace briefly the main facts and discussions on Article XX paras. (b) and (g) discussed in the sub-sessions of Chapter 2 in the following order (cases 1 to 8): *United States – Tuna I and II*; *United States – Reformulated Gasoline*; *United States – Shrimp I and II*; *European Union – Asbestos, Thailand Cigarettes*; and *Brazil – Retread Tyres*. The risk of conflicting judgements by the WTO dispute settlement system and the International Tribunal for the Law of the Sea (ITLOS), as discussed in chapter 3, is illustrated by case 9 (*Chile – Swordfish*).

¹⁷⁷ The brief of all the cases cited below is an extract of the memoranda by the Secretariat of WTO, identified as WT/CTE/203, 8 March 2002. The note was 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. Consulted on 5 May 2008 at: http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FCTE%2FW%203%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FCTE%2FW%2F203.

¹⁷⁸ In relation to WT/CTE/203, 8 March 2002, p. 3: “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’ as the phrase ‘subsequent practice’ is used in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (the ‘Vienna Convention’), the Appellate Body held that: ‘Adopted panel reports are an important part of the GATT *acquis*. 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’. 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”. Furthermore, in the US – Shrimp (Article 21.5) case, the Appellate Body held that its reasoning in *Japan – Alcoholic beverages* on the GATT *acquis* “applies to adopted Appellate Body Reports as well”. 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.”

1 *United States – Tuna I (Mexico)*

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.

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.

Main Facts

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 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.

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 authorisation. It governed in particular the taking of marine mammals incidental to harvesting yellow-fin tuna in the ETP.

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 yellow-fin 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. 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. In 1991, countries affected by the primary nation embargo were Mexico, Venezuela and Vanuatu. 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.

Mexico claimed that the import prohibition on yellow-fin tuna and tuna products was inconsistent with Articles XI, XIII and III. 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).

Summary of Findings on Article XX

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).

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. 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 rights under GATT. Also, 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 co-operative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. 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).

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".

2 *United States – Tuna II (EEC)*

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.

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.

Main Facts

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 yellow-fin tuna or yellow-fin 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. 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.

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.

Summary of Findings on Article XX

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 contract-

ing party, 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).

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), 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). 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.

3 United States – Reformulated Gasoline (EEC)

Parties

Panel

Complainant: Brazil and Venezuela.

Respondent: United States.

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

Appellate Body

Appellant: United States.

Appellees: Brazil and Venezuela.

Third Participants: the European Communities and Norway.

Timeline of Dispute

Panel requested: 25 March 1995.

Panel established: 10 April 1995.

Panel composed: 28 April 1995.

Panel Report circulated: 29 January 1996.

Notice of appeal: 21 February 1996.

Appellate Body Report circulated: 29 April 1996.

Adoption: 20 May 1996.

Main Facts

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

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

The EPA regulation provided two different sets of baseline emissions standards. 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 estab-

lished a “statutory baseline”, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. The statutory baseline imposed a stricter burden on foreign gasoline producers.

Venezuela and Brazil claimed that the Gasoline Rule was prejudicial to their exports to the United States and that it favoured 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. 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. The United States appealed the panel report but limited its appeal to the panel’s interpretation of Article XX of the GATT 1994.

Summary of Findings on Article XX

The panel found that imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefiting 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. The Gasoline Rule was accordingly inconsistent with Article III.

The panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of human, animal and plant life or health mentioned in Article XX(b). 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. 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. 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). 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. In light of these findings, it was not deemed necessary by the panel to determine whether the measure met the conditions set out in the chapeau of Article XX. The panel concluded that the Gasoline Rule could not be justified under Article XX(b), (d) or (g). The panel finding was reversed on appeal.

The Appellate Body held that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX. It noted that the chapeau addressed not so much the questioned measure or its specific contents as such,

but rather the manner in which that measure is applied. Accordingly, the chapeau is animated by the principle that while Members have a *legal right* to invoke the exceptions of Article XX, they should not be so *applied* as to lead to an abuse or misuse.

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. First, the United States had not explored adequately means, including in particular co-operation 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.

4 *United States – Shrimp I*

Parties

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.

Appellate Body

Appellant: United States.

Appellees: India; Malaysia; Pakistan and Thailand.

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

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.

Panel Report circulated: 15 May 1997.

Notice of appeal: 13 July 1998.

Appellate Body Report circulated: 12 October 1998.

Adoption: 6 November 1998.

Main Facts

Sea turtles at issue are characterised 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").¹⁷⁹

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 trawl-

¹⁷⁹ *Ibid.*, Panel Report, para. 2.3.

ers used “turtle excluder devices” (TEDs) in their nets when fishing in areas where there was a significant likelihood of encountering sea turtles.

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. 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.

The complainants argued that the import prohibition on shrimp and shrimp products was inconsistent with Article XI:1, with Article I:1, 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. 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. The complainants argued to the contrary that 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.

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.

Summary of Findings on Article XX

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. This ruling was rejected by the Appellate Body. It indicated that the sequence of steps followed in the *US – Gasoline* case (first, characterisation 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.

The panel had found that the ban imposed by the United States was inconsistent with Article XI. 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. It had reasoned that allowing such a ban would undermine Members’ autonomy to determine their own policies. 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.

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), and that Section 609 was a measure “relating to” the conservation of an exhaustible natural resource. 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. 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.

5 *United States – Shrimp II (Article 21.5)*

Parties

Panel

Complainant: Malaysia.

Respondent: United States.

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

Appellate Body

Appellant: Malaysia.

Appellee: United States.

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

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.

Main Facts

In accordance with Article 21.5 of the DSU, 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. The DSB referred the matter to the original panel.

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”). 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.

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.

Summary of Findings on Article XX

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).¹⁸⁰

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 1994.¹⁸¹

The panel concluded that the recognition that the protection of migratory species was best achieved through international co-operation significantly moved the line of equilibrium towards a bilaterally or multilaterally negotiated solution, thus rendering recourse to unilateral measures less acceptable. 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. It also concluded that the US had made serious good faith efforts to negotiate an international agreement.

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.¹⁸² Malaysia also

¹⁸⁰ *Ibid.*, paras. 5.39-5.42.

¹⁸¹ *US – Shrimp*, Appellate Body Report, para. 159.

¹⁸² *US – Shrimp (21.5)*, Appellate Body Report, para. 134.

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 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”.

6 *European Communities – Asbestos (Article 21.5)*

Parties

Panel

Complainant: Canada.

Respondent: European Communities.

Third Parties: Brazil; the United States and Zimbabwe.

Appellate Body

Appellant and Appellee: Canada.

Appellant and Appellee: European Communities.

Third Participants: Brazil and the United States.

Timeline of Dispute

Panel requested: 8 October 1998.

Panel established: 25 November 1998.

Panel composed: 29 March 1999.

Panel Report circulated: 18 September 2000.

Notice of appeal: 23 October 2000.

Appellate Body Report circulated: 12 March 2001.

Adoption: 5 April 2001.

Main Facts

Chrysotile asbestos is generally considered to be a highly toxic material, the exposure to which poses significant threats to human health such as risk of asbestosis, lung cancer or mesothelioma. 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.

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

I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than

chrysotile fibre to workers handling those materials, products or devices; on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof (...).¹⁸³

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. France contended that it could thereby reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma.

Canada is the number two producer and number one exporter of chrysotile. 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, which were themselves higher than those of the WHO or those applied by France before the ban.

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).

Summary of Findings on Article XX

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

The panel noted that the experts consulted confirmed the health risks associated with exposure

¹⁸³ Decree N.º 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.

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)). 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. Concerning the *chapeau* of Article XX, the panel found that the application of the Decree did not constitute arbitrary or unjustifiable discrimination, 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.

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. 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, 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.

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. 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 realisation 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. In this case, the objective pursued (health) was characterised as "vital and important in the highest degree". 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.

7 Thailand – Cigarettes

Parties

Complainant: United States.

Respondent: Thailand.

Third Parties: The European Communities.

Timeline of Dispute

Panel requested: 5 February 1990.

Panel established: 3 April 1990.

Panel composed: 16 May 1990.

Panel Report circulated: 5 October 1990.

Adoption: 7 November 1990.

Main Facts

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

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

The WHO indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used additives and flavourings. Moreover, locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as

women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. However, the WHO could not provide any scientific evidence that cigarettes with additives were less or more harmful to health than cigarettes without.

Summary of Findings on Article XX

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

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. 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. For instance, the panel suggested that a ban on cigarette advertising could curb the demand while meeting the requirements of Article III:4.

8 *Brazil – Retreaded Tyres case*

Complainant: European Communities

Respondent: Brazil

Third Parties: Argentina; Australia; China; Cuba; Guatemala; Japan; Korea; Mexico; Paraguay; Chinese Taipei; Thailand; United States

Timeline of Dispute

Request for Consultations received: 20 June 2005

Panel Report circulated: 12 June 2007

Appellate Body Report circulated: 3 December 2007

Summary up-to-date at 22 January 2008

Appellate Body and Panel Reports Adopted

Complaint by the European Communities.

On 20 June 2005, the European Communities requested consultations with Brazil on the imposition of measures that adversely affect exports of retreaded tyres from the EC to the Brazilian market. The EC would like to address the following measures:

- Brazil's imposition of an import ban on retreaded tyres;
- Brazil's adoption of a set of measures banning the importation of used tyres, which sometimes applies against imports of retreaded tyres, despite the fact that these are not used tyres;
- Brazil's imposition of a fine of 400 BRL per unit on the importation, as well as the marketing, transportation, storage, keeping or keeping in deposit or warehouses of imported, but not of domestic retreaded tyres; and
- Brazil's exemption of retreaded tyres imported from other Mercosur countries from the import ban and from the above-mentioned financial penalties, in response to the ruling of a Mercosur panel established at the request of Uruguay.

The EC considers that the foregoing measures are inconsistent with Brazil's obligations under Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994.

On 4 July 2005, Argentina requested to join the consultations. On 20 July 2005, Brazil accepted Argentina's request to join the consultations.

On 17 November 2005, the European Communities requested the establishment of a panel. At its meeting on 28 November 2005, the DSB deferred the establishment of a panel until a second request is made by the European Communities. At its meeting on 20 January 2006, the DSB established a panel. Argentina, Australia, Japan, Korea and the United States reserved their third party rights at the meeting. Subsequently, China, Cuba, Guatemala, Mexico, Paraguay, Chinese Taipei and Thailand reserved their third party rights. On 6 March 2006, the European Communities requested the Director-General to compose the panel. On 16 March 2006, the Director-General composed the panel.

On 18 September 2006, the Chairman of the Panel informed the DSB that it would not be possible for the Panel to complete its work in six months due to the schedule adopted by the Panel taking into consideration the views of the parties. The Panel expected to complete its work in December 2006. On 21 December 2006, the Chairman of the Panel informed the DSB that it would not be possible for the Panel to complete its work in December 2006 and estimated that it will issue its final report to the parties by April 2007.

On 12 June 2007, the report of the Panel was circulated to Members. The Panel concluded that:

- with respect to Brazil's import prohibition on retreaded tyres (i) Portaria SECEX 14/2004 is inconsistent with Article XI:1 of GATT 1994 in that it prohibits the issuance of import licences for retreaded tyres, and is not justified under Article XX(b) of GATT 1994; (ii) Portaria DECEX 8/1991, to the extent that it prohibits the importation of retreaded tyres, is inconsistent with Article XI:1 and is not justified under Article XX(b) of GATT 1994; and (iii) Resolution CONAMA 23/1996 is not inconsistent with Article XI:1.
- with respect to the fines imposed by Brazil on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres, Presidential Decree 3.179, as amended by Presidential Decree 3.919, is inconsistent with Article XI:1 of GATT 1994 in that it imposes limiting conditions in relation to the importation of retreaded tyres and is not justified under either Article XX(b) or Article XX(d) of GATT 1994.
- with respect to the measures maintained by the Brazilian State of Rio Grande do Sul in respect of retreaded tyres, Law 12.114, as amended by Law 12.381, is inconsistent with Article III:4 of GATT 1994 in that it accords less favourable treatment to imported retreaded tyres than to like domestic products and is not justified under Article XX(b) of GATT 1994.

On 3 September 2007, the European Communities notified its intention to appeal to the Appellate Body certain issues of law covered in the Panel report and certain legal interpretations developed by the Panel. On 31 October 2007, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its report within 60 days due to the time required for completion

and translation of the report. The Appellate Body estimated that the report would be circulated to WTO Members no later than 3 December 2007.

On 3 December 2007, the Appellate Body report was circulated to Members. The Appellate Body:

- upheld the Panel's finding that the import ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision and found that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts.
- reversed the Panel's findings that the Mercosur exemption would result in the import ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the import ban;
- reversed the Panel's findings that the Mercosur exemption has not resulted in arbitrary discrimination and that the Mercosur exemption has not resulted in unjustifiable discrimination; and found instead that the Mercosur exemption has resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX;
- reversed the Panel's findings that the imports of used tyres under court injunctions have resulted in the import ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the import ban; and found instead that the imports of used tyres under court injunctions have resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX; and
- with respect to Article XX of the GATT 1994, the Appellate Body upheld, albeit for different reasons, the Panel's findings that the import ban is not justified under Article XX of the GATT 1994.

On 17 December 2007, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

9 *Chile – Swordfish case*

Facts

Swordfish migrate through the waters of the Pacific Ocean. Along their extensive journeys swordfish cross jurisdictional boundaries. For ten years, the European Communities and Chile have been engaged in a controversy over swordfish fisheries in the South Pacific, resorting to different international law regimes to support their positions. However, the European Communities decided in April 2000 to bring the case before the WTO, and Chile before the ITLOS in December 2000.

Proceedings at the WTO

On 19 April 2000, the European Communities requested consultations with Chile regarding the prohibition on unloading of swordfish in Chilean ports established on the basis of the Chilean Fishery Law.

The European Communities asserted that its fishing vessels operating in the South East Pacific were not allowed, under Chilean legislation, to unload their swordfish in Chilean ports. The European Communities considered that, as a result, Chile made transit through its ports impossible for swordfish. The European Communities claimed that the above-mentioned measures were inconsistent with GATT 1994, and in particular Articles V and XI.

On 12 December 2000, the Dispute Settlement Body (DSB) established a panel further to the request of the European Communities. In March 2001, the European Communities and Chile agreed to suspend the process for the constitution of the panel (this agreement was further reiterated in November 2003).

Proceedings at the ITLOS

Proceedings in the Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean were instituted on 19 December 2000 at the ITLOS by Chile and the European Communities.

Chile requested, inter alia, the ITLOS to declare whether the European Communities had fulfilled its obligations under UNCLOS Articles 64 (calling for co-operation in ensuring conservation of highly migratory species), 116-119 (relating to conservation of the living resources of the high seas), 297 (concerning dispute settlement) and 300 (calling for good faith and no abuse of right). The European Communities requested, inter alia, the Tribunal to declare whether Chile had violated Articles 64, 116-119 and 300 of UNCLOS, mentioned above, as well as Articles 87 (on freedom of the high seas including freedom of fishing, subject to conservation obligations) and 89 (prohibiting any State from subjecting any part of the high seas to its sovereignty).

On 9 March 2001, the parties informed the ITLOS that they had reached a provisional arrangement concerning the dispute and requested that the proceedings before the ITLOS be suspended. This suspension was recently confirmed for a further period of two years in January 2004. Therefore, the case remains on the docket of the Tribunal.

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