

1 ARTICLE XX.....	3
1.1 Text of Article XX.....	3
1.2 Text of note <i>ad</i> Article XX	4
1.3 General	4
1.3.1 Nature and purpose of Article XX	4
1.3.2 Structure of Article XX.....	5
1.3.2.1 Two-tier test	5
1.3.2.2 Language of paragraphs (a) to (i)	6
1.3.3 Burden of proof	6
1.3.4 "measures" to be analysed under Article XX.....	8
1.4 Paragraph (a)	8
1.4.1 General	8
1.4.1.1 Analysing the elements of Article XX(a)	9
1.4.1.2 Burden of proof	9
1.4.2 Aspects of the measure that must be examined.....	9
1.4.3 Design of the measure; "not incapable of" protecting public morals.....	10
1.4.4 "necessary"; "weighing and balancing"	13
1.4.4.1 Specific factors	15
1.4.4.1.1 Importance of the objective.....	16
1.4.4.1.2 Contribution of the measure to the objective	17
1.4.4.1.3 Trade restrictiveness of the measure	23
1.4.4.1.4 "Reasonably available" alternatives	24
1.4.4.1.5 Burden of proof.....	25
1.4.5 "to protect"; level of protection	25
1.4.6 "public morals"	26
1.5 Paragraph (b)	27
1.5.1 General; burden of proof	27
1.5.2 Policy objective of the measure at issue	30
1.5.3 "necessary".....	31
1.5.3.1 Aspect of measure to be justified as "necessary".....	32
1.5.3.2 Treatment of scientific data and risk assessment	32
1.5.3.3 Weighing and balancing of relevant factors	33
1.5.3.3.1 Importance of the interest or values protected.....	33
1.5.3.3.2 Contribution of the measure to the objective	34
1.5.3.3.3 Trade restrictiveness of the measure	38
1.5.3.3.4 "Reasonably available" alternatives	38
1.5.3.3.5 Burden of proof.....	41
1.5.4 "to protect".....	42
1.6 Paragraph (d)	42
1.6.1 General; burden of proof	42

1.6.2	Aspect of measure to be justified as "necessary"	45
1.6.3	Measures "designed to secure compliance" with laws or regulations "not inconsistent" with the GATT 1994.....	45
1.6.3.1	"laws or regulations"	46
1.6.3.2	"to secure compliance"	50
1.6.4	"necessary", "weighing and balancing"	51
1.6.4.1	Specific factors	53
1.6.4.2	"Reasonably available" alternatives	56
1.7	Paragraph (g)	59
1.7.1	General; burden of proof; jurisdictional limitations.....	59
1.7.2	Analytical framework.....	60
1.7.3	"relating to the conservation of exhaustible natural resources"	62
1.7.3.1	"relating to"	62
1.7.3.2	"conservation of exhaustible natural resources"	64
1.7.4	"made effective in conjunction with"	66
1.7.5	Paragraph (g) and chapeau.....	70
1.8	Paragraph (j)	70
1.8.1	Analytical framework; design and necessity	70
1.8.2	"essential"; "weighing and balancing"	71
1.8.3	"products in general or local short supply"	72
1.9	Chapeau of Article XX	74
1.9.1	Purpose	74
1.9.2	Order of analysis: subparagraphs of Article XX and chapeau	75
1.9.3	"measures"	76
1.9.4	"applied"	77
1.9.5	"arbitrary or unjustifiable discrimination between countries where the same conditions prevail".....	77
1.9.5.1	Constitutive elements.....	77
1.9.5.1.1	discrimination; "arbitrary or unjustifiable" discrimination.....	77
1.9.5.1.1.1	"discrimination" under the chapeau of Article XX vs. "discrimination" under the non-discrimination obligations of the GATT 1994	79
1.9.5.1.1.2	"arbitrary and unjustifiable discrimination"	79
1.9.5.1.1.3	Examples of arbitrary and unjustifiable discrimination	80
1.9.5.1.1.4	Relevance of the context of the word "discrimination" in other WTO provisions	85
1.9.5.1.2	"between countries where the same conditions prevail"	87
1.9.6	"disguised restriction on international trade"	88
1.10	Relationship with other WTO Agreements	89
1.10.1	Anti-Dumping Agreement.....	89
1.10.2	GATS.....	90
1.10.3	SPS Agreement	90
1.10.4	TBT Agreement.....	91

1.10.5 Special provisions in Protocols of Accession	91
---	----

1 ARTICLE XX

1.1 Text of Article XX

Article XX

General Exceptions

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

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

1.2 Text of note *ad* Article XX

Ad Article XX

Subparagraph (h)

The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

1.3 General

1.3.1 Nature and purpose of Article XX

1. In *US – Gasoline*, in discussing the preambular language (the "chapeau") of Article XX, the Appellate Body stated:

"[T]he chapeau says that '*nothing in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures ...' The exceptions listed in Article XX thus relate to all of the obligations under the *General Agreement*: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well."¹

2. In *US – Shrimp*, the Appellate Body examined the GATT-consistency of the import ban on shrimp and shrimp products from exporting nations not certified by United States authorities. Such certification could be obtained, *inter alia*, where the foreign country could demonstrate that shrimp or shrimp products were being caught using methods which did not lead to incidental killing of turtles beyond a certain level. The Panel had found that the measure at issue could not be justified under Article XX, because Article XX could not serve to justify "measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies". The Appellate Body disagreed with this interpretation of the scope of Article XX and stated:

"[C]onditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."²

3. In *US – Shrimp*, interpreting the chapeau of Article XX, the Appellate Body described the nature and purpose of Article XX as a balance of rights and duties:

"[A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of

¹ Appellate Body Report, *US – Gasoline*, p. 24.

² Appellate Body Report, *US – Shrimp*, para. 121.

the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."³

4. In *US – Gasoline*, the Appellate Body concluded its analysis by emphasizing the function of Article XX with respect to national measures taken for environmental protection:

"It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*,⁴ there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements."⁵

1.3.2 Structure of Article XX

1.3.2.1 Two-tier test

5. In *US – Gasoline*, the Appellate Body examined the Panel's findings that the United States regulation concerning the quality of gasoline was inconsistent with GATT Article III:4 and not justified under either paragraph (b), (d) or (g) of Article XX. The Appellate Body presented a two-tiered test under Article XX:

"In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."⁶

6. In *US – Shrimp*, the Appellate Body reviewed the Panel's finding concerning an import ban on shrimp and shrimp products harvested by foreign vessels. The ban applied to shrimp and shrimp products where the exporting country had not been certified by United States authorities as using methods not leading to incidental killing of sea turtles above a certain level. The Panel found a violation of Article III and held that the United States measure was not within the scope of measures permitted under the chapeau of Article XX. As a result of its finding that the United States measure could not be justified under the terms of the chapeau, the Panel did not examine the import ban in the light of Articles XX(b) and XX(g). The Appellate Body referred to its finding in *US – Gasoline*, cited in paragraph 5 above, and emphasized the need to follow the sequence of steps as set out in that Report:

"The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental

³ Appellate Body Report, *US – Shrimp*, paras. 156 and 159.

⁴ (*footnote original*) Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.

⁵ Appellate Body Report, *US – Gasoline*, pp. 30-31.

⁶ Appellate Body Report, *US – Gasoline*, p. 22.

structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States – Gasoline* 'seems equally appropriate.' We do not agree.

The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure 'in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail' or 'a *disguised restriction* on international trade.' (emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies."⁷

7. In *Brazil – Retreaded Tyres*, the Appellate Body again confirmed that examination of a measure under Article XX is two-tiered. A panel must first examine whether a measure falls under one of the exceptions listed in the various sub-paragraphs of Article XX. Subsequently, a panel must examine whether the measure in question satisfies the requirements of the chapeau of Article XX.⁸ For an Article XX defence to succeed, both elements of the two-tiered test must be met.

1.3.2.2 Language of paragraphs (a) to (i)

8. In *US – Gasoline*, the Appellate Body compared the terms used in paragraphs (a) to (i) of Article XX, emphasizing that different terms are used in respect of the different categories of measures described in paragraphs (a) to (i):

"Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

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

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized."⁹

1.3.3 Burden of proof

9. In *US – Gasoline*, the Appellate Body differentiated between the burden of proof under the individual paragraphs of Article XX on the one hand, and under the chapeau of Article XX on the other:

"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

⁷ Appellate Body Report, *US – Shrimp*, paras. 119-120.

⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139.

⁹ Appellate Body Report, *US – Gasoline*, pp. 17.

invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue."¹⁰

10. The Panel in *EC – Asbestos*, in a statement not reviewed by the Appellate Body, elaborated on the burden of proof under Article XX in the context of a defence based on Article XX(b):

"We consider that the reasoning of the Appellate Body in *United States – Shirts and Blouses from India* is applicable to Article XX, inasmuch as the invocation of that Article constitutes a 'defence' in the sense in which that word is used in the above-mentioned report. It is therefore for the European Communities to submit in respect of this defence a prima facie case showing that the measure is justified. Of course, as the Appellate Body pointed out in *United States – Gasoline*, the burden on the European Communities could vary according to what has to be proved. It will then be for Canada to rebut that prima facie case, if established.

If we mention this working rule at this stage, it is because it could play a part in our assessment of the evidence submitted by the parties. Thus, the fact that a party invokes Article XX does not mean that it does not need to supply the evidence necessary to support its allegation. Similarly, it does not release the complaining party from having to supply sufficient arguments and evidence in response to the claims of the defending party. Moreover, we are of the opinion that it is not for the party invoking Article XX to prove that the arguments put forward in rebuttal by the complaining party are incorrect until the latter has backed them up with sufficient evidence."¹¹

11. The Panel in *EC – Asbestos*, in a finding not addressed by the Appellate Body, further discussed the burden of proof specifically regarding the scientific aspect of the measure at issue. The Panel chose to confine itself to the provisions of the GATT 1994 and to the criteria defined by the practice relating to the application of GATT Article XX rather than to extend the principles of the SPS Agreement to examination under Article XX:¹²

"[I]n relation to the scientific information submitted by the parties and the experts, the Panel feels bound to point out that it is not its function to settle a scientific debate, not being composed of experts in the field of the possible human health risks posed by asbestos. Consequently, the Panel does not intend to set itself up as an arbiter of the opinions expressed by the scientific community.

Its role, taking into account the burden of proof, is to determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health and that the measures taken by France are necessary in relation to the objectives pursued. The Panel therefore considers that it should base its conclusions with respect to the existence of a public health risk on the scientific evidence put forward by the parties and the comments of the experts consulted within the context of the present case. The opinions expressed by the experts we have consulted will help us to understand and evaluate the evidence submitted and the arguments advanced by the parties.¹³ The same approach will be adopted with respect to the necessity of the measure concerned."¹⁴

12. In *Indonesia – Import Licensing Regimes*, the Appellate Body upheld the Panel's conclusion that the burden of proof under Article XX, as incorporated in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture, rested on Indonesia as the respondent:

¹⁰ Appellate Body Report, *US – Gasoline*, p. 22.

¹¹ Panel Report, *EC – Asbestos*, paras. 8.177-8.178.

¹² Panel Report, *EC – Asbestos*, para. 8.180.

¹³ (footnote original) Report of the Appellate Body in *Japan – Agricultural Products*, para. 129. At this point, we recall that the experts were selected in consultation with the parties and that the latter did not challenge the appointment of any of them, although they reserved the right to comment on their statements.

¹⁴ Panel Report, *EC – Asbestos*, paras. 8.181-8.182. See also para. 82 of this Chapter.

"In sum, Article 4.2 of the Agreement on Agriculture and footnote 1 thereto, read in their relevant context, do not suggest that the nature of Article XX of the GATT 1994 as an *affirmative defence* is modified by virtue of the incorporation of this provision into Article 4.2 by the reference contained in the second part of footnote 1. We therefore reject Indonesia's claim that the Panel erred in allocating to Indonesia the burden of proof under Article XX of the GATT 1994 as referenced in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture."¹⁵

13. The Appellate Body in *Indonesia – Import Licensing Regimes* held that the same burden of proof applies under Article XX, regardless of whether that provision is invoked in relation to Article XI:1 of the GATT 1994 or Article 4.2 of the Agreement on Agriculture:

"Furthermore, a measure found to be a quantitative import restriction on agricultural products inconsistent with Article XI:1 may potentially be justified under Article XX of the GATT 1994, and the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture also incorporates Article XX of the GATT 1994. To the extent that they apply to the claims regarding the 18 measures at issue in this dispute, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are thus subject to the same exceptions under Article XX of the GATT 1994, and, as we determine further below in our analysis, the same burden of proof applies under Article XX, regardless of whether that provision is invoked in relation to Article XI:1 or Article 4.2."¹⁶

1.3.4 "measures" to be analysed under Article XX

14. In *EC – Seal Products*, the Appellate Body stated:

"We begin by noting that the general exceptions of Article XX apply to 'measures' that are to be analysed under the subparagraphs and chapeau, not to any inconsistency with the GATT 1994 that might arise from such measures. In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994. Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that the analysis of the Article XX(d) defence in that case should focus on the 'differences in the regulation of imports and of like domestic products' giving rise to the finding of less favourable treatment under Article III:4. Thus, the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994."¹⁷

1.4 Paragraph (a)

1.4.1 General

15. The Panel in *US – Tariff Measures* noted that the correct interpretation of Article XX(a) must be done in accordance with the text of the Preamble of the WTO Agreement and the spirit of the covered agreements:

"[T]he context of Article XX(a) includes the third recital of the Preamble of the WTO Agreement, which refers to the desire of WTO Members to contribute to 'reciprocal and mutually advantageous arrangements directed to the *substantial reduction of tariffs and other barriers to trade* and to the *elimination of discriminatory treatment in international trade relations*'. Further, the object and purpose of the covered agreements are focused on the principle of liberalization of trade flows between WTO Members. Accordingly, an interpretation of Article XX(a) allowing any type or range of restrictive trade measures that may otherwise breach a complainant's WTO rights, simply on the basis of an assertion that they were necessary, rather than a demonstration by a respondent of the necessity of the measures, would be contrary both to the text of the Preamble of the WTO Agreement, and to the spirit of the WTO

¹⁵ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.51.

¹⁶ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.17.

¹⁷ Appellate Body Reports, *EC – Seal Products*, para. 5.185.

covered agreements. Such an interpretation would reduce the word 'necessary' used in Article XX(a) to redundancy and inutility, running counter to the principle of effectiveness in treaty interpretation."¹⁸

1.4.1.1 Analysing the elements of Article XX(a)

16. The Panel in *US – Tariff Measures* used a holistic approach in analysing the various elements of Article XX(a), before reaching an overall conclusion on whether the challenged measures were "necessary to protect public morals":

"The Panel considers that its analysis under subparagraph (a) of Article XX is a *holistic* exercise, which involves an overall assessment of whether the United States has demonstrated that the challenged measures are necessary to protect its invoked public morals, although this overall assessment will be based on the Panel's interpretation of each element of Article XX(a) and on its application to the specific facts of this dispute. Using this holistic approach, the Panel will analyse the elements and requirements of subparagraph (a) together, before reaching its ultimate conclusion on whether the United States has demonstrated that the WTO-inconsistent measures are necessary to protect its invoked public morals. The Panel will refrain from reaching any intermediate conclusion before completing the entire analysis.¹⁹ Only such a holistic approach guarantees that the nature and purpose of Article XX(a) are not frustrated."²⁰

1.4.1.2 Burden of proof

17. Recalling its finding in *US – Gambling*, the Appellate Body in *EC – Seal Products* held that "the burden of proving that a measure is 'necessary to protect public morals' within the meaning of Article XX(a) resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken".^{21,22}

1.4.2 Aspects of the measure that must be examined

18. The Appellate Body in *EC – Seal Products*, agreed with the Panel's conclusion that an analysis under Article XX(a) should examine both the prohibitive and permissive aspects of the EU Seal Regime:

"Norway appears to contend that the baseline establishment rules, which the Appellate Body found needed to be justified in *US – Gasoline*, were like the IC and MRM exceptions of the EU Seal Regime in that they constituted the WTO-inconsistent aspect of the measure. We do not agree with the analogy drawn by Norway between the baseline establishment rules and the IC and MRM exceptions. Rather, we see the baseline establishment rules as comparable to the prohibitive and permissive aspects of the EU Seal Regime, which, taken together, resulted in the differential treatment found to be inconsistent with the GATT 1994. The Appellate Body confirmed this when it stated, in *US – Gasoline*, that it had to consider whether the 'baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline)' were justified under Article XX(g).

¹⁸ Panel Report, *US – Tariff Measures*, para. 7.160.

¹⁹ (footnote original) The Panel does not consider itself obliged, in every instance, to make an explicit intermediate finding that a party has met its burden to establish a *prima facie* case in respect of each element of a particular claim or defence (see e.g. Appellate Body Reports, *Thailand – H-Beams*, para. 134; *Korea – Dairy*, para. 145; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 135; and *China – Rare Earths*, para. 5.141).

²⁰ Panel Report, *US – Tariff Measures*, para. 7.111.

²¹ (footnote original) Appellate Body Report, *US – Gambling*, paras. 309-311. The Appellate Body additionally noted that a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements, the Appellate Body stated, do not contemplate such an impracticable and impossible burden. (Ibid., para. 309)

²² Appellate Body Reports, *EC – Seal Products*, para. 5.169.

At the same time, we do not consider that the Panel was correct to the extent that it suggested that what it considered must be 'justified' in this case was limited to the permissive aspects flowing from the IC and MRM exceptions. Rather, what must be justified is, as we have said, both the prohibitive and permissive components of the EU Seal Regime, taken together. However, because the Panel, in determining what needed to be 'analysed', ultimately considered whether the prohibitive and permissive aspects of the EU Seal Regime together were 'necessary to protect public morals' within the meaning of Article XX(a), we find no error in the Panel's approach. Accordingly, we reject Norway's claim, and find that the Panel did not err in concluding that the analysis under Article XX(a) of the GATT 1994 should examine the prohibitive and permissive aspects of the EU Seal Regime."²³

1.4.3 Design of the measure; "not incapable of" protecting public morals

19. In *Colombia – Textiles*, the Appellate Body held that an Article XX(a) analysis proceeds in two steps. First, the measure must be "designed" to protect public morals. Second, the measure must be "necessary" to protect such public morals. With respect to the "design" of the measure, there must be a relationship between an otherwise GATT-inconsistent measure and the protection of public morals, i.e. the measure must "not be incapable" of protecting public morals:

"In order to establish whether a measure is justified under Article XX(a), the analysis proceeds in two steps. First, the measure must be 'designed' to protect public morals. Second, the measure must be 'necessary' to protect such public morals.

With respect to the analysis of the 'design' of the measure, the phrase 'to protect public morals' calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection of public morals. If this initial, threshold examination reveals that the measure is incapable of protecting public morals, there is not a relationship between the measure and the protection of public morals that meets the requirements of the 'design' step. In this situation, further examination with regard to whether this measure is 'necessary' to protect such public morals would not be required. This is because there can be no justification under Article XX(a) for a measure that is not 'designed' to protect public morals. However, if the measure is not incapable of protecting public morals, this indicates the existence of a relationship between the measure and the protection of public morals. In this situation, further examination of whether the measure is 'necessary' is required under Article XX(a).

In order to determine whether such a relationship exists, a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation. We note that a measure may expressly mention an objective falling within the scope of 'public morals' in that society. However, an express reference to such objective may not, in and of itself, be sufficient to establish that the measure is 'designed' to protect public morals for purposes of substantiating the availability of the defence under Article XX(a). Conversely, a measure that does not expressly refer to a 'public moral' may nevertheless be found to have such a relationship with public morals following an assessment of the design of the measure at issue, including its content, structure, and expected operation.

We do not see the examination of the 'design' of the measure as a particularly demanding step of the Article XX(a) analysis. By contrast, the assessment of the 'necessity' of a measure entails a more in-depth, holistic analysis of the relationship between the measure and the protection of public morals. The Appellate Body has explained that a necessity analysis involves a process of 'weighing and balancing' a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-

²³ Appellate Body Reports, *EC – Seal Products*, paras. 5.192-5.193.

restrictiveness of the measure. In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken."²⁴

20. The Appellate Body in *Colombia – Textiles* went on to state:

"We observe that, once an analysis of the 'design' of a measure reveals that the measure is not incapable of protecting public morals, such that there is a relationship between the measure and the protection of public morals, a panel may not refrain from conducting the 'necessity' step of the analysis. The Appellate Body has emphasized that '[a] panel must not ... structure its analysis of the ['design' step] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis.'²⁵ As we have noted, the 'necessity' analysis involves weighing and balancing the relative importance of the societal interest or value at stake, the degree of contribution, and the degree of trade-restrictiveness so as to determine whether the measure is 'necessary' to protect public morals.²⁶ Whether a particular degree of contribution is sufficient for a measure to be considered 'necessary' cannot be answered in isolation from an assessment of the degree of the measure's trade-restrictiveness and of the relative importance of the interest or value at stake. For example, a measure making a limited contribution to protecting public morals may be justified under Article XX(a) in circumstances where the measure has only a very low trade-restrictive impact, taking into account the importance of the specific interest or value at stake; similarly, it may be that a measure making a significant contribution is not justified under Article XX(a) if that measure is highly trade restrictive. Thus, if a panel finds some degree of contribution, but ceases to analyse the other factors (the degree of trade-restrictiveness and the relative importance of the interest or value at stake), a weighing and balancing exercise cannot be conducted, and thus a proper consideration of a respondent's defence that the measure is necessary is foreclosed."²⁷

21. The Appellate Body in *Colombia – Textiles* found that the measure at issue was "designed" to protect public morals in Colombia within the meaning of Article XX(a):

"Our prior examination of Colombia's claim of error revealed that, when several findings by the Panel are read together, it is clear from its analysis that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals. Indeed, we understand the Panel to have recognized that at least some goods priced at or below the thresholds could be imported into Colombia at artificially low prices for money laundering purposes, and would thus be subject to the disincentive created by the higher specific duties that apply to these goods.

Therefore, on the basis of the Panel's findings, we find that the measure at issue is 'designed' to protect public morals in Colombia within the meaning of Article XX(a) of the GATT 1994."²⁸

22. In *Brazil – Taxation*, the Panel found that the measure at issue was "designed" to protect public morals:

"The Panel recalls that the standard adopted by the Appellate Body for determining whether a measure is 'designed' to achieve a particular objective is whether that measure 'is not incapable' of contributing to that objective. The Panel further recalls the Appellate Body's instructions that '[i]n order to determine whether such a

²⁴ Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70. See also Panel Report, *US – Tariff Measures*, para. 7.125.

²⁵ Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

²⁶ (footnote original) As we have also noted, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive. (Appellate Body Reports, *EC – Seal Products*, para. 5.169)

²⁷ Appellate Body Report, *Colombia – Textiles*, para. 5.77.

²⁸ Appellate Body Report, *Colombia – Textiles*, paras. 5.99-5.100.

relationship exists, a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation'. Furthermore, the Appellate Body explained that it does 'not see the examination of the 'design' of the measure as a particularly demanding step.'

...

The Panel therefore finds that, notwithstanding its significant reservations regarding the design, structure, and expected operation, Brazil demonstrated that the measure is not incapable of contributing to the objective of bridging the digital divide and promoting social inclusion. In light of its finding above that these objectives have been shown to be 'public moral' objectives within the meaning of Article XX(a) of the GATT 1994, the Panel consequently finds that Brazil has demonstrated that the measure is designed to protect public morals within the meaning of Article XX(a)."²⁹

23. In analysing the design of the challenged measures, the Panel in *US – Tariff Measures* considered whether the exceptions outlined in Article XX can pertain to economic interests and concerns, and whether the term "public morals" can encompass economic concerns. The Panel addressed these two points of disagreement among the parties as follows:

"On the first point, the Panel observes that several of the subparagraphs in Article XX refer to the protection of interests that involve, directly or indirectly, a clear economic dimension, including the importation or exportation of gold or silver (Article XX(c)), the protection of intellectual property rights (Article XX(d)), price stabilization efforts (Article XX(i)) and products in short supply (Article XX(j)).

On the second point, public morals objectives may frequently have inseparable economic aspects. For example, prior panels have recognized that measures targeting money laundering, bridging the digital divide or promoting social inclusion and fraud prevention were measures related to public morals. In the Panel's view, a measure may be found to pursue a public morals objective even if it has economic aspects. Moreover, often the pursuit of non-economic concerns might lead to the adoption of measures that have economic effects – for instance, a restriction of imports so as to protect against, for example, risks to health has a clear economic effect and directly affects trade."³⁰

24. In *US – Tariff Measures* the parties disagreed whether Article XX(a) contains any textual requirement to show that a measure is "designed to" protect public morals. China asserted that such a requirement exists but questioned whether the legal standard suggested by the Appellate Body i.e. "not incapable" of protecting public morals (see paras. 19-20 above), was "properly based" on the text of Article XX(a). Considering these arguments, the Panel observed:

"[T]he design test is a preliminary step aimed at assisting and informing the further analysis of whether a measure is provisionally justified under subparagraph (a) of Article XX. That said, it will sometimes be the case that the application of this test at a general level will not necessarily provide useful information that informs this further analysis.

In the present case, the Panel does not consider that the 'design test', if there is one, is an undemanding task to perform. Having said this, the Panel is not convinced that, in the absolute, the imposition of additional duties would always be incapable of protecting public morals or would never be incapable of protecting public morals. In the circumstances of this case, the Panel finds it difficult to assess at any general level whether the measures at issue are 'designed' to protect public morals and is therefore not convinced that the intermediate step of such a design test is helpful for its analysis. The more detailed design aspects and consequential understanding of measures may only become apparent once an analysis of the necessity of the measures is advanced further. In this regard the Panel agrees with the Appellate Body

²⁹ Panel Report, *Brazil – Taxation*, paras. 7.570 and 7.583.

³⁰ Panel Report, *US – Tariff Measures*, paras. 7.136-7.137.

that it must not structure its analysis of the 'design' step in such a way as to lead it to truncate its investigation prematurely."³¹

1.4.4 "necessary"; "weighing and balancing"

25. See also the discussion in paragraph 19 above.

26. In *China – Publications and Audiovisual Products*, the Appellate Body held that an analysis of "necessity" in the context of Article XX involves "weighing and balancing" a number of distinct factors relating both to the measure sought to be justified as "necessary" and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective:

"The Appellate Body has previously considered the proper approach to take in analyzing the 'necessity' of a measure in several appeals, in particular: *Korea – Various Measures on Beef* (in the context of Article XX(d) of the GATT 1994); *US – Gambling* (in the context of Article XIV(a) of the GATS); and in *Brazil – Retreaded Tyres* (in the context of Article XX(b) of the GATT 1994). In each of these cases, the Appellate Body explained that an assessment of 'necessity' involves 'weighing and balancing' a number of distinct factors relating both to the measure sought to be justified as 'necessary' and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective.

...

We do not see that the Appellate Body's approach to the 'necessity' analysis in *Brazil – Retreaded Tyres* differs from that in *US – Gambling*, which in turn referred to *Korea – Various Measures on Beef*. In each case, a sequential process of weighing and balancing a series of factors was involved. *US – Gambling* sets out a sequence by using the phrases: 'The process *begins with* an assessment of the 'relative importance' of the interests or values furthered by the challenged measure'; 'Having *ascertained* the importance of the particular interests at stake, a panel should *then* turn to the other factors that are to be 'weighed and balanced''; and 'A comparison between the challenged measure and possible alternatives should *then* be undertaken'. The description of this sequence in *Brazil – Retreaded Tyres* mentions, first, the relevant factors to be weighed and balanced for the measure sought to be justified, and continues that the result of this analysis 'must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective'. Although the language used is not identical, both reports articulate the same approach and, like the Appellate Body report in *Korea – Various Measures on Beef*, emphasize the need to identify relevant factors and undertake a weighing and balancing process including, where relevant, with respect to proposed alternative measures that may be less trade restrictive while making an equivalent contribution to the relevant objective. These three reports also all recognize that a comprehensive analysis of the 'necessity' of a measure is a sequential process. As such, the process must logically begin with a first step, proceed through a number of additional steps, and yield a final conclusion."³²

27. The Appellate Body in *China – Publications and Audiovisual Products* upheld the Panel's approach in how it conducted its "necessity" analysis:

"In the present case, the Panel was required to assess the 'necessity' within the meaning of Article XX(a) of multiple provisions that it had found to be inconsistent with China's trading rights commitments. The Panel did so in a number of steps. First, the Panel considered the relationship between the provisions and China's stated objective (to protect public morals by avoiding the dissemination of goods containing prohibited content within China). The Panel assumed that each of the types of prohibited content in China's measures could, if it were brought into China, have a

³¹ Panel Report, *US – Tariff Measures*, paras. 7.150-7.151.

³² Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 239 and 242.

negative impact on 'public morals' in China within the meaning of Article XX(a) of the GATT 1994. Next, the Panel identified the importance of the objective pursued ('the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy') and the level of protection sought by China ('a high level of protection of public morals'). Up to this point in its analysis, the Panel's analysis dealt collectively with all of the provisions that China sought to justify.

In the next stage of its analysis, the Panel addressed separately each provision that it had found to be inconsistent with China's trading rights commitments. For each, the Panel: (i) identified the contribution made to the realization of the objective pursued; (ii) identified the restrictive impact on trade and on those wishing to import; and (iii) 'weighed and balanced' three factors, namely, the extent of the contribution, the restrictive impact, and the 'fact that the protection of public morals is a highly important governmental interest and that China has adopted a high level of protection of public morals within its territory.'

Having weighed and balanced these factors for each provision, the Panel reached a 'conclusion' for each such provision. The Panel characterized the suitable organization and qualified personnel requirement and the State plan requirement as 'necessary', 'in the absence of reasonably available alternatives', to protect public morals in China. For each of the other provisions, the Panel 'concluded' that China had not demonstrated that the requirement in question is 'necessary' to protect public morals within the meaning of Article XX(a)."³³

28. The Appellate Body in *China – Publications and Audiovisual Products* further noted that the Panel thereafter considered whether a less trade-restrictive alternative measure was reasonably available:

"Once it had completed this exercise with respect to all of the provisions, the Panel turned to consider whether, in respect of the two requirements that it had characterized as 'necessary', a less restrictive alternative measure was reasonably available. In analyzing the United States' proposal that the Chinese Government be given sole responsibility for conducting content review, the Panel examined the restrictive effect that such alternative would have ('significantly less restrictive'), the contribution that the alternative would make to the objective of protecting public morals ('at least equivalent to'), and weighed these factors together with the importance of the interest at stake and China's desired high level of protection. Finally, the Panel found that China had not demonstrated that the proposed alternative is not a genuine alternative or is not reasonably available. Having done so, the Panel then reached its overall conclusion, namely, that 'none of the provisions of China's measures which we have determined to be inconsistent with China's trading rights commitments under the Accession Protocol is 'necessary' within the meaning of Article XX(a)."

...

The challenge faced by the Panel in deciding how to tackle the series of factors to be weighed and balanced in its analysis of the 'necessity' of the multiple provisions it had found to be inconsistent with China's trading rights commitments was heightened by the large number of measures challenged by the United States in this dispute. The Panel chose to group together all of the relevant provisions for purposes of certain steps of its analysis but to analyze these provisions individually for purposes of other steps in its analysis. While this was not necessarily the only way that the Panel could have approached its task, we do not see that, in the circumstances of this case, the Panel's approach amounted to error or contradicted the approach set out in previous Appellate Body reports."³⁴

³³ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 243-245.

³⁴ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 246 and 249.

29. In *Colombia – Textiles* the Appellate Body emphasized that the weighing and balancing exercise is a "holistic" operation:

"The Appellate Body has noted that 'the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise'. In this respect, the weighing and balancing exercise can be understood as 'a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement.'"³⁵

30. The Appellate Body in *Colombia – Textiles* also noted that the "design" and "necessity" steps of the analysis under Article XX(a) are conceptually distinct, yet related aspects of the overall inquiry under this provision:

"Finally, we observe that the 'design' and 'necessity' steps of the analysis under Article XX(a) are conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is 'necessary to protect public morals'.³⁶ As the assessment of these two steps is not entirely disconnected, there may, in fact, be some overlap in the sense that certain evidence and considerations may be relevant to both aspects of the defence under Article XX(a). We note, in particular, that, in the context of the 'design' step of the analysis, a panel is not precluded from taking into account evidence and considerations that may also be relevant to the examination of the contribution of the measure in the context of the 'necessity' analysis."³⁷

1.4.4.1 Specific factors

31. As regards the specific factors involved in a "necessity" analysis, the Appellate Body in *Colombia – Textiles* stated:

"Regarding the specific factors of the 'necessity' analysis, we first note that it entails 'an assessment of the 'relative importance' of the interests or values furthered by the challenged measure'. The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as 'necessary'.

A panel must also examine the contribution of the measure to the objectives pursued by it. In assessing this factor, 'a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution.' This is because '[t]he greater the contribution, the more easily a measure might be considered to be 'necessary'.' The Appellate Body has indicated that there is no 'generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994'. Since a measure's contribution is only one component of the necessity calculus under Article XX, the assessment of whether a measure is 'necessary' cannot be determined by the degree of contribution alone, but will depend on the manner in which the other factors of the 'necessity' standard inform the analysis.

Another relevant factor in conducting a 'necessity' analysis is the restrictiveness of the measure in respect of international commerce. In assessing this factor, 'a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade.' As with the assessment of a measure's contribution to its objective, the examination of a measure's trade-restrictiveness may be done in a qualitative or quantitative manner.

³⁵ Appellate Body Report, *Colombia – Textiles*, para. 5.75.

³⁶ Appellate Body Report, *Argentina – Financial Services*, para. 6.205.

³⁷ Appellate Body Report, *Colombia – Textiles*, para. 5.76. See also Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, para. 6.102.

The Appellate Body has stated that '[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.'

As we have noted, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive. The Appellate Body has explained that an alternative measure may be found not to be 'reasonably available' where 'it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.'³⁸

1.4.4.1.1 Importance of the objective

32. In *US – Gambling*, in a finding upheld by the Appellate Body, the Panel stated:

"The Congressional statements identified above in paragraphs 6.482-6.485 indicate that these Acts are intended to protect society against the threat of money laundering, organized crime, fraud and risks to children (i.e underage gambling) and to health (i.e. pathological gambling).

...

On the basis of the foregoing, it is clear to us that the interests and values protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) serve very important societal interests that can be characterized as "vital and important in the highest degree" in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC – Asbestos*."³⁹

33. With regard to the importance of the objective of protecting of public morals, the Panel in *China – Publications and Audiovisual Products* stated:

"In our view, it is undoubtedly the case that the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy. We do not consider it simply accident that the exception relating to 'public morals' is the first exception identified in the ten sub-paragraphs of Article XX. We therefore concur that the protection of public morals is a highly important value or interest."⁴⁰

34. In *EC – Seal Products*, the Panel stated:

"The European Union submits that the 'moral concern with regard to the protection of animals' is regarded as a value of high importance in the European Union.⁴¹ We consider, and the parties do not dispute, that the protection of such public moral concerns is indeed an important value or interest."⁴²

35. In *Colombia – Textiles*, the Appellate Body noted that the objective of fighting against money laundering is a societal interest that could be described as vital and important in the highest degree:

"With these considerations in mind, we begin with the Panel's findings regarding the relative importance of the interests or values pursued by the challenged measure. We recall that the Panel noted that money laundering is criminal conduct in Colombia

³⁸ Appellate Body Report, *Colombia – Textiles*, paras. 5.71-5.74.

³⁹ Panel Report, *US – Gambling*, paras. 6.489 and 6.492.

⁴⁰ Panel Report, *China – Publications and Audiovisual Products*, para. 7.187.

⁴¹ (footnote original) This part of the Article XX analysis may be comparable to the risks of non-fulfilment under Article 2.2 of the TBT Agreement.

⁴² Panel Reports, *EC – Seal Products*, para. 7.632.

under Article 323 of its Criminal Code, and that Colombia had submitted documents showing that combating money laundering is an important policy objective for Colombia. In the Panel's view, Colombia presented sufficient evidence to demonstrate the existence of a real and present concern in Colombia with regard to money laundering, as well as with regard to the way in which money laundering is linked with drug trafficking and other criminal activities and with Colombia's internal armed conflict. For these reasons, in a finding that is not contested on appeal, the Panel held that, in Colombia, the objective of combating money laundering reflects societal interests that can be described as vital and important in the highest degree. We also observe that, before the Panel and on appeal, Panama has not denied that, for Colombia, the fight against money laundering is a societal interest that could be described as vital and important in the highest degree."⁴³

36. The Panel in *Brazil – Taxation* found that Brazil had demonstrated that a concern existed in Brazilian society on the need to bridge the digital divide and promote social inclusion and that such a concern was within the scope of "public morals" as defined and applied by Brazil. In assessing the importance of the objective, the Panel stated:

"In light of this jurisprudence, the Panel considers that in determining the importance of a particular objective, it is more pertinent to assess the importance of the *particular* societal interest being protected, rather than assuming that by virtue of its status as a 'public moral' objective the interest is *per se* vital or important to the highest degree.

In assessing the importance of the particular public moral objective at issue in this dispute, namely bridging the digital divide and promoting social inclusion, the Panel notes that this objective is internationally recognized as an important policy objective, and indeed is recognized as a target of the UN MDGs. The importance of the MDGs should not be understated. This is true in any developing country, but in the Panel's view the specific MDG target at issue here is particularly important in Brazil, where the percentage of households and individuals with internet access or computer access is low. Overall, the Panel considers that the objective of bridging the digital divide and social inclusion and access to information is a reasonably important policy objective."⁴⁴

1.4.4.1.2 Contribution of the measure to the objective

37. In *China – Publications and Audiovisual Products*, the Appellate Body made the following observations:

"We recall the Appellate Body's finding, in *Korea – Various Measures on Beef*, that the term 'necessary', in the abstract, refers to a range of degrees of necessity. The Appellate Body explained that determining whether a measure is 'necessary' involves a process of weighing and balancing a series of factors that prominently include the contribution made by the measure to secure compliance with the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. The greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as 'necessary'

In *Brazil – Retreaded Tyres*, the Appellate Body clarified how the analysis of the contribution made by a challenged measure to the achievement of the objective pursued is to be undertaken. The Appellate Body noted that a party seeking to demonstrate that its measures are 'necessary' should seek to establish such necessity through 'evidence or data, pertaining to the past or the present', establishing that the measures at issue contribute to the achievement of the objectives pursued. In examining the evidence put forward, a panel must always assess the actual contribution made by the measure to the objective pursued.

⁴³ Appellate Body Report, *Colombia – Textiles*, para. 5.105.

⁴⁴ Panel Report, *Brazil – Taxation*, paras. 7.591-7.592.

However, this is not the only type of demonstration that could establish such a contribution. The Appellate Body explained that a panel is not bound to find that a measure does not make a contribution to the objective pursued merely because such contribution is not 'immediately observable' or because, '[i]n the short-term, it may prove difficult to isolate the contribution [made by] one specific measure from those attributable to the other measures that are part of the same comprehensive policy'. Accordingly, the Appellate Body stated in *Brazil – Retreaded Tyres*, that:

... a panel might conclude that [a measure] is necessary on the basis of a demonstration that [it] is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.⁴⁵

38. In *EC – Seal Products*, the Appellate Body held that the Panel was not required to apply a standard of "materiality" as a "pre-determined threshold" in assessing the contribution of the measure to the objective:

"The Appellate Body in *Brazil – Retreaded Tyres* was thus confronted with the particular challenge of assessing the contribution of a measure that formed part of a broader policy scheme, and that was not yet having, or likely itself to produce, an immediately discernible impact on its objective. The Appellate Body thus sought to determine whether the measure was 'apt to make a material contribution' to its objective. This reflected the Appellate Body's recognition that, notwithstanding the particular features of the measure at issue in that dispute, it was nevertheless possible to determine the level of contribution to be made by the measure, by assessing the extent to which it was *apt to do so* at some point in the future. We further note that the Appellate Body was careful not to suggest that its approach in that dispute was requiring the use of a generally applicable threshold for a contribution analysis. Rather, the Appellate Body was making the more limited statement that 'when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, *it appears to us that it would be difficult* for a panel to find that measure necessary unless it is satisfied that the measure is *apt to make a material contribution* to the achievement of its objective'. We therefore do not see that the Appellate Body's approach in *Brazil – Retreaded Tyres* sets out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analysing the necessity of a measure under Article XX of the GATT 1994.

This understanding is supported, in our view, by the other dimensions of a necessity analysis. As we noted, the Appellate Body has explained in several disputes that a necessity analysis involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. As the Appellate Body has stated, '[i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is 'reasonably available'. Such an analysis, the Appellate Body has observed, involves a 'holistic' weighing and balancing exercise 'that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement'.

A measure's contribution is thus only one component of the necessity calculus under Article XX. This means that whether a measure is 'necessary' cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis. It will also depend on the nature, quantity, and quality

⁴⁵ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 251-254.

of evidence, and whether a panel's analysis is performed in quantitative or qualitative terms. Indeed, the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature.⁴⁶ The flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor. If the level of contribution alone cannot determine whether a measure is necessary or not, we do not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis.⁴⁷ The Appellate Body's approach in *Brazil – Retreaded Tyres* is consonant with an assessment of the contribution of a measure as one element of a holistic necessity analysis under Article XX. It is also consistent with our understanding that the EU Seal Regime, even if it were highly trade-restrictive in nature, could still be found to be 'necessary' within the meaning of Article XX(a), subject to the result of a weighing and balancing exercise under the specific circumstances of the case and in the light of the particular nature of the measure at issue."⁴⁸

39. The Appellate Body in *EC – Seal Products* upheld the Panel's finding that the EU Seal Regime was "capable of making and does make some contribution" to its objective, or that it did so "to a certain extent".⁴⁹

40. In *Colombia – Textiles*, the Appellate Body upheld the Panel's finding that there was lack of sufficient clarity with respect to the contribution of the measure at issue to the objective:

"In sum, our assessment of the Panel's findings reveals the Panel's consideration that there was a lack of sufficient clarity with respect to several key aspects of the 'necessity' analysis concerning the defence that Colombia presented to the Panel under Article XX(a). In particular, there was a lack of sufficient clarity regarding the degree of contribution of the measure at issue to the objective of combating money laundering and the degree of trade-restrictiveness of the measure. Without sufficient clarity in respect of these factors, a proper weighing and balancing that could yield a conclusion that the measure is 'necessary' could not be conducted. In the light of these considerations, the Panel's findings support the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is 'necessary' to protect public morals.

Therefore, on the basis of the Panel's findings, we find that Colombia has not demonstrated that the compound tariff is a measure 'necessary to protect public morals' within the meaning of Article XX(a) of the GATT 1994."⁵⁰

⁴⁶ (footnote original) While there may be circumstances in which a weighing and balancing exercise would not require that a panel proceed to evaluate alternative measures (see *supra*, fn 1182), we also do not consider that such an exercise mandates a preliminary determination of the necessity of the challenged measure before proceeding to assess those alternatives. (See Appellate Body Report, *US – Gambling*, paras. 306 and 307. See also Appellate Body Reports, *Brazil – Retreaded Tyres*, paras. 156 and 178; and *China – Publications and Audiovisual Products*, para. 241 (stating that if a panel reaches a preliminary conclusion that a measure is necessary, this result must be confirmed by comparing the measure with possible alternatives)) We therefore disagree with Canada's assertion that a preliminary determination of necessity is required before proceeding to compare the challenged measure with possible alternatives. (Canada's appellant's submission, paras. 310 and 318)

⁴⁷ (footnote original) We also note the Appellate Body's statements that the term "necessary" refers to a range of degrees of necessity, but that a "necessary" measure would be located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". (Appellate Body Report, *Korea – Various Measures on Beef*, para. 161; Appellate Body Report, *US – Gambling*, para. 310) It is conceptually useful to distinguish the *degree of contribution* that informs the weighing and balancing exercise, from the question of where on the continuum the *necessity* of that measure lies following such a weighing and balancing exercise. The Appellate Body's above statements can be understood in this context to refer to the latter question.

⁴⁸ Appellate Body Reports, *EC – Seal Products*, paras. 5.213-5.214.

⁴⁹ Appellate Body Reports, *EC – Seal Products*, para. 5.289.

⁵⁰ Appellate Body Report, *Colombia – Textiles*, paras. 5.116-5.117.

41. In *Brazil – Taxation*, the Panel found that Brazil had not demonstrated that the measure at issue contributed to the objective of social inclusion or access to information:

"In the Panel's view, Brazil has not demonstrated that the manner in which the PATVD programme incentivises domestic production has led, will lead, or is apt to lead, to an increase in social inclusion or access to information. Thus, in the Panel's view, although it is possible that the PATVD programme *could*, in theory, contribute to social inclusion and access to information, Brazil has not demonstrated that the PATVD programme does, or will, in fact, contribute to the realisation of Brazil's policy goal. In the Panel's view, it is likely that the PATVD programme will not make much, if any, contribution to the objective of social inclusion and access to information. Nonetheless, the Panel continues its analysis."⁵¹

42. In *US – Tariff Measures*, the United States asserted that "[a] measure may be necessary to protect public morals without being limited to a product that itself offends public morals".⁵² China argued, albeit in the context of the "design" test, that Article XX(a) cannot be interpreted as permitting measures that target non-morally offensive products.⁵³ However, the Panel did not consider it necessary for the purposes of this dispute, to resolve the issue at an abstract level. Rather, the Panel sought to understand the United States' explanation of how the specific measures had contributed to the invoked public morals objective:

"[T]o demonstrate the existence of such a contribution, and in particular of a genuine relationship of ends and means between the public morals objective and the measures at issue, the United States must demonstrate how the additional duties are apt to contribute to the public morals objective as invoked by the United States. The Panel recalls that the measures in this case are additional duties applying to a very wide range of products.⁵⁴ The Panel considers that a genuine relationship of ends and means between the measures the United States has chosen and the public morals objective could be discerned through demonstrating the existence of a nexus between these chosen measures and the public morals objective as invoked by the United States. In this way, the United States would be able to point to or prove a genuine relationship of ends and means between the measures at issue and the invoked public morals objective that would highlight the contribution the measures make to the stated objective and assist the Panel in reaching its conclusions on the necessity test as a whole. Therefore, the Panel will direct its enquiry towards seeking to identify the nexus between the measures the United States has chosen (i.e. additional duties on a wide range of products) and the US public morals concerns, in order to inform the examination of the question of whether and how the measures contribute, and could be shown or demonstrated to be 'necessary', to protect public morals within the meaning of Article XX(a).

[T]he scope of Article XX(a) is intrinsically limited and is circumscribed, *first*, by the determination of the specific content of the public morals that the responding Member wishes to protect, and, *second*, by the requirement that the measure a Member has chosen can be demonstrated to be *necessary* to the achievement of this public morals objective. In other words, even assuming, *arguendo*, that a measure does not have to only apply to products that are considered to embody morally offensive conduct to be justified under Article XX(a), the respondent still has to demonstrate that the measure it chose (in this case, additional duties on a wide range of products from China) is apt to contribute to protecting public morals concerns, by establishing the relevant nexus, and also that such measures do not go beyond what is necessary within the meaning of Article XX(a)."⁵⁵

⁵¹ Panel Report, *Brazil – Taxation*, para. 7.602.

⁵² Panel Report, *US – Tariff Measures*, para. 7.177.

⁵³ Panel Report, *US – Tariff Measures*, para. 7.177.

⁵⁴ This contrasts with previous cases where Article XX(a) has been invoked, in which the measures at issue were more narrowly targeted or focused on specific goods or services sectors (Panel Reports and Appellate Body Reports, *US – Gambling*, *China – Publications and Audiovisual Products*; *EC – Seal Products*; *Colombia – Textiles*; and *Brazil – Taxation*).

⁵⁵ Panel Report, *US – Tariff Measures*, paras. 7.178-7.179.

43. The Panel in *US – Tariff Measures* continued by analysing the contribution of each challenged measure to the pursued public morals objective as invoked by the United States. With respect to the contribution of the first set of measures (the imposition of additional duties on List 1 products), the Panel began by noting the United States' assertions that it had imposed the additional duties on products that benefitted from China's "immoral" practices documented in the Section 301 Report. In this regard, the Panel observed:

"[T]he legal instruments through which the United States adopted and implemented the measures at issue do not explain the relationship between the chosen measures – additional duties applied to a range of specified products – and the public morals objective pursued by the United States. The United States has also not provided any other evidence in support of its assertion that the products on which it imposed additional duties benefitted from practices of China that the United States considered to be contrary to its public morals, nor evidence that would more generally demonstrate how the products it selected for additional duties treatment contributed to its public morals objective."⁵⁶

44. In conducting its analysis, the Panel also examined the initial narrowing of the range of products covered by List 1. The Panel found that the narrowing did not indicate "how the United States sought to ensure, or how it would enable the United States to demonstrate, a genuine relationship of ends and means between the invoked objective of public morals and the additional duties imposed on List 1 products"⁵⁷:

"[T]he documents the parties submitted suggest that the narrowing of the range of products covered by List 1 was based on considerations related to the likely risks of disruptions to the US economy and to the value of imports covered by the additional duties on the 'estimated harm to the U.S. economy'. The elimination of certain imported products from List 1 does not appear to have considered the potential harm to the invoked public morals objective, nor the coherence of the policy goal pursued, in the process of narrowing the range of products covered by List 1."⁵⁸

45. Similarly, regarding the exclusion of particular products on List 1 from the scope of the additional duties, the Panel found that the United States had not sufficiently explained how the exclusion was coherent with the policy objective and did not undermine its achievement:

"[T]he United States has not sufficiently explained why products that were initially considered to benefit from China's practices and policies (which the United States claims harm its public morals) are excluded from the additional duties and how such exclusions do not undermine the achievement of the public morals objective as invoked by the United States. ...

Absent sufficient explanation by the United States, the Panel thus finds it difficult to see how the factors considered by the United States in the Procedures for exclusions, as well as the resulting exclusions of particular products from List 1, are coherent with the public morals objective as invoked by the United States. The Procedures for exclusion could lead to situations where two products produced in China, using similar practices and policies that the United States considers contrary to US public morals, are treated differently (one product is subject to additional punitive duties, and the other is not). This potential difference in treatment requires the United States to explain how it reconciles its public morals objective with these exclusions. It is unclear to the Panel how this conforms with the United States' description of the contribution of the measures to the pursued public morals objective and with the United States' assertion that these measures were structured so as to target particular types of goods that benefit from these practices."⁵⁹

⁵⁶ Panel Report, *US – Tariff Measures*, para. 7.191.

⁵⁷ Panel Report, *US – Tariff Measures*, para. 7.200.

⁵⁸ Panel Report, *US – Tariff Measures*, para. 7.200.

⁵⁹ Panel Report, *US – Tariff Measures*, paras. 7.212-7.213.

46. In sum, the Panel concluded that the United States "has not provided an explanation that demonstrates a genuine relationship of ends and means between the imposition of duties on List 1 products and the public morals objective as invoked by the United States."⁶⁰

47. The Panel in *US – Tariff Measures* continued to analyse the contribution of the second set of measures (the imposition of additional duties on List 2 products). The Panel understood the United States to argue that the imposition of additional duties on List 2 products "contributes to the achievement of the public morals objective pursued by the United States, because it 're-enforces' the imposition of additional duties on List 1 products, and applies stronger economic pressure on China 'in a comprehensive sense'."⁶¹ Nonetheless, the Panel noted:

"[A] genuine relationship of ends and means between the challenged measure and the public morals objective pursued could not be derived from the potential existence of such a relationship with respect to a different measure. The Panel notes that the range of List 2 products is not related to China's practices and policies allegedly harming US public morals. The Panel observes that the United States also asserts, as a general matter, that, irrespective of whether products on which additional duties are imposed benefit from China's practices and policies that involve public morals concerns, all such additional duties contributed to, and were in fact necessary to, protect the invoked US public morals concerns. In this context, the United States has not adequately explained how there is a genuine relationship of ends and means between the imposition of additional duties on List 2 products and the public morals objective as invoked by the United States.

The Panel further recalls that Article XX(a) allows WTO Members to adopt measures which would be otherwise WTO-inconsistent to *protect* their public morals. As mentioned above, the scope of Article XX(a) is limited by the specific public morals objective identified by the respondent, and by the requirement that the measures be necessary to achieve this public morals objective. While there are provisions in the WTO agreements that specifically provide for the imposition of additional tariffs above bound rates in certain defined circumstances, without any need to demonstrate any 'necessity' for the measures to achieve a particular purpose, those provisions are not applicable to the current dispute."⁶²

48. The Panel in *US – Tariff Measures*, following the assessment of all elements, concluded that the United States had not adequately explained how the chosen measures were necessary to protect public morals, and noted:

"[T]he nature and purpose of Article XX – to allow WTO Members to adopt measures that would be otherwise WTO-inconsistent to protect their public morals – cannot be reconciled with a situation where WTO Members would be allowed to restrict any trade from any WTO Member with the mere invocation of what might, in an abstract sense, be considered a valid policy objective within the meaning of Article XX of the GATT 1994. The scope of the restrictive measures justifiable under Article XX(a) is determined by the public morals objective invoked and by the requirement that the measures be *necessary* to achieve this objective. In other words, there is a requirement that there be a nexus between the challenged measure and the interest protected by the policy objective at issue. In the case of Article XX(a), this requirement is specified by the term 'necessary to protect public morals'. This is especially important in the context of Article XX(a), because the concept of 'public morals' is a broad one, that may be based on considerations specific to individual WTO Members.

[I]f the adopting WTO Member does not explain how the challenged measures contribute to the achievement of the public morals objective pursued, by showing that there is a genuine relationship of 'ends and means' between these measures and the

⁶⁰ Panel Report, *US – Tariff Measures*, para. 7.215.

⁶¹ Panel Report, *US – Tariff Measures*, para. 7.221.

⁶² Panel Report, *US – Tariff Measures*, paras. 7.222-7.223.

public morals objective, this is a strong indication that the challenged measures have exceeded the limits acceptable under Article XX(a) of the GATT 1994."⁶³

1.4.4.1.3 Trade restrictiveness of the measure

49. In *China – Publications and Audiovisual Products*, the Appellate Body concluded that the Panel had not erred in taking into account the restrictive effect that the relevant provisions and requirements have on those wishing to engage in importing, as part of its assessment of the restrictive effect of the measures found to be inconsistent with China's trading rights commitments.⁶⁴

50. In *Colombia – Textiles*, the Appellate Body upheld the Panel's finding that there was lack of sufficient clarity regarding the degree of trade restrictiveness of the measure. The Appellate Body agreed with the Panel's ultimate conclusion that the measure at issue was not "necessary" to protect public morals:

"Turning to an assessment of the restrictive impact of the measure on international commerce, the Appellate Body has stated that '[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.' Consequently, in assessing a measure's trade-restrictiveness 'a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade.

...

In sum, our assessment of the Panel's findings reveals the Panel's consideration that there was a lack of sufficient clarity with respect to several key aspects of the 'necessity' analysis concerning the defence that Colombia presented to the Panel under Article XX(a). In particular, there was a lack of sufficient clarity regarding the degree of contribution of the measure at issue to the objective of combating money laundering and the degree of trade-restrictiveness of the measure. Without sufficient clarity in respect of these factors, a proper weighing and balancing that could yield a conclusion that the measure is 'necessary' could not be conducted. In the light of these considerations, the Panel's findings support the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is 'necessary' to protect public morals.

Therefore, on the basis of the Panel's findings, we find that Colombia has not demonstrated that the compound tariff is a measure 'necessary to protect public morals' within the meaning of Article XX(a) of the GATT 1994"⁶⁵

51. In *Brazil – Taxation*, the Panel found that the actual and potential overall trade restrictiveness of the PATVD programme was "material":

"The Panel recognises that a determination of the trade-restrictiveness of a particular measure should be as precise as possible. However, the Panel is not in a position to make a quantitative estimation of the level of trade-restrictiveness. In the present dispute, the discriminatory aspects of the PATVD programme result in a disincentive to purchase imported products (both finished products and the components used to produce those finished products), which in the view of the Panel will have a material impact on imports of those products. The Panel therefore considers that the actual and potential overall trade-restrictiveness of the PATVD programme is material."⁶⁶

⁶³ Panel Report, *US – Tariff Measures*, paras. 7.236-7.237.

⁶⁴ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 300-311.

⁶⁵ Appellate Body Report, *Colombia – Textiles*, paras. 5.95-5.117.

⁶⁶ Panel Report, *Brazil – Taxation*, para. 7.607.

1.4.4.1.4 "Reasonably available" alternatives

52. In *US – Gambling*, the Appellate Body held that an alternative measure may be found not to be "reasonably available" where it is merely "theoretical":

"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."⁶⁷

53. The Appellate Body in *China – Publications and Audiovisual Products* upheld the Panel's finding that China had not demonstrated that the alternative proposed by the United States was not reasonably available to it:

"After having set out the above reasoning, the Panel determined that China had not 'demonstrated that the alternative proposed by the United States would impose on China an undue burden, whether financial or otherwise' and that, accordingly, China had not 'demonstrated that the alternative proposed by the United States is not 'reasonably available' to it.

We are not persuaded that the Panel erred in the above analysis. The Panel did not find that the proposed alternative measure involves no cost or burden to China. As the Appellate Body report in *US – Gambling* makes clear, an alternative measure should not be found not to be reasonably available merely because it involves some change or administrative cost. Changing an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists. Rather, in order to establish that an alternative measure is not 'reasonably available', the respondent must establish that the alternative measure would impose an undue burden on it, and it must support such an assertion with sufficient evidence."⁶⁸

54. In *EC – Seal Products*, the Appellate Body upheld the Panel's finding that the alternative measure was not reasonably available:

"In sum, having reviewed the Panel's reasoning and findings in respect of the alternative measure, we do not consider that the Panel erred in concluding that "the alternative measure is not reasonably available". In our view, the Panel undertook considerable efforts to understand what impact hypothetical variations of the alternative measure might have on the objective of the EU Seal Regime. The Panel considered that, whether focusing on addressing the EU public's participation in the market for products derived from inhumanely killed seals, or the overall number of inhumanely killed seals, even the most stringent certification system would be difficult to implement and enforce, and would lead to increased numbers of inhumanely killed seals. The Panel further considered that making the welfare standards or the certification and labelling requirements more lenient would make the alternative measure more reasonably available but would not meaningfully contribute to addressing EU public moral concerns regarding seal welfare. We therefore understand the Panel to have concluded that, irrespective of the level of stringency, a certification system would be beset by difficulties in addressing EU public moral concerns regarding seal welfare. The Panel thus was not persuaded that such a hypothetical regime constituted an alternative that is reasonably available."⁶⁹

55. In *Brazil – Taxation*, the Panel found that Brazil had not demonstrated that the alternative measures proposed by the complainants were not "reasonably available":

'Brazil has not demonstrated that the proposed alternatives are not financially, technically, or otherwise, reasonably available, nor has Brazil rebutted the complaining parties' demonstrations that such alternatives would be WTO-consistent,

⁶⁷ Appellate Body Reports, *US – Gambling*, para. 308.

⁶⁸ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 326-327.

⁶⁹ Appellate Body Reports, *EC – Seal Products*, para. 5.279.

less trade-restrictive than the PATVD programme, and more likely to contribute to the objective than the PATVD programme.

The Panel therefore concludes that the alternative measures suggested by the complaining parties are reasonably available to Brazil, WTO-consistent, less trade-restrictive than the PATVD programme, and are likely to result in a greater contribution than the PATVD programme to the objective of bridging the digital divide and promoting social inclusion."⁷⁰

1.4.4.1.5 Burden of proof

56. In *China – Publications and Audiovisual Products*, the Appellate Body clarified the burden of proof with regard to the existence of reasonably available alternatives:

"As regards the burden of proof with respect to 'reasonably available alternatives', the Appellate Body explained in *US – Gambling* that a responding party invoking Article XIV(a) of the GATS bears the burden of demonstrating that its GATS-inconsistent measure is 'necessary' to achieve the objective of protecting public morals. This burden does not imply that the responding party must take the initiative to demonstrate that there are *no* reasonably available alternatives that would achieve its objectives. When, however, the complaining party identifies an alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not a genuine alternative or is not 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary'."⁷¹

1.4.5 "to protect"; level of protection

57. In *EC – Seal Products*, the Appellate Body clarified that the phrase "to protect" in Article XX(a) does not require the panel to identify a risk against which the measure that is to be justified seeks to protect:

"Canada's claim asks us to consider whether the use of the phrase 'to protect' in Article XX(a) requires a panel to identify a risk against which the measure that is to be justified seeks to protect. The ordinary meaning of the verb 'protect' includes 'defend or guard against injury or danger; shield from attack or assault; support, assist ...; keep safe, take care of ...'. The meaning of 'to protect' in a given provision also requires taking into account the context in which the phrase is used. The phrase 'to protect' is used in three subparagraphs of Article XX that concern the 'protection' of different non-economic interests and concerns. In *EC – Asbestos*, in addressing the term 'to protect' in Article XX(b), the panel noted that 'the notion of 'protection' ... impl[ies] the existence of a health risk'. We note that Article XX(b) focuses on the protection of 'human, animal or plant life or health'. It may be that the protection of human, animal, or plant life or health implies a particular focus on the protection from or against certain dangers or risks. For example, the concepts of 'risk' and 'protection' are expressly reflected in the SPS Agreement, which elaborates rules for the application of Article XX(b).

However, the notion of risk in the context of Article XX(b) is difficult to reconcile with the subject matter of protection under Article XX(a), namely, public morals. While the focus on the dangers or risks to human, animal, or plant life or health in the context of Article XX(b) may lend itself to scientific or other methods of inquiry, such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals. We therefore do not consider that the term 'to protect', when used in relation to 'public morals' under Article XX(a), required the

⁷⁰ Panel Report, *Brazil – Taxation*, paras. 7.620-7.621.

⁷¹ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 319.

Panel, as Canada contends, to identify the existence of a risk to EU public moral concerns regarding seal welfare."⁷²

58. The Appellate Body in *EC – Seal Products* held that "to protect" public morals under Article XX(a) does not mean that the responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement. The Appellate Body emphasized that Members may set different levels of protection even when responding to similar interests of moral concern:

"Finally, by suggesting that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appears to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement 'to protect' public morals under Article XX(a). In this regard, we note that the panel in *US – Gambling* underscored that Members have the right to determine the level of protection that they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern. Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals, and must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, we do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns in the same way.

For these reasons, we reject Canada's argument that the Panel was required to assess whether the seal welfare risks associated with seal hunts exceed the level of animal welfare risks accepted by the European Union in other situations such as terrestrial wildlife hunts. We therefore also do not consider it necessary to address Canada's claim under Article 11 of the DSU regarding the same issue. Accordingly, we find that the Panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994."⁷³

1.4.6 "public morals"

59. The Panel in *China – Publications and Audiovisual Products* adopted the interpretation of "public morals" developed by the Panel in *US – Gambling*, namely that:

"[T]he term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation' ... 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values' ... Members, in applying this and other similar societal concepts, 'should be given some scope to define and apply for themselves the concepts of 'public morals' ... in their respective territories, according to their own systems and scales of values'."⁷⁴

60. The Panel in *China – Publications and Audiovisual Products* recalled that "the content and scope of the concept of 'public morals' can vary from Member to Member, as they are influenced by each Members' prevailing social, cultural, ethical and religious values" and it proceeded with its analysis on the assumption that "each of the prohibited types of content listed in China's measures is such that, if it were brought into China as part of a physical product, it could have a negative impact on 'public morals' in China within the meaning of Article XX(a) of the GATT 1994."⁷⁵

61. The Panel in *China – Publications and Audiovisual Products* further recalled that "it is the WTO-inconsistent measure that a responding party seeks to justify which must be 'necessary'" and found that in the case at hand, the measures, the necessity of which China must establish, are the provisions that restrict the right to import contrary to China's trading rights commitments under the Accession Protocol. The separate provisions prescribing that the competent Chinese authorities

⁷² Appellate Body Reports, *EC – Seal Products*, paras. 5.197-5.198.

⁷³ Appellate Body Reports, *EC – Seal Products*, paras. 5.200-5.201.

⁷⁴ Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.

⁷⁵ Panel Report, *China – Publications and Audiovisual Products*, para. 7.763.

and/or import entities review the content of imported finished audiovisual products and reading materials, and that such products may not be imported if they carry prohibited content, are not at issue.⁷⁶

62. In *EC – Seal Products*, the Appellate Body emphasized that Members must be given some scope to define and apply for themselves the concept of public morals according to their own system and values. Accordingly, a panel is not required to identify the exact content of the public morals standard at issue:

"[W]e also have difficulty accepting Canada's argument that, for the purposes of an analysis under Article XX(a), a panel is required to identify the exact content of the public morals standard at issue. The Panel accepted the definition of 'public morals' developed by the panel in *US – Gambling*, according to which 'the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation. The Panel also referred to the reasoning developed by the panel in *US – Gambling* that the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values. Canada does not challenge these propositions on appeal. In addition, we note that, although Canada indirectly questions the existence of EU public moral concerns regarding seal welfare by contending that the Panel ought to have considered the similarity of animal welfare risks in both terrestrial wildlife hunts and seal hunts, Canada does not directly challenge the Panel's finding that there are public moral concerns in relation to seal welfare in the European Union."⁷⁷

63. In *Brazil – Taxation*, the Panel noted that "although Members have 'some scope to define and apply for themselves the concept of 'public morals' in their respective territories, according to their own systems and scales of values', this latitude does not excuse a responding party in dispute settlement from its burden of establishing that the alleged public policy objective at issue is indeed a public moral objective according to its value system".⁷⁸

64. The Panel in *US – Tariff Measures* emphasized that in its analysis, it was considering only the issue of the public morals objectives that had been invoked, and not their relationship to the measures at issue. The Panel then concluded that "the 'standards of right and wrong' invoked by the United States (including norms against theft, misappropriation and unfair competition) could, at least at a conceptual level, be covered by the term 'public morals' within the meaning of Article XX(a) of the GATT 1994."⁷⁹

1.5 Paragraph (b)

1.5.1 General; burden of proof

65. The Panel in *US – Gasoline*, in a finding not reviewed by the Appellate Body, presented the following three-tier test in respect of Article XX(b):

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

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and

⁷⁶ Panel Report, *China – Publications and Audiovisual Products*, para. 7.789.

⁷⁷ Appellate Body Reports, *EC – Seal Products*, para. 5.199.

⁷⁸ Panel Report, *Brazil – Taxation*, para. 7.558. See also Panel Report, *US – Tariff Measures*, para. 7.131.

⁷⁹ Panel Report, *US – Tariff Measures*, para. 7.140.

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

In order to justify the application of Article XX(b), all the above elements had to be satisfied."⁸⁰

66. In *EC – Asbestos*, the Panel followed the approach used by the Panel in *US – Gasoline* and indicated that it "must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health".⁸¹

67. The Panel in *EC – Tariff Preferences* also followed the same approach as the Panels on *US – Gasoline* and *EC – Asbestos*:

"In *EC – Asbestos*, the panel followed the same approach as used in *US – Gasoline*: 'We must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health'.

Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, or whether the policy objective is for the purpose of, "protect[ing] human ... life or health". In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is "necessary" to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the chapeau of Article XX."⁸²

68. In agreeing with the Panel's reasoning, the Appellate Body in *Brazil – Retreaded Tyres* concluded that Article XX(b) "illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns".⁸³

69. In *Turkey – Pharmaceutical Products (EU)*, the Panel pointed to the importance of demonstrating a substantial degree of probability of a specified risk to human life or health, as follows:

"The Panel does not consider that there is any rigid or pre-determined threshold or evidentiary standard that should be applied in this respect. Insofar as a responding party presents evidence and arguments demonstrating that there is a substantial degree of probability of a specified risk to human life or health materializing, it will be easier for the responding party to discharge its burden of proving that the challenged measure was taken to protect against that risk, thus qualifying as a measure taken to protect human life or health under Article XX(b). Conversely, insofar as a responding party asserts the existence of a risk without establishing any substantial degree of probability, such that the risk appears to be theoretical, abstract or otherwise hypothetical, it will be more difficult for the responding party to discharge its burden of proving that the challenged measure was taken to protect against that risk."⁸⁴

70. In *Turkey – Pharmaceutical Products (EU)*, Türkiye argued that over-reliance on imported pharmaceutical products posed a risk of long-term shortage of such products:

"According to Turkey, its over-reliance on imported pharmaceutical products creates a risk of long-term shortage of supply of safe, effective and affordable pharmaceutical products risk because of several prevailing economic circumstances relating to the cost of imported pharmaceutical products in Turkey, including most notably that: (i) the low prices of pharmaceutical products on the Turkish market create the risk

⁸⁰ Panel Report, *US – Gasoline*, para. 6.20.

⁸¹ Panel Report, *EC – Asbestos*, para. 8.184.

⁸² Panel Report, *EC tariff preferences*, paras. 7.198-7.199.

⁸³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.

⁸⁴ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.171.

that foreign pharmaceutical producers might decide to supply other countries where they can receive a higher price for their products, instead of Turkey; and (ii) imported pharmaceutical products may become unaffordable to the SSI if a foreign currency gains in value or the Turkish lira depreciates."⁸⁵

71. The Panel found Türkiye's argument to be insufficient to discharge the burden of proof under Article XX:

"In the Panel's view, the nature of the risk identified by Turkey in this dispute involves the kind of hypothetical possibility that previous panels and the Appellate Body have regarded as insufficient to discharge a responding party's burden under Article XX. Significantly, Turkey has not identified any instance of shortage of supply of a specific product caused by foreign producers deciding to stop supplying medicines to Turkey to instead sell in other countries where they can receive a higher price for their products; or caused by a medicine becoming unaffordable to the SSI because of a foreign currency gaining in value or the Turkish lira depreciating."⁸⁶

72. The Panel also considered that evidence submitted by Türkiye, including certain press articles, did not demonstrate long-term shortage of supply of pharmaceutical products:

"The Panel recalls that it is for Turkey, as the party invoking the general exception in Article XX(b), to substantiate its assertion that its alleged over-reliance on imported pharmaceutical products creates a risk of long-term shortage of supply of safe, effective and affordable medicines. As indicated above, the Panel agrees with Turkey that the press articles submitted 'provide ample evidence of disruptions in the supply of pharmaceutical products' in Turkey and further that, insofar as the products in question were imported, such shortages were 'linked to' imports. However, the Panel's review of these press articles does not reveal any instance of shortage of supply of a specific product caused by foreign producers deciding to stop supplying medicines to Turkey to sell instead in other countries where they can receive a higher price for their products; or caused by a medicine becoming unaffordable to the SSI because of a foreign currency gaining in value or the Turkish lira depreciating. Thus, the absence of evidence linking these past instances of shortages to Turkey's over-reliance on imports further confirms that the risk identified by Turkey – and more specifically, that the factors that give rise to a risk of future shortages in respect of any and all pharmaceutical products can only be characterized as hypothetical."⁸⁷

73. The Panel also found Türkiye's description of the alleged risk to be too general in nature:

"In addition to being merely hypothetical, the situation described by Turkey in this dispute is characterized by a level of temporal and sectoral generality that is at odds with the concept of risk under Article XX(b). The generality of Turkey's argument is in fact such that the risk identified by Turkey could be present in any sector and concern any market. Indeed, Turkey refers to general economic circumstances that are not specific to the pharmaceutical sector, and not specific to Turkey (such as exchange rate fluctuations). The generality of Turkey's underlying argument would lead to the conclusion that there is a permanent risk of shortage of products concerning each and every sector of any WTO Member's economy. Following the logic of Turkey's argument, international trade liberalization in products and sectors that are necessary for the protection of human life or health creates a permanent risk to human life or health under Article XX(b).

...

In sum, Turkey asserts the existence of a risk without establishing any substantial degree of probability, such that the risk appears to be theoretical, abstract and hypothetical. In the Panel's view, the hypothetical and overly general nature of the alleged risk, as asserted by Turkey, casts serious doubt on Turkey's assertion that the

⁸⁵ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.172.

⁸⁶ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.173.

⁸⁷ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.177.

localisation requirement was taken to protect against a future shortage of supply of safe, effective and affordable pharmaceutical products in Turkey."⁸⁸

74. The Panel in *Turkey – Pharmaceutical Products (EU)* found that the record evidence did not demonstrate that the challenged localisation requirement linked to the stated objective of protection of public health.⁸⁹ The Panel further found that "the objective of the localisation requirement, as it appears in several documents, has no rational relationship to the invoked objective of ensuring a continuous supply of safe, effective and affordable pharmaceutical products."⁹⁰ In the Panel's view, not every measure taken by a WTO member to increase its production of pharmaceutical products necessarily aims to protect human life or health.⁹¹

1.5.2 Policy objective of the measure at issue

75. In determining whether the policy objective of the European Communities' Drug Arrangements was the protection of human life or health, the Panel in *EC – Tariff Preferences* analysed the design and the structure of the GSP Regulation. However, it found no references to the alleged policy objective of protection of human life and health:

"Examining the design and structure of Council Regulation 2501/2001 and the Explanatory Memorandum of the Commission, the Panel finds nothing in either of these documents relating to a policy objective of protecting the health of European Communities citizens. The only objectives set out in the Council Regulation (in the second preambular paragraph) are 'the objectives of development policy, in particular the eradication of poverty and the promotion of sustainable development in the developing countries'. The Explanatory Memorandum states that '[t]hese objectives are to favour sustainable development, so as to improve the conditions under which the beneficiary countries are combatting drug production and trafficking'.

Examining the structure of the Regulation, the Panel notes that Title I provides definitions of 'beneficiary countries' and the scope of product coverage for various categories of beneficiaries. Title II then specifies the methods and levels of tariff cuts for the various preference schemes set out in the Regulation, including for the General Arrangements, Special Incentive Arrangements, Special Arrangements for Least Developed Countries and Special Arrangements to Combat Drug Production and Trafficking. Title II also provides Common Provisions on graduation. Title III deals with conditions for eligibility for special arrangements on labour rights and the environment. Title IV provides only that the European Communities should monitor and evaluate the effects of the Drug Arrangements on drug production and trafficking in the beneficiary countries. There are other titles dealing with temporary withdrawal and safeguard provisions, as well as procedural requirements. From an examination of the whole design and structure of this Regulation, the Panel finds nothing linking the preferences to the protection of human life or health in the European Communities."⁹²

76. In addressing European Communities' argument that providing market access is a necessary component of the United Nations' comprehensive international strategy to fight drug problem by promoting alternative development, the Panel in *EC – Tariff Preferences* stated that while alternative development is one component of that strategy, providing market access is not itself a significant component of the comprehensive strategy. The Panel went on to state that even if it were assumed that market access was an important component of the international strategy, the European Communities had not established a link between the market access improvement and the protection of human health in the European Communities:

"From its examination of these international instruments, including the 1988 Convention and the 1998 Action Plan, the Panel understands that alternative development is one component of the comprehensive strategy of the UN to combat

⁸⁸ Panel Report, *Turkey – Pharmaceutical Products (EU)*, paras. 7.178 and 7.180.

⁸⁹ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.199.

⁹⁰ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.201.

⁹¹ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.210.

⁹² Panel Report, *EC – Tariff Preferences*, paras. 7.201-202.

drugs. The Panel has no doubt that market access plays a supportive role in relation to alternative development, but considers that market access is not itself a significant component of this comprehensive strategy. As the Panel understands it, the alternative development set out in the Action Plan depends more on the long-term political and financial commitment of both the governments of the affected countries and the international community to supporting integrated rural development, than on improvements in market access.

Even assuming that market access is an important component of the international strategy to combat the drug problem, there was no evidence presented before the Panel to suggest that providing improved market access is aimed at protecting human life or health in drug importing countries. Rather, all the relevant international conventions and resolutions suggest that alternative development, including improved market access, is aimed at helping the countries seriously affected by drug production and trafficking to move to sustainable development alternatives."⁹³

1.5.3 "necessary"

77. In *Brazil – Retreaded Tyres*, the Appellate Body explained that a "necessity" assessment under Article XX(b) entails an analysis of all relevant factors:

"In order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to 'show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."⁹⁴

78. The Appellate Body in *Brazil – Retreaded Tyres* held that the weighing and balancing exercise is a "holistic operation" that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement:

"In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body.⁹⁵ The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not 'actually' weigh and balance the relevant factors, or that the Panel made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban."⁹⁶

⁹³ Panel Report, *EC – Tariff Preferences*, paras. 7.206-7.207.

⁹⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

⁹⁵ (footnote original) Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

⁹⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para.182.

1.5.3.1 Aspect of measure to be justified as "necessary"

79. In *US – Gasoline*, the Panel addressed the question of which specific aspect of a measure under scrutiny should be justified as "necessary" within the meaning of paragraph (b) of Article XX. The Panel held that "it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefiting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product". The Appellate Body did not address the Panel's findings on paragraph (b). However, in addressing the Panel's findings on paragraph (g), more specifically the Panel's statements concerning the terms "relating to" and "primarily aimed at", the Appellate Body was critical that "the Panel [had] 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 found that "the Panel ... was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue." ⁹⁷

1.5.3.2 Treatment of scientific data and risk assessment

80. In *EC – Asbestos*, the Panel found that the measure at issue, a French ban on the manufacture, importation and exportation, and domestic sale and transfer of certain asbestos products including products containing chrysotile asbestos fibres, was inconsistent with GATT Article III:4, but justified under Article XX(b) in light of the underlying policy of prohibiting chrysotile asbestos in order to protect human life and health. The Appellate Body rejected Canada's argument under Article XX(b) that the Panel erred in law by deducing that chrysotile-cement products pose a risk to human life or health. The Appellate Body referred to Article 11 of the DSU and its reports on *US – Wheat Gluten* and *Korea – Alcoholic Beverages*, and stated:

"The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence."⁹⁸

81. Further, in *EC – Asbestos*, Canada argued that Article 11 of the DSU requires that the scientific data must be assessed in accordance with the principle of the balance of probabilities, and that in particular where the evidence is divergent or contradictory, a Panel must take a position as to the respective weight of the evidence by virtue of the principle of the preponderance of the evidence. The Appellate Body rejected this argument, pointing out:

"As we have already noted, '[w]e cannot second-guess the Panel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]'. And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that 'responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources.' (emphasis added) 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 respected, 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."⁹⁹

⁹⁷ Appellate Body Report, *US – Gasoline*, p. 16.

⁹⁸ Appellate Body Report, *EC – Asbestos*, para. 161. With respect to the standard of review in general, see the Section on Article 11 of the DSU.

⁹⁹ Appellate Body Report, *EC – Asbestos*, paras. 177-178.

82. In *EC – Asbestos*, the Appellate Body also rejected Canada's argument that in examining whether the French ban on manufacture, sale and imports of certain asbestos products including chrysotile-cement products was justified under GATT Article XX(b), the Panel should have quantified the risk associated with chrysotile-cement products:

"As for Canada's second argument, relating to 'quantification' of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health. A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that 'no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis.' The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer. Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' 'hypotheses' of the risk."¹⁰⁰

83. The Appellate Body also rejected Canada's argument that the Panel erroneously postulated that the level of health protection inherent in the measure was a halt to the spread of asbestos-related health risks, because it did not take into consideration the risk associated with the use of substitute products without a framework for controlled use. The Appellate Body stated:

"[W]e note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, 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. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres, although that evidence did *not* indicate that the risk posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place."¹⁰¹

1.5.3.3 Weighing and balancing of relevant factors

1.5.3.3.1 Importance of the interest or values protected

84. In *Brazil – Retreaded Tyres*, the Appellate Body agreed with the Panel that protecting human life and health against diseases is "both vital and important in the highest degree":

"In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases 'is both vital and important in the highest degree'. The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important. Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us."¹⁰²

¹⁰⁰ Appellate Body Report, *EC – Asbestos*, para. 167.

¹⁰¹ Appellate Body Report, *EC – Asbestos*, para. 168.

¹⁰² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 179.

85. In *Indonesia – Chicken*, the Panel and the complainant agreed with the respondent that the protection of human health is of "highest importance":

"We first observe that the objective pursued through the intended use requirement, as noted above, is the protection of human health, an interest which Indonesia considers of the highest importance. We agree and do not understand Brazil to disagree."¹⁰³

86. In *Brazil – Taxation*, the Panel found that increasing vehicle safety and reduction of CO₂ emissions are interests of high importance:

"The Panel, therefore, finds that increasing vehicle safety is an interest of high importance.

With respect to the reduction of CO₂ emissions, the Panel notes that Brazil has launched numerous initiatives in recent decades to reduce pollutant emissions by motor vehicles, such as the Air Pollution Control Program by Motor Vehicles (PROCONVE). Further, the Brazilian Transport and Urban Mobility Plan indicates that 78% of total national CO₂ emissions associated with transportation derive from the use of individual vehicles. A study prepared by the Brazilian Ministry of the Environment shows that vehicle emissions of CO₂ in Brazil have increased significantly. For example, in the five years that preceded the establishment of the INOVAR-AUTO programme this figure increased by 61.5% for gasoline cars. In the Panel's view, this shows the importance of this objective for Brazil.

The Panel recalls that the Appellate Body has explained that 'few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important.

In light of the above, the Panel finds that the level of importance of the interests pursued by Brazil (i.e. increase of vehicle safety and reduction of CO₂ emissions) is high."¹⁰⁴

1.5.3.3.2 Contribution of the measure to the objective

87. In *EC – Tariff Preferences*, the Panel, in considering the extent to which the European Communities' Drug Arrangements were necessary in achieving the European Communities' stated health objective, referred to the approach used by the Appellate Body in *Korea – Various Measures on Beef*. The Panel found that the GSP benefits decreased during the period 1 July 1999 to 31 December 2001 and that the continuing contribution of the Drug Arrangements to the European Communities' health objective was therefore doubtful:

"The Panel recalls the Appellate Body ruling in *Korea – Various Measures on Beef* that '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'. In order to determine where the Drug Arrangements are situated along this continuum between 'contribution to' and 'indispensable', the Panel is of the view that it should determine the extent to which the Drug Arrangements contribute to the European Communities' health objective. This requires the Panel to assess the benefits of the Drug Arrangements in achieving the objective of protecting life or health in the European Communities.

The Panel notes the Report of the Commission pursuant to Article 31 of Council Regulation No. 2820/98 of 21 December 1998 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001. The assessment of the effects of the Drug Arrangements in this report reveals that the

¹⁰³ Panel Report, *Indonesia – Chicken*, para. 7.225.

¹⁰⁴ Panel Report, *Brazil – Taxation*, paras. 7.913-7.916.

product coverage under the Drug Arrangements decreased by 31 per cent from 1999 through 2001. It also shows that the volume of imports from the beneficiary countries under the Drug Arrangements decreased during the same period. As the Panel understands it, this decrease in product coverage and in imports from the beneficiaries is due to the reduction to zero – or close to zero – of the MFN bound duty rates on certain products, including coffee products.

The Panel considers that the above-referenced decreases in product coverage and depth of tariff cuts reflect a long-term trend of GSP benefits decreasing as Members reduce their import tariffs towards zero in the multilateral negotiations. Given this decreasing trend of GSP benefits, the contribution of the Drug Arrangements to the realization of the European Communities' claimed health objective is insecure for the future. To the Panel, it is difficult to deem such measure as 'necessary' in the sense of Article XX(b). Moreover, given that the benefits under the Drug Arrangements themselves are decreasing, the Panel cannot come out to the conclusion that the 'necessity' of the Drug Arrangements is closer to the pole of 'indispensable' than to that of 'contributing to' in achieving the objective of protecting human life or health in the European Communities."¹⁰⁵

88. The Panel in *EC – Tariff Preferences* also considered the temporary suspension mechanism in the European Communities' GSP Regulation as well as its application to Myanmar and found that with one or more drug-producing or trafficking countries outside of the scheme, the Drug Arrangements are not contributing sufficiently to the reduction of drug supply to the EC's market:

"Assuming a beneficiary country under the Drug Arrangements was not ensuring sufficient customs controls on export of drugs, or was infringing the objectives of an international fisheries conservation convention, the European Communities could then suspend the tariff preferences under the Drug Arrangements to this country, for reasons unrelated to protecting human life or health. Given that this beneficiary would be a seriously drug-affected country, the suspension of the tariff preferences would arrest the European Communities' support to alternative development in that beneficiary and therefore also stop efforts to reduce the supply of illicit drugs into the European Communities. The whole design of the EC Regulation does not support the European Communities' contention that it is 'necessary' to the protection of human life and health in the European Communities, because such design of the measure does not contribute sufficiently to the achievement of the health objective.

The European Communities confirms that while Myanmar is one of the world's leading producers of opium, it is not necessary to separately include this country under the Drug Arrangements since it is already accorded preferential tariff treatment as a least-developed country. The Panel notes that the European Communities has suspended tariff preferences for Myanmar. ...

Recalling that the European Communities confirms that it is required to continue its suspension of tariff preferences for Myanmar through the expiration of the EC Regulation on 31 December 2004, the Panel notes that any of the 12 beneficiaries is also potentially subject to similar suspension under the same Regulation, regardless of the seriousness of the drug problems in that country. With one or more of the main drug-producing or trafficking countries outside the scheme, it is difficult to see how the Drug Arrangements are in fact contributing sufficiently to the reduction of drug supply into the European Communities' market to qualify as a measure necessary to achieving the European Communities' health objective."¹⁰⁶

89. The Appellate Body in *Brazil – Retreaded Tyres* affirmed that varying methodologies may be employed to evaluate the contribution of the measure to the achievement of its objective:

"Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk,

¹⁰⁵ Panel Report, *EC – Tariff Preferences*, paras. 7.211-7.213.

¹⁰⁶ Panel Report, *EC – Tariff Preferences*, paras. 7.216-7.218.

the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU."¹⁰⁷

90. The Appellate Body in *Brazil – Retreaded Tyres* held that a panel may conduct either a quantitative or qualitative analysis of the contribution of a measure to the achievement of its objective:

"In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified. To the contrary, in *EC – Asbestos*, the Appellate Body emphasized that there is 'no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health'. In other words, '[a] risk may be evaluated either in quantitative or qualitative terms.' Although the reference by the Appellate Body to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms."¹⁰⁸

91. The Appellate Body in *Brazil – Retreaded Tyres* explained that a panel may evaluate whether a measure at issue is necessary based on whether it "is apt to produce a material contribution to the achievement of its objective":

"This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."¹⁰⁹

92. In *China – Publications and Audiovisual Products*, the Appellate Body made the following observations:

"We recall the Appellate Body's finding, in *Korea – Various Measures on Beef*, that the term 'necessary', in the abstract, refers to a range of degrees of necessity. The Appellate Body explained that determining whether a measure is 'necessary' involves

¹⁰⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

¹⁰⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 146.

¹⁰⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

a process of weighing and balancing a series of factors that prominently include the contribution made by the measure to secure compliance with the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. The greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as 'necessary'.

In *Brazil – Retreaded Tyres*, the Appellate Body clarified how the analysis of the contribution made by a challenged measure to the achievement of the objective pursued is to be undertaken. The Appellate Body noted that a party seeking to demonstrate that its measures are 'necessary' should seek to establish such necessity through 'evidence or data, pertaining to the past or the present', establishing that the measures at issue contribute to the achievement of the objectives pursued. In examining the evidence put forward, a panel must always assess the actual contribution made by the measure to the objective pursued.

However, this is not the only type of demonstration that could establish such a contribution. The Appellate Body explained that a panel is not bound to find that a measure does not make a contribution to the objective pursued merely because such contribution is not 'immediately observable' or because, '[i]n the short-term, it may prove difficult to isolate the contribution [made by] one specific measure from those attributable to the other measures that are part of the same comprehensive policy'. Accordingly, the Appellate Body stated in *Brazil – Retreaded Tyres*, that:

... a panel might conclude that [a measure] is necessary on the basis of a demonstration that [it] is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."¹¹⁰

93. In *Indonesia – Chicken*, the Panel considered that in light of the objective of preventing health risks from thawing chicken at tropical temperatures, the intended use requirement "overshoots" such objective with respect to "safe" chicken or chicken that was being kept frozen in cold storage:

"[W]e have some doubts whether the intended use requirement can be seen as making an important contribution. We acknowledge that it significantly reduces the risks arising from thawing chicken at tropical temperatures and, thus, materially contributes to preventing that risk. In doing so, however, the intended use requirement prevents the sale of frozen chicken in traditional markets, including of chicken that would *not* present the above risk, and in particular, chicken that is being kept frozen in cold storage, where available. In respect of such *safe* chicken the measure makes no contribution to achieving any objective. Put differently, the measure 'overshoots' its intended objective, which, as Indonesia states, is to 'ensure that only *safe* imported chicken is sold in markets facilities'."¹¹¹

94. In *Brazil – Taxation*, the Panel concluded that it was "likely" that the INOVAR-AUTO programme would not make much contribution to Brazil's objectives:

"In the Panel's view, Brazil has not demonstrated that the discriminatory aspects of the INOVAR-AUTO programme have led, will lead, or are apt to lead, to an increase in vehicle safety or energy efficiency. Thus, in the Panel's view, although it is possible that the INOVAR-AUTO programme *could*, in theory, contribute to these objectives, Brazil has not demonstrated that the discriminatory aspects of the programme are likely or apt to contribute to the realisation of those goals. In the Panel's view, for the

¹¹⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 251-253.

¹¹¹ Panel Report, *Indonesia – Chicken*, para. 7.228.

reason indicated in paragraph 7.290 above, it is likely that the INOVAR-AUTO programme will not make much, if any, contribution to these objectives."¹¹²

1.5.3.3.3 Trade restrictiveness of the measure

95. In *Indonesia – Chicken*, the Panel noted that the measure at issue operated as a "trade restriction to the highest degree", but that a material contribution made by the measure could still outweigh that trade-restrictiveness:

"With these considerations in mind, we turn to the third factor, which is the trade-restrictiveness of the measure. As seen above, the intended use requirement operates generally as a trade restriction directly impacting the volume of chicken that may be imported into Indonesia. This restriction most notably affects access to modern markets and traditional markets, which are altogether excluded from the allowed uses. In terms, specifically, of access to traditional markets to which Indonesia's defence under Article XX(b) exclusively relates, the measure operates as a trade restriction to the highest degree. As the Appellate Body made clear in *Brazil – Retreaded Tyres*, such trade restrictiveness weighs heavily against considering a measure necessary. Depending on the circumstances, however, a material contribution made by the measure may still outweigh that trade-restrictiveness."¹¹³

96. In *Brazil – Taxation*, the Panel considered the trade restrictiveness of the measure at issue to be "material":

"With respect to the discriminatory rules on the use of presumed IPI tax credits, the Panel has noted that these rules prioritize domestic vehicles over imported vehicles. In the view of the Panel, this particular aspect of the INOVAR-AUTO programme is particularly trade-restrictive, because it incentivises the purchase of domestically manufactured vehicles, which has a material impact on imports of like motor vehicles.

The Panel recognises that a determination of the trade-restrictiveness of a particular measure should be as precise as possible. However, the Panel is not in a position to make a quantitative estimation of the level of trade-restrictiveness. In the present dispute, in light of its observations above, the Panel finds that the level of trade-restrictiveness of these aspects of the rules on accreditation in order to receive the presumed IPI tax credits, calculation of the amount of presumed IPI tax credits to be accrued, and the use of presumed IPI tax credits resulting from expenditure in strategic inputs and tools, is material."¹¹⁴

1.5.3.3.4 "Reasonably available" alternatives

97. In *EC – Asbestos*, the Appellate Body held that an alternative measure which is impossible to implement is not "reasonably available". With regard to alternative measures that involve administrative difficulties, the Appellate Body explained that several factors must be taken into account, other than the difficulty of implementation:

"We certainly agree with Canada that an alternative measure which is impossible to implement is not 'reasonably available'. But we do not agree with Canada's reading of either the panel report or our report in *United States – Gasoline*. In *United States – Gasoline*, the panel held, in essence, that an alternative measure did not *cease* to be 'reasonably' available simply because the alternative measure involved *administrative difficulties* for a Member. The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case.

Looking at this issue now, we believe that, in determining whether a suggested alternative measure is 'reasonably available', several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on*

¹¹² Panel Report, *Brazil – Taxation*, para. 7.921.

¹¹³ Panel Report, *Indonesia – Chicken*, para. 7.227.

¹¹⁴ Panel Report, *Brazil – Taxation*, paras. 7.928-7.929.

Importation of and Internal Taxes on Cigarettes, the panel made the following observations on the applicable standard for evaluating whether a measure is 'necessary' under Article XX(b):

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

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

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

We indicated in *Korea – Beef* that one aspect of the 'weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure' is reasonably available is the extent to which the alternative measure 'contributes to the realization of the end pursued'. 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 asbestos fibres. The value pursued is both vital and important in the highest degree."¹¹⁵

98. The Appellate Body in *EC – Asbestos* upheld the Panel's finding that no alternative measure was "reasonably available":

"In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated. Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a "significant residual risk of developing asbestos-related diseases." The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos. Given these factual findings by the Panel, we believe that "controlled use" would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. "Controlled use" would, thus, not be an alternative measure that would achieve the end sought by France.

For these reasons, we uphold the Panel's finding, in paragraph 8.222 of the Panel Report, that the European Communities has demonstrated a *prima facie* case that there was no "reasonably available alternative" to the prohibition inherent in the Decree. As a result, we also uphold the Panel's conclusion, in paragraph 8.223 of the

¹¹⁵ Appellate Body Report, *EC – Asbestos*, paras. 170-172.

Panel Report, that the Decree is "necessary to protect human ... life or health" within the meaning of Article XX(b) of the GATT 1994."¹¹⁶

99. The Appellate Body in *Brazil – Retreaded Tyres* emphasized the view originally set forth in *US – Gambling* that a reasonably available alternative must allow for a Member to achieve the desired level of protection:

"We note that the objective of the Import Ban is the reduction of the 'exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres' and that 'Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible', and that a measure or practice will not be viewed as an alternative unless it 'preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'."¹¹⁷

100. In considering reasonably available alternatives, the Appellate Body in *Brazil – Retreaded Tyres* additionally clarified that measures which form one element of a comprehensive policy, and are thus "complementary", should not be considered alternatives to the import ban at issue:

"Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres. Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban."¹¹⁸

101. The Appellate Body in *Brazil – Retreaded Tyres* rejected the European Union's argument that the Panel had failed to make a proper "collective" assessment of all the proposed alternatives:

"The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that 'none of these, either individually or collectively, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban.' Secondly, as noted by the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy. Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives."¹¹⁹

102. See also the discussion in paragraph 77 above.

103. The Panel in *Indonesia – Chicken* noted that Brazil (the complainant) had not put forward alternative measures. The Panel noted however that it had the discretion to develop its own reasoning, and, in this regard, considered that Indonesia's subsequent legislation pertaining to this issue which imposed a cold storage requirement was a reasonably available less trade-restrictive alternative:

"We are mindful that the Appellate Body has cautioned panels not to take it upon themselves 'to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so'. However, the Appellate Body has also held that where a defence or rebuttal of a defence has been made, a panel may rule on the

¹¹⁶ Appellate Body Report, *EC – Asbestos*, paras. 174-175.

¹¹⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 170.

¹¹⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

¹¹⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 181.

defence 'relying on arguments advanced by the parties or developing its own reasoning'.

We believe that, for the purposes of our analysis here, we can consider the cold storage requirement as a less-trade restrictive alternative, for the following reasons: First, given the subsequent legislative developments, we have before us evidence that this is an alternative measure that is reasonably available and meets Indonesia's objective. Second, Indonesia's defence of the intended use requirement, in fact, reads like a reference to, and anticipation of, this subsequent legislation. In other words, we do not see Indonesia defending a complete ban from traditional markets, as enacted through MoA 58/2015, but rather the cold storage requirement as enacted through MoA 34/2016. Indonesia, for example, in discussing necessity, states the following: 'Thus, by *requiring importers* to import frozen and chilled chicken meat and products to be sold *only in markets that have a proper cold-chain systems*...is capable of making and does make some contribution...'. The intended use requirement as enacted through MoA 58/2015, which Indonesia defends pertinently with this statement, notably does not require cold storage, but prohibits access to traditional markets altogether. Third, while Brazil does not suggest cold storage, it does, as seen above, suggest *inter alia* 'rules regulating the thawing of frozen chicken to be offered for sale' as a less trade-restrictive alternative measure. In our view a cold storage requirement could be considered to fall under 'rules regulating the thawing of frozen chicken'.¹²⁰

104. In *Brazil – Taxation*, the Panel found that Brazil had not demonstrated that the alternative measures identified by the complainants were not reasonably available:

"In the Panel's view, the complaining parties have identified alternatives which are WTO-consistent and less-trade-restrictive than the discriminatory aspects of the INOVAR-AUTO programme, and which would achieve an equivalent or higher degree of contribution to the claimed objective as the challenged measures. The Panel considers that Brazil has not demonstrated that the alternative measures identified by the complaining parties were not reasonably available, were not less trade-restrictive, or failed to make an equivalent contribution to the claimed policy objectives."¹²¹

1.5.3.3.5 Burden of proof

105. In *Brazil – Retreaded Tyres*, the Appellate Body stated that, once a panel finds a measure to be "necessary" within the meaning of Article XX(b), it is for the complaining party to demonstrate the existence of an alternative measure that is less trade restrictive but which provides an equivalent contribution to the achievement of the objective pursued:

"In order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to 'show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives.'"¹²²

¹²⁰ Panel Report, *Indonesia – Chicken*, paras. 7.237-7.238.

¹²¹ Panel Report, *Brazil – Taxation*, para. 7.960.

¹²² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

1.5.4 "to protect"

106. In *EC – Seal Products*, the Appellate Body cited the panel's finding in *EC – Asbestos* and explained the meaning of the phrase "to protect":

"Canada's claim asks us to consider whether the use of the phrase 'to protect' in Article XX(a) requires a panel to identify a risk against which the measure that is to be justified seeks to protect. The ordinary meaning of the verb 'protect' includes 'defend or guard against injury or danger; shield from attack or assault; support, assist ...; keep safe, take care of ...'. The meaning of 'to protect' in a given provision also requires taking into account the context in which the phrase is used. The phrase 'to protect' is used in three subparagraphs of Article XX that concern the 'protection' of different non-economic interests and concerns. In *EC – Asbestos*, in addressing the term 'to protect' in Article XX(b), the panel noted that 'the notion of 'protection' ... impl[ies] the existence of a health risk'. We note that Article XX(b) focuses on the protection of 'human, animal or plant life or health'. It may be that the protection of human, animal, or plant life or health implies a particular focus on the protection from or against certain dangers or risks. For example, the concepts of 'risk' and 'protection' are expressly reflected in the SPS Agreement, which elaborates rules for the application of Article XX(b)."¹²³

107. The Appellate Body in *EC – Seal Products* held, in the context of Article XX(a), that Members have the right to determine the level of protection that they consider appropriate. The Appellate Body noted that the Panel in *EC – Asbestos* had taken a similar position in the context of Article XX(b):

"Finally, by suggesting that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appears to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement 'to protect' public morals under Article XX(a). In this regard, we note that the panel in *US – Gambling* underscored that Members have the right to determine the level of protection that they consider appropriate¹²⁴, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern. Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals, and must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, we do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns in the same way."¹²⁵

108. See also the discussion in paragraph 58 above.

1.6 Paragraph (d)

1.6.1 General; burden of proof

109. In *Korea – Various Measures on Beef*, the Appellate Body examined Korea's argument that the prohibition of retail sales of both domestic and imported beef products (the dual retail system) was designed to secure compliance with a consumer protection law, and thus, although in violation of Article III:4, nevertheless justified by Article XX(d). Referring to its Report on *US – Gasoline*, the Appellate Body set forth the following two elements for paragraph (d):

¹²³ Appellate Body Reports, *EC – Seal Products*, para. 5.197. See also Appellate Body Reports, *EC – Seal Products*, fn 1253 to para. 5.200, quoted in fn 124 below.

¹²⁴ (footnote original) Panel Report, *US – Gambling*, para. 6.461 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 176; and *EC – Asbestos*, para. 168). We note that the panel in *EC – Asbestos* took a similar position in the context of Article XX(b) when it stated that, although it must examine the particular health risk posed by chrysotile asbestos fibres, it was not required to assess France's choice to protect its population against that risk. (Panel Report, *EC – Asbestos*, paras. 8.170 and 8.171)

¹²⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.200.

"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."¹²⁶

110. In *Thailand – Cigarettes (Philippines)*, the Appellate Body held that a Member raising a defence under Article XX(d) has to prove three key elements: (i) that the measure at issue secures compliance with "laws or regulations" that are themselves consistent with the GATT 1994; (ii) that the measure at issue is "necessary" to secure such compliance; and (iii) that the measure at issue meets the requirements set out in the chapeau of Article XX:

"A Member will successfully discharge that burden and establish its Article XX(d) defence upon demonstration of three key elements, namely: (i) that the measure at issue secures compliance with 'laws or regulations' that are themselves consistent with the GATT 1994; (ii) that the measure at issue is 'necessary' to secure such compliance; and (iii) that the measure at issue meets the requirements set out in the chapeau of Article XX. Furthermore, when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be 'necessary' is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are 'necessary' to secure compliance with 'laws or regulations' that are not GATT-inconsistent."¹²⁷

111. The Panel in *Turkey – Pharmaceutical Products (EU)* refrained from making a finding as to whether paragraph (d) covers measures taken by a WTO member to secure its own compliance with its laws or regulations. However, the Panel found, based on its findings under paragraph (b) of Article XX, that "Turkey has failed to demonstrate that the localisation requirement was taken to secure compliance with laws requiring Turkey to ensure 'accessible, effective and financially sustainable healthcare' for its population."¹²⁸

112. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Turkey – Pharmaceutical Products (EU)*, the Arbitrator pointed to a shortcoming in the order of the Panel's analysis under Article XX(d):

"In our view, it would have been more prudent had the Panel followed the order of the relevant analysis and articulated the applicable legal standard in assessing Türkiye's invocation of Article XX(d) of the GATT 1994. In other words, logically and analytically, it would have been more reasonable for the Panel to consider first which specific legal instruments were identified by Türkiye as the relevant 'laws or regulations', whether such instruments qualified as 'laws or regulations' within the meaning of Article XX(d), and whether they were not inconsistent with provisions of the GATT 1994, before turning to the examination of the relationship between the localisation requirement and the specific laws or regulations for the purposes of its 'design' analysis.

The Panel did not follow the order of analysis suggested above. Specifically, there is no express confirmation in the Panel Report of the relevant laws or regulations cited by Türkiye, nor any examination of the characteristics of those instruments to confirm whether they could qualify as 'laws or regulations' within the meaning of Article XX(d). The Panel also did not address whether the relevant laws or regulations were not inconsistent with the GATT 1994. In addition, the Panel Report is silent on the applicable legal standard for the Article XX(d) defence."¹²⁹

¹²⁶ Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

¹²⁷ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.

¹²⁸ Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.218.

¹²⁹ Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, paras. 6.160-6.161.

113. However, the Arbitrator found that in so doing the Panel did not commit a legal error:

"To begin with, the Panel appears to have taken Türkiye's description of the relevant legal instruments at face value, and assumed *arguendo* that the legal instruments cited could be said to 'require Türkiye to ensure accessible, effective, and financially sustainable healthcare' for its population. Considering this assumption, the Panel focused on whether the localisation requirement was taken to (designed to) secure compliance with laws requiring Türkiye to ensure the proclaimed objective.

On the basis of its prior finding under Article XX(b) that the localisation requirement pursues industrial policy rather than the alleged objective of ensuring a continuous supply of safe, effective, and affordable pharmaceutical products, and considering the equivalent arguments advanced by Türkiye in its Article XX(d) defence, the Panel seems to have implicitly but necessarily reached an intermediate finding that there is no rational relationship between the localisation requirement and the proclaimed objective of securing compliance with laws or regulations requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare. We also understand the Panel's *mutatis mutandis* application to suggest that a similar intermediate finding may apply in the context of Article XX(d). In light of the manner in which Türkiye articulated its justification for the localisation requirement under Article XX(d), it does not seem to constitute a legal error for the Panel to have extended elements of its assessment under Article XX(b) *mutatis mutandis* to the analysis of Türkiye's defence under Article XX(d)."¹³⁰

114. In coming to this conclusion, the Arbitrator underlined the cumulative nature of the requirements found in Article XX(d):

"We note once again that all the conditions and relevant elements for Article XX(d) are cumulative in nature. Hence, even without the Panel's examination of the laws or regulations cited by Türkiye and their qualification under Article XX(d), the Panel's intermediate finding on the lack of rational relationship between the localisation requirement and the proclaimed objective, which was made on the basis of the Panel's *mutatis mutandis* application, was sufficient for the Panel to conclude that the localisation requirement was not taken to secure compliance with the relevant laws or regulations, even if taken at face value as described by Türkiye."¹³¹

115. The Panel in *Indonesia – Raw Materials* stated that, in the context of Article XX(d), the law or regulation with which compliance is sought to be secured should be treated as WTO-consistent until proven otherwise:

"Past panels dealing with defences under Article XX(d) such as *Colombia – Ports of Entry* and *Colombia – Textiles* found that a responding Member's law should be treated as WTO consistent until proven otherwise on the basis of an Appellate Body statement in *US – Carbon Steel*. Even if this Appellate Body statement concerned the consistency of the challenged measures, and not the consistency of the legal instruments the measures at issue seek to secure compliance with, the Panel considers it also relevant for this element of the legal standard because it reflects the general principle that the party arguing that a measure is WTO inconsistent must prove it."¹³²

116. The Panel in *Indonesia – Raw Materials*, while noting the difference between paragraphs (d) and (g) of Article XX as to whether the challenged measure also applies to domestic consumption, stated that such factors could be taken into account in assessing the respondent's arguments concerning the objective of the measure:

"The Panel is of the view that measures can have multiple objectives and effects. 469 Even though the stated objective of the export ban relates to ensuring supply for the domestic industry this does not preclude that it was also intended to address problems

¹³⁰ Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, paras. 6.166-6.167.

¹³¹ Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, para. 6.168.

¹³² Panel Report, *Indonesia – Raw Materials*, para. 7.203.

related to the sustainability of export-oriented nickel mines. The Panel also cannot exclude that the resulting reduction in exports could have had a positive impact on the sustainability of nickel mining in Indonesia.

The European Union is correct that the prohibition on nickel ore exports was not done in conjunction with a limitation on domestic consumption of nickel ore. The Panel agrees with Indonesia, however, that such restrictions on domestic consumption do not constitute an integral part of the legal standard under Article XX(d) of the GATT 1994 as they would if Indonesia had invoked Article XX(g). The presence or lack of such restrictions, nonetheless, constitutes a relevant factor in assessing Indonesia's argument that the export ban pursues the conservation objective of decreasing the extraction rate of nickel ore."¹³³

1.6.2 Aspect of measure to be justified as "necessary"

117. The Panel in *US – Gasoline* held that "maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not 'secure compliance' with the baseline system. These methods were not an enforcement mechanism."¹³⁴ While the Panel's findings on Article XX(d) were not appealed, the Appellate Body noted that, in the context of Article XX(g), "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 found that "the Panel ... was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue."¹³⁵

1.6.3 Measures "designed to secure compliance" with laws or regulations "not inconsistent" with the GATT 1994

118. With regard to the first element of the analysis under Article XX(d), the Appellate Body in *India – Solar Cells* stated:

"As to the first element of the analysis contemplated under Article XX(d), the Appellate Body has stated that the responding party has the burden of demonstrating that: there are 'laws or regulations'; such 'laws or regulations' are 'not inconsistent with the provisions of' the GATT 1994; and the measure sought to be justified is designed 'to secure compliance' with such 'laws or regulations'. An examination of a defence under Article XX(d) thus includes an initial, threshold examination of the relationship between the challenged measure and the 'laws or regulations' that are not GATT-inconsistent so as to determine whether the former is designed 'to secure compliance' with specific rules, obligations, or requirements under the relevant provisions of such 'laws or regulations'. If the assessment of the design of a measure, including its content, structure, and expected operation, reveals that the measure is 'incapable' of securing compliance with specific rules, obligations, or requirements under the relevant provisions of such 'laws or regulations' that are not GATT-inconsistent, then the measure cannot be justified under Article XX(d), and this would be the end of the inquiry."¹³⁶

119. See also the discussion in paragraph 138 below.

120. The Appellate Body in *Colombia – Textiles* disagreed with the Panel's conclusion that the measure at issue was not designed to secure compliance with laws or regulations that were not GATT-inconsistent. The Appellate Body noted that the Panel had already recognized that the measure was not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance:

"We recall that, having found that Colombia had not shown that the compound tariff is a measure 'designed' to secure compliance with Article 323 of the Criminal Code, the

¹³³ Panel Report, *Indonesia – Raw Materials*, paras. 7.230-7.231.

¹³⁴ Panel Report, *US – Gasoline*, para. 6.33.

¹³⁵ Appellate Body Report, *US – Gasoline*, p. 15.

¹³⁶ Appellate Body Report, *India – Solar Cells*, para. 5.58.

Panel concluded that there was no need to examine whether the compound tariff is 'necessary' to secure compliance with Colombian anti money laundering legislation. Nevertheless, 'in order to be exhaustive in its analysis', the Panel evaluated whether the measure is 'necessary' by assuming, for the sake of argument, that the compound tariff is 'designed' to secure such compliance. We note, in any event, that the Panel's ultimate conclusion as to the availability of the Article XX(d) defence to Colombia was founded solely on its conclusion that Colombia had not demonstrated that the compound tariff is 'designed' to secure compliance with Article 323 of Colombia's Criminal Code.

In sum, the Panel erred in concluding that Colombia had failed to demonstrate that the measure is 'designed' to secure compliance with laws or regulations that are not GATT-inconsistent given its recognition that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance. Thus, the Panel failed to assess the 'necessity' of the measure on the basis of a weighing and balancing exercise. Contrary to the legal standard under Article XX(d), the Panel prematurely ceased its analysis under this provision without proceeding to assess the degree of contribution of the measure to its objective, together with the other 'necessity' factors in a weighing and balancing exercise."¹³⁷

121. In a panel report that was not appealed, the Panel in *Indonesia – Chicken* found that a measure designed to prevent consumer deception could be considered to be a measure designed to comply with Indonesian consumer protection laws:

"As noted previously, the legal standard as clarified by the Appellate Body requires a panel to apply 'an initial examination of the relationship between the inconsistent measure and the relevant laws or regulations'. A panel, thus, must 'scrutinize the design of the measures sought to be justified'. The Appellate Body further clarified that the standard for ascertaining whether such a relationship exists is whether the assessment of the design of the measure reveals that the measure is *not incapable* of securing compliance with the relevant laws and regulations in Indonesia. Finally, we note that the Appellate Body has described this test as 'not... particularly demanding', in contrast to the requirements of the next step of the analysis, namely the necessity test.

It is our understanding that Indonesian law does not specifically describe the passing off of thawed chicken as fresh chicken as a deceptive practice. However, we agree with Indonesia that it would be deceptive for a consumer to buy thawed chicken in the belief that it is freshly slaughtered chicken. We do not understand Brazil to disagree with that point. Thus, a measure designed to prevent consumer deception, could be considered to be a measure designed to secure compliance with Indonesian consumer protection laws. Furthermore, Brazil has not called into question the consistency of these laws with the GATT 1994, and we agree with Indonesia that it must, therefore, be presumed."¹³⁸

1.6.3.1 "laws or regulations"

122. In considering whether Mexico's tax measures were justified under Article XX(d), the Appellate Body in *Mexico – Taxes on Soft Drinks* considered the term "laws or regulations". (the Panel had commenced its analysis by considering the term "to secure compliance") The Appellate Body considered that the term "laws or regulations" in Article XX(d) meant "rules that form part of the domestic legal system of a WTO Members". Although finding that this term did not include obligations of another WTO Member under an international agreement, the Appellate Body did consider that "laws or regulations" could include international rules incorporated into or having direct effect within the domestic legal system of a WTO Member. It concluded its analysis of the term "laws or regulations" by stating that "the 'laws or regulations' with which the Member

¹³⁷ Appellate Body Report, *Colombia – Textiles*, paras. 5.134-5.135.

¹³⁸ Panel Report, *Indonesia – Chicken*, paras. 7.248-7.249.

invoking Article XX(d) may seek to secure compliance do not include obligations of *another* WTO Member under an international agreement."¹³⁹

123. The Appellate Body in *Mexico – Taxes on Soft Drinks* rejected Mexico's interpretation of the terms "laws or regulations" in Article XX(d), as including international obligations of another WTO Member, as it would logically imply that a WTO Member could invoke Article XX(d) to justify measures designed "to secure compliance" with another Member's WTO obligations. Thus, accepting Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a unilateral determination that another Member has breached its WTO obligations, contrary to Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994. The Appellate Body noted that, even if Article XX(d) applied to only international agreements other than the WTO agreements, Mexico's interpretation would mean that, in order to examine whether a measure is justified under that provision, panels and the Appellate Body would have to determine whether the relevant non-WTO international agreements have been violated, which is not the function they are intended to have under the DSU:

"Even if 'international countermeasures' could be described as intended 'to secure compliance', what they seek 'to secure compliance with'—that is, the international obligations of another WTO Member—would be outside the scope of Article XX(d). This is because 'laws or regulations' within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member.

...

We observe, furthermore, that Mexico's interpretation of Article XX(d) disregards the fact that the GATT 1994 and the DSU specify the actions that a WTO Member may take if it considers that another WTO Member has acted inconsistently with its obligations under the GATT 1994 or any of the other covered agreements. As the United States points out, Mexico's interpretation of the terms 'laws or regulations' as including international obligations of another WTO Member would logically imply that a WTO Member could invoke Article XX(d) to justify also measures designed 'to secure compliance' with that other Member's WTO obligations. By the same logic, such action under Article XX(d) would evade the specific and detailed rules that apply when a WTO Member seeks to take countermeasures in response to another Member's failure to comply with rulings and recommendations of the DSB pursuant to Article XXIII:2 of the GATT 1994 and Articles 22 and 23 of the DSU.¹⁴⁰ Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a *unilateral* determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994."¹⁴¹

124. The Panel in *Brazil – Retreaded Tyres* declined to evaluate a defence raised by the respondent that fines were justified by Article XX(d) as "necessary to secure compliance with" a ban imposed on imports of retreaded tyres, which the respondent argued was itself justified by Article XX(b) of the GATT 1994. The Panel agreed that the fines were designed to secure compliance with the import ban; however, the Panel concluded that the fines could not be justified under Article XX(d) since they did not "fall within the scope of measures that are designed to secure compliance with 'the laws or regulations that are not themselves inconsistent with some provision of the GATT 1994.'"¹⁴²

125. In *China – Auto Parts*, China stated that the law or regulation for the purpose of its Article XX(d) defence was China's alleged valid interpretation of its tariff provisions for motor vehicles. The Panel found that China's interpretation of its concessions on motor vehicles could not form

¹³⁹ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69.

¹⁴⁰ (*footnote original*) Mexico's interpretation would also undermine the limitations in paragraphs 3 and 4 of Article 22 as to the magnitude and the trade sectors in which such countermeasures could be taken. (*Ibid.*, paras. 37-38)

¹⁴¹ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 75, 77.

¹⁴² Panel Report, *Brazil – Retreaded Tyres*, paras. 7.387-7.388.

part of China's tariff schedule itself, and found that such an interpretation was not a law or regulation relevant to its Article XX(d) defence.¹⁴³

126. The Panel in *Thailand – Cigarettes (Philippines)* rejected an Article XX(d) defence by Thailand that administrative requirements imposed on resellers of imported cigarettes (and penalties imposed in case of failure to meet such administrative requirements) were necessary to secure compliance with VAT laws; the Panel had already found that the Thai VAT laws in question were WTO-inconsistent.¹⁴⁴

127. The Appellate Body in *India – Solar Cells* analysed the meaning of the terms "laws" and "regulations", and the illustrative list in Article XX(d):

"Beginning with the ordinary meaning of the terms 'laws' and 'regulations', we note that the term 'law' is generally understood to refer to 'a rule of conduct imposed by authority', while the term 'regulation' is defined as '[a] rule or principle governing behaviour or practice; esp. such a directive established and maintained by an authority'. In *Mexico – Taxes on Soft Drinks*, the Appellate Body said that the terms 'laws or regulations' in Article XX(d) refer to 'rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.' As to the illustrative list contained in Article XX(d), the Appellate Body observed that the matters listed as examples in Article XX(d) – namely, customs enforcement, the enforcement of monopolies, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices – involve the regulation by a government of activity undertaken by a variety of economic actors (e.g. private firms and State enterprises), as well as by governmental agencies. The illustrative list contained in Article XX(d) reinforces the notion that 'laws or regulations' refer to rules of conduct and principles governing behaviour or practice that form part of the domestic legal system of a Member."¹⁴⁵

128. The Appellate Body in *India – Solar Cells* held that in ascertaining whether an alleged rule falls within the scope of "laws or regulations" for purposes of Article XX(d), it may be relevant to assess whether the rule at issue has been adopted or recognized by a Member's competent authority:

"Furthermore, as noted by the Appellate Body, 'laws or regulations' encompass 'rules adopted by a WTO Member's legislative or executive branches of government'. In ascertaining whether an alleged rule falls within the scope of 'laws or regulations' for purposes of Article XX(d), it may therefore be relevant to assess whether the rule at issue has been adopted or recognized by an authority that is competent to do so under the domestic legal system of the Member concerned."¹⁴⁶

129. The Appellate Body in *India – Solar Cells* examined the immediate context of the terms "laws or regulations" and noted that Article XX(d) refers to "laws or regulations" in respect of which "compliance" can be "secure[d]". The Appellate Body concluded that the "laws or regulations" referred to in Article XX(d) must therefore be ones in respect of which conduct would, or would not, be in "compliance":

"Turning to the immediate context of the terms 'laws or regulations', we note that the text of Article XX(d) refers to 'laws or regulations' in respect of which 'compliance' can be 'secure[d]'. The 'laws or regulations' referred to in Article XX(d) must therefore be ones in respect of which conduct would, or would not, be in 'compliance'. As to the term 'secure', we understand that, in *Mexico – Taxes on Soft Drinks*, the Appellate Body disagreed with the panel's interpretation that 'to secure compliance' is to be read as meaning to *enforce* compliance'. The Appellate Body explained that absolute certainty in the achievement of a measure's stated goal, as well as the use of coercion, are not necessary components of a measure designed 'to secure compliance'

¹⁴³ Panel Report, *China – Auto Parts*, paras. 7.293-7.296.

¹⁴⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.758.

¹⁴⁵ Appellate Body Report, *India – Solar Cells*, para. 5.106.

¹⁴⁶ Appellate Body Report, *India – Solar Cells*, para. 5.107.

within the meaning of Article XX(d). Instead, a measure can be said 'to secure compliance' with 'laws or regulations' when it seeks to secure observance of specific rules, even if the measure cannot be guaranteed to achieve such result with absolute certainty."¹⁴⁷

130. With regard to the scope of "laws or regulations", the Appellate Body in *India – Solar Cells* explained that it is not limited to instruments that are legally enforceable or that are accompanied by penalties and sanctions to be applied in situations of non-compliance. According to the Appellate Body, the concept of "laws or regulations" is broader and may include rules in respect of which a Member seeks to "secure compliance", even when compliance is not coerced, for example, through the imposition of penalties or sanctions:

"We do not consider that the scope of 'laws or regulations' is limited to instruments that are legally enforceable (including, e.g. before a court of law), or that are accompanied by penalties and sanctions to be applied in situations of non-compliance. Instead, as we see it, the concept is broader and may, in appropriate cases, include rules in respect of which a Member seeks to 'secure compliance', even when compliance is not coerced, for example, through the imposition of penalties or sanctions. In assessing whether a rule falls within the scope of 'laws or regulations' under Article XX(d), a panel should consider the degree to which an instrument containing the alleged rule is normative in nature. It is therefore relevant for a panel to examine whether a rule is legally enforceable, as this may demonstrate the extent to which it sets out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member. It also may be relevant for a panel to examine whether the instrument provides for penalties or sanctions to be applied in situations of non-compliance."¹⁴⁸

131. The Appellate Body in *India – Solar Cells* further clarified that, in terms of their form, "laws or regulations" within the meaning of Article XX(d) could be a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement in respect of which a measure seeks compliance, or it could also be a given rule, obligation, or requirement by reference to, or deriving from, several elements or parts of one or more instruments under its domestic legal system:

"In certain cases, a respondent may be able to identify a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement with which it seeks 'to secure compliance' for purposes of Article XX(d). However, it is also possible to envisage situations where a respondent seeks to identify a given rule, obligation, or requirement by reference to, or deriving from, several elements or parts of one or more instruments under its domestic legal system. In *Argentina – Financial Services*, the Appellate Body acknowledged this possibility when it said that a respondent 'may choose to demonstrate that the measure is designed and necessary to secure compliance with an obligation or obligations arising from several laws or regulations operating together as part of a comprehensive framework'. Indeed, we do not see anything in the text of Article XX(d) that would exclude, from the scope of 'laws or regulations', rules, obligations, or requirements that are not contained in a single domestic instrument or a provision thereof. In a given domestic legal system, several elements of one or more instruments may function together to set out a rule of conduct or course of action. In such a scenario, in order to understand properly the content, substance, and normativity of a given rule, a panel may be required to examine together the different elements of one or more instruments identified by a respondent. Of course, insofar as a respondent seeks to rely on a rule deriving from several instruments or parts thereof, it would still bear the burden of establishing that the instruments or the parts that it identifies actually set out the alleged rule."¹⁴⁹

132. The Appellate Body in *India – Solar Cells* also cautioned that in determining whether a law or rule falls within the scope of "laws or regulations" under Article XX(d), a Panel must give due

¹⁴⁷ Appellate Body Report, *India – Solar Cells*, para. 5.108.

¹⁴⁸ Appellate Body Report, *India – Solar Cells*, para. 5.109.

¹⁴⁹ Appellate Body Report, *India – Solar Cells*, para. 5.111.

consideration to all the characteristics of the relevant instruments and must avoid focusing on any single characteristic:

"With respect to the Panel's findings under Article XX(d) of the GATT 1994, we consider that, in determining whether a responding party has identified a rule that falls within the scope of 'laws or regulations' under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule. Importantly, this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, as well as the domestic legal system of the Member concerned."¹⁵⁰

133. In *India – Solar Cells*, the Appellate Body upheld the Panel's finding that India had failed to demonstrate that international instruments identified by it qualified as "laws or regulations" under Article XX(d):

"We emphasize that, even if a particular international instrument can be said to form part of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule, obligation, or requirement within the domestic legal system of the Member that falls within the scope of a 'law or regulation' under Article XX(d). Rather, as set out above, an assessment of whether an instrument operates with a sufficient degree of normativity and specificity under the domestic legal system of a Member so as to set out a rule of conduct or course of action, and thereby qualify as a 'law or regulation', must be carried out on case by case basis, taking into account all the other relevant factors relating to the instrument and the domestic legal system of the Member.

...

For the above reasons, we uphold the Panel's finding, in paragraph 7.301 of its Report, that India failed to demonstrate that the international instruments identified by it – namely, the preamble of the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and UN Resolution A/RES/66/288 (2012) (Rio+20 Document: 'The Future We Want') – qualify as 'laws or regulations' under Article XX(d) of the GATT 1994 in the present dispute."¹⁵¹

134. See also the discussion in paragraph 137 below.

135. The Panel in *Indonesia – Raw Materials* found that a law did not qualify as a law or regulation for purposes of Article XX(d) because it was not an enforceable obligation whose compliance could be secured.¹⁵²

1.6.3.2 "to secure compliance"

136. Noting that there is no justification under Article XX(d) for a measure that is not designed "to secure compliance" with a Member's laws or regulations, the Appellate Body in *Mexico – Taxes on Soft Drinks* then held, contrary to the Panel, that a measure can be said to be designed "to

¹⁵⁰ Appellate Body Report, *India – Solar Cells*, para. 6.6.

¹⁵¹ Appellate Body Report, *India – Solar Cells*, paras. 5.141 and 5.149.

¹⁵² Panel Report, *Indonesia – Raw Materials*, paras. 7.186-7.192. See also *ibid.* paras. 7.197-7.200.

secure compliance" even if the measure cannot be guaranteed to achieve its result with absolute certainty¹⁵³ and that the "use of coercion" was not a necessary component of a measure "designed to secure compliance".

"In our view, a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty.¹⁵⁴ Nor do we consider that the 'use of coercion' is a necessary component of a measure designed 'to secure compliance'. Rather, Article XX(d) requires that the design of the measure contribute 'to secur[ing] compliance with laws or regulations which are not inconsistent with the provisions of' the GATT 1994."¹⁵⁵

137. The Appellate Body in *India – Solar Cells* held that the "'more precisely' a respondent is able to identify specific rules, obligations, or requirements contained in the relevant 'laws or regulations', the 'more likely' it will be able to elucidate how and why the inconsistent measure secures compliance with such 'laws or regulations'":

"The Appellate Body has stated that a 'measure can be said 'to secure compliance' with laws or regulations when its design reveals that it secures compliance with *specific rules, obligations, or requirements* under such laws or regulations'. It is important, in this regard, to distinguish between the specific rules, obligations, or requirements with respect to which a measure seeks to secure compliance, on the one hand, and the objectives of the relevant 'laws or regulations', which may assist in 'elucidating the content of specific rules, obligations, or requirements' of the 'laws or regulations', on the other hand. The 'more precisely' a respondent is able to identify specific rules, obligations, or requirements contained in the relevant 'laws or regulations', the 'more likely' it will be able to elucidate how and why the inconsistent measure secures compliance with such 'laws or regulations'. Thus, in assessing whether an instrument constitutes a 'law or regulation' within the meaning of Article XX(d), a panel should also consider the degree of specificity or precision with which the relevant instrument lays down a particular rule of conduct or course of action within the domestic legal system of a Member, as opposed to simply providing a legal basis for action that may be consistent with certain objectives."¹⁵⁶

1.6.4 "necessary", "weighing and balancing"

138. With regard to the second element of an Article XX(d) analysis, the Appellate Body in *India – Solar Cells* stated:

"As to the second element of the analysis contemplated under Article XX(d), the Appellate Body has stated that a determination of whether a measure is 'necessary' entails a more in-depth and holistic examination of the relationship between the inconsistent measure and the relevant laws or regulations. This involves, in each case, a process of 'weighing and balancing' a series of factors, including: the extent to which the measure sought to be justified contributes to the realization of the end pursued (i.e. securing compliance with specific rules, obligations, or requirements under the relevant provisions of 'laws or regulations' that are not GATT-inconsistent); the relative importance of the societal interest or value that the 'law or regulation' is intended to protect; and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken."¹⁵⁷

139. See also the discussion in paragraph 118 above.

¹⁵³ The Appellate Body rejected the Panel's reliance on the Appellate Body Report in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R, adopted 20 April 2005).

¹⁵⁴ (footnote original) The European Communities notes that "even within the domestic legal order of WTO Members, enforcement of laws and regulations may not simply be taken for granted, but may depend on numerous factors". (European Communities' third participant's submission, para. 28)

¹⁵⁵ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras 75 and 77. See also Appellate Body Report, *India – Solar Cells*, para. 5.108.

¹⁵⁶ Appellate Body Report, *India – Solar Cells*, para. 5.110.

¹⁵⁷ Appellate Body Report, *India – Solar Cells*, para. 5.59.

140. In *Argentina – Hides and Leather*, the disputed measures were certain collection and withholding mechanisms that Argentina had adopted to secure compliance with tax laws and to combat tax evasion. The disputing parties, Argentina and the European Communities, had different views on how the term "necessary" in Article XX(d) should be interpreted. The European Communities claimed that a measure can only be "necessary" if there is no alternative, whereas Argentina argued that the Member claiming the "necessity" of a measure should be entitled to a certain degree of discretion in that determination. The Panel refused to resolve this interpretative dispute¹⁵⁸, but, taking into account *inter alia* the "general design and structure" of the measures, the Panel found that the arguments advanced by Argentina raised a presumption, not rebutted by the European Communities, and accordingly held that the measures were "necessary":

"[W]e are satisfied that Argentina has adduced argument and evidence sufficient to raise a presumption that the contested measures, in their general design and structure, are 'necessary' even on the European Communities' reading of that term. Argentina stresses the fact that tax evasion is common in its territory and that, against this background of low levels of tax compliance, tax authorities cannot expect to improve tax collection primarily through the pursuit of repressive enforcement strategies (e.g. aggressive criminal prosecution of tax offenders). In those circumstances, Argentina maintains, tax authorities must direct their efforts towards preventing tax evasion from occurring in the first place. According to Argentina, this is precisely what RG 3431 and RG 3543 are designed to accomplish."¹⁵⁹

The European Communities does not dispute that, in the circumstances of the present case, collection and withholding mechanisms are necessary to combat tax evasion. Nor has the European Communities submitted other arguments or evidence which would rebut the presumption raised by Argentina in respect of the 'necessity' of RG 3431 and RG 3543.¹⁶⁰

In light of the foregoing, we conclude that, in view of their general design and structure, RG 3431 and RG 3543 are 'necessary' measures within the meaning of Article XX(d).

Since it has thus been established that RG 3431 and RG 3543 satisfy all of the requirements set forth in Article XX(d), we further conclude that they enjoy provisional justification under the terms of Article XX(d)."¹⁶¹

141. The Panel in *Indonesia – Raw Materials*, after summarizing past panel and Appellate Body decisions regarding the contribution that the challenged measure is to make to its stated objective, stated that:

"The Panel's understanding of a measure's ability to make a material contribution implies that the measure at issue must be in a position to contribute to the realization of the objective; the contribution of the measure should not be reduced to a hypothetical contribution in implausible or improbable factual scenarios. There should

¹⁵⁸ Panel Report, *Argentina – Hides and Leather*, para. 11.304.

¹⁵⁹ (footnote original) In our view, the presumption raised by Argentina of the existence of a relationship of necessity between Argentina's declared objective of securing compliance with the IVA Law and IG Law and the general design of RG 3431 and RG 3543 is not affected by the inconsistency of these measures with Article III:2, first sentence.

¹⁶⁰ (footnote original) It is true that the European Communities disputes that the higher rates applied to imported products pursuant to RG 3431 and RG 3543 are "necessary" in order to secure compliance with the IVA Law and IG Law. See e.g. EC First Oral Statement, at paras. 79, 82 and 84. We consider that this contention goes to the question of whether Argentina makes improper use of the exception set out in Article XX(d) and not to the question of whether RG 3431 and RG 3543, in light of their general design and structure, fall within the terms of Article XX(d). We therefore address the justifiability of applying higher rates to imported products when we appraise RG 3431 and RG 3543 under the chapeau of Article XX. This approach is in accordance with that followed by the Appellate Body in *United States – Gasoline*. See the Appellate Body Report, *United States – Gasoline*, *supra*, at pp. 19 and 25-29.

¹⁶¹ Panel Report, *Argentina – Hides and Leather*, paras. 11.306–11.308.

be some certainty in the ability of the measure to contribute towards securing compliance with the relevant law or regulation."¹⁶²

142. The Panel in *Indonesia – Raw Materials* explained the difference between the "designed to secure compliance" and the contribution elements, as follows:

"[T]he 'designed to secure compliance' element and the contribution element are conceptually distinct; otherwise, there would not be two separate steps to the analysis. The former element involves an assessment of whether the measure is not incapable of ensuring compliance with the relevant law or regulation whereas the latter element requires that a panel determine whether the measure at issue is 'apt to produce a material contribution to the achievement of its objective', i.e. securing compliance with the relevant law or regulation. As noted by the Appellate Body, the element of the test focusing on whether the measures are designed to secure compliance is less demanding than the contribution element. This is so because in the Appellate Body's view '[a] panel must not ... structure its analysis of the ['design' step] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis.'"¹⁶³

1.6.4.1 Specific factors

143. In *Korea – Various Measures on Beef*, the Appellate Body situated the meaning of the term "necessary" in the context of Article XX(d) on a "continuum" stretching from "indispensable/of absolute necessity" to "making a contribution to". Furthermore, the Appellate Body emphasized the context in which the term "necessary" is found in Article XX(d) and held that in assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation a treaty interpreter may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect:

"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'.¹⁶⁴

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

¹⁶² Panel Report, *Indonesia – Raw Materials*, para. 7.263.

¹⁶³ Panel Report, *Indonesia – Raw Materials*, para. 7.265.

¹⁶⁴ (footnote original) We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources". (emphasis added). This requirement is more flexible textually than the "necessity" requirement found in Article XX(d). We note that, under the more flexible "*relating to*" standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a "*substantial relationship*", (emphasis added) i.e., a *close and genuine* relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141.

common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

...

In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."¹⁶⁵

144. In *Korea – Various Measures on Beef*, the Panel, in a finding upheld by the Appellate Body, did not accept Korea's argument for invoking an exception under Article XX(d) to justify a violation of Article III:4. Korea argued that it was "necessary to have domestic and imported beef sold through separate stores in order to counteract fraudulent practices prohibited by the *Unfair Competition Act*", the dual retail system.¹⁶⁶ Korea argued that due to the fact that imported beef was cheaper than domestic beef, "traders have a strong incentive to sell imported beef as domestic beef since by doing so they can profit from the higher sales price."¹⁶⁷ Korea adopted and implemented the dual retail system in 1990 and decided to abrogate the previous simultaneous sales system which had been in place since 1988 when imports of beef first resumed. Korea claimed further that, in view of the substantial costs to the government, it was not sustainable from an economic point of view to maintain continuous policing of the shops. When evaluating whether the adoption of the *Unfair Competition Act* fulfilled the "necessity" criterion in Article XX(d), the Panel stated:

"To demonstrate that the dual retail system is 'necessary', Korea has to convince the Panel that, contrary to what was alleged by Australia and the United States, no alternative measure consistent with the WTO Agreement is reasonably available at present in order to deal with misrepresentation in the retail beef market as to the origin of beef. The Panel considers that Korea has not discharged this burden for two inter-related reasons. First, Korea has not found it 'necessary' to establish 'dual retail systems' in order to prevent similar cases of misrepresentation of origin from occurring in other sectors of its domestic economy. Second, Korea has not shown to the satisfaction of the Panel that measures, other than a dual retail system, compatible with the WTO Agreement, are not sufficient to deal with cases of misrepresentation of origin involving imported beef."¹⁶⁸

145. The Appellate Body in *Korea – Various Measures on Beef* stated that a determination of whether a measure is necessary under Article XX(d), when that measure is not actually indispensable in achieving compliance with the law or regulation at issue, requires weighing and balancing different factors:

"In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."¹⁶⁹

146. In keeping with this interpretation, the Panel in *Canada – Wheat Exports and Grain Imports* undertook the weighing and balancing of various factors in the following manner:

¹⁶⁵ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161-162 and 164.

¹⁶⁶ Panel Report, *Korea – Various Measures on Beef*, para. 645.

¹⁶⁷ Panel Report, *Korea – Various Measures on Beef*, para. 645.

¹⁶⁸ Panel Report, *Korea – Various Measures on Beef*, para. 659.

¹⁶⁹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

"In applying the 'weighing and balancing' test, the Appellate Body in *Korea – Various Measures on Beef* and, subsequently, in *EC Asbestos* considered the importance of the value or interest pursued by the laws with which the challenged measure sought to secure compliance, whether the objective pursued by the challenged measure contributed to the end that was sought to be realized and whether a reasonably available alternative measure existed. We apply the same approach here in determining whether Section 57(c) of the *Canada Grain Act* is 'necessary' for the purposes of Article XX(d) of the GATT 1994.

With respect to the importance of the interests or values that the statutory and other provisions with which, according to Canada, Section 57(c) secures compliance are intended to protect, Canada has indicated that those objectives are to ensure the quality of Canadian grain, maintain the integrity of the Canadian grading system, protect consumers against misrepresentation and preserve and enforce the CWB monopoly. In other words, the relevant provisions are said to essentially help maintain the integrity of Canada's grading and quality assurance system and of the CWB's exclusive right to sell Western Canadian grain for domestic sale or export and, thereby, to preserve the reputation of Canadian grain notably in export markets. It is clear that these interests, which appear to be essentially commercial in nature, are important. It seems equally clear, however, that these interests are not as important as, for instance, the protection of human life and health against a lifethreatening health risk, an interest which the Appellate Body in *EC – Asbestos* characterized as 'vital and important in the highest degree'.¹⁷⁰

147. The Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* upheld the view expressed by the Panel. The Panel had resorted to the factors set forth in *Korea – Various Measures on Beef* in evaluating whether tax stamps could be used effectively to monitor tax collection on cigarettes and to avoid tax evasion. The Appellate Body discussed the Panel's approach:

"As regards the first factor, 'the Panel [did] not disagree with the Dominican Republic's argument that tax stamps may be a useful instrument to monitor tax collection on cigarettes and, conversely, to avoid tax evasion.' The Panel also recognized that 'the collection of tax revenue (and, conversely, the prevention of tax evasion) is a most important interest for any country and particularly for a developing country such as the Dominican Republic.' With respect to the trade impact of the measure, the Panel noted that the tax stamp requirement did not prevent Honduras from exporting cigarettes to the Dominican Republic and that its exports had increased significantly over recent years. Accordingly, the Panel assumed 'that the measure has not had any intense restrictive effects on trade.' As far as the third factor is concerned, the Panel noted the Dominican Republic's claim that 'the tax stamp requirement secures compliance with its tax laws and regulations generally, and more specifically with the provisions governing the Selective Consumption Tax.' The Panel, however, was of the view that the tax stamp requirement was of limited effectiveness in preventing tax evasion and cigarette smuggling. According to the Panel, requiring that tax stamps be affixed in the Dominican Republic under the supervision of the tax authorities 'in and of itself, would not prevent the forgery of tax stamps, nor smuggling and tax evasion.' In this respect, the Panel indicated that other factors, such as security features incorporated into the tax stamps, or police controls on roads and at different commercial levels, would play a more important role in preventing forgery of tax stamps, tax evasion and smuggling of tobacco products. Having considered the importance of the interests protected by the tax stamp requirement, its trade impact, and its contribution to the realization of the end pursued, we are of the view that the Panel conducted an appropriate analysis, following the approach set out in the Appellate Body Reports in *Korea – Various Measures on Beef* and in *EC – Asbestos*, and affirmed in *US – Gambling*."¹⁷¹

148. In *US – Customs Bond Directive*, the Appellate Body reaffirmed the validity of the approach, originally set forth in *Korea – Various Measures on Beef*, to determine whether a

¹⁷⁰ Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 6.223-6.224.

¹⁷¹ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 71.

measure is "necessary" to secure compliance with laws or regulations, by stating that the said approach was "in consonance with the previous jurisprudence of the Appellate Body".¹⁷²

149. The Appellate Body in *US – Customs Bond Directive* upheld the Panel's determination that an enhanced bond requirement, as applied to shrimp, was not "necessary" to secure compliance with certain laws or regulations within the meaning of Article XX(d) of the GATT 1994.¹⁷³ The Appellate Body in *US – Customs Bond Directive* noted that the Panel first evaluated the assessment and collection of anti-dumping or countervailing duties and concluded that it carried significant importance, specifically in the context of efforts by the United States to enforce trade remedies permissible under the covered agreements and to protect its revenue within the context of its retrospective duty assessment system".¹⁷⁴ The Appellate Body also recalled the Panel's conclusion that the enhanced bond requirement "is designed to secure specifically against the likelihood of anti-dumping duties exceeding cash deposit rates" and that the respondent had failed however to establish that rates of dumping in the anti-dumping duty order were likely to increase, and that additional security "reasonably correlated to any case of suspected dumping in excess of the dumping of margin established in the anti-dumping duty order".¹⁷⁵ The Appellate Body stated:

"We see no error in the Panel's analysis of the meaning of the term 'necessary' and the factors relied upon by it to evaluate the necessity of the EBR to secure compliance with certain laws and regulations of the United States, as the Panel's analysis is in consonance with the previous jurisprudence of the Appellate Body.

The EBR is intended to secure potential additional liability that might arise from significant increases in the amount of dumping after the imposition of an anti-dumping duty order. The United States has not demonstrated that the margins of dumping for subject shrimp were likely to increase significantly so as to result in significant additional liability over and above the cash deposit rates. Like the Panel, we do not, therefore, see how taking security, such as the EBR, can be viewed as being 'necessary' in the sense of it contributing to the realization of the objective of ensuring the final collection of anti-dumping or countervailing duties in the event of default by importers."¹⁷⁶

150. In another example of weighing and balancing, the Panel in *Colombia – Ports of Entry* evaluated Colombia's Article XX(d) defence that its ports of entry measure was necessary to secure compliance with Colombia's customs laws, and to combat under-invoicing and smuggling. The Panel determined that the customs laws sought to be enforced were generally GATT-consistent, but that Colombia had not provided evidence to demonstrate increased compliance arising from the measure, the measure had a limited scope, and evidence on price data, seizures and trade distortions did not demonstrate that it was effective. On this basis, the Panel was unable to conclude that the ports of entry measure contributed to combatting customs fraud and contraband in Colombia.¹⁷⁷

1.6.4.2 "Reasonably available" alternatives

151. In *Canada – Wheat Exports and Grain Imports*, the Panel made reference to the Appellate Body report in *EC – Asbestos* regarding "reasonably available" alternatives in the context of Article XX(b) and to the Appellate Body report in *Korea – Various Measures on Beef* (see paragraph in addressing "reasonably available" alternatives in the context of Article XX(d):

"Therefore, the question remains as to whether there is an alternative measure to Section 57(c) that is reasonably available. The Appellate Body has indicated that relevant factors for determining whether an alternative measure is 'reasonably available' are: (i) the extent to which the alternative measure 'contributes to the realization of the end pursued'; (ii) the difficulty of implementation³¹¹; and (iii) the trade impact of the alternative measure compared to that of the measure for which

¹⁷² Appellate Body Report, *US – Customs Bond Directive*, para. 316.

¹⁷³ Appellate Body Report, *US – Customs Bond Directive*, para. 319.

¹⁷⁴ Appellate Body Report, *US – Customs Bond Directive*, para. 313.

¹⁷⁵ Appellate Body Report, *US – Customs Bond Directive*, para. 313.

¹⁷⁶ Appellate Body Report, *US – Customs Bond Directive*, paras. 316–317.

¹⁷⁷ Panel Report, *Colombia – Ports of Entry*, paras. 7.482–7.620.

justification is claimed under Article XX. The Appellate Body has also stated that, in addition to being 'reasonably available', the alternative measure must also achieve the level of compliance sought. In this regard, the Appellate Body has recognized that 'Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations'.¹⁷⁸

152. In *EC – Trademarks and Geographical Indications*, the Panel held that the European Communities had not demonstrated that "government participation in the designation, approval and monitoring of inspection structures, and the provision of a declaration by governments concerning these matters," was justified under Article XX(d) due to the availability of alternative measures to the European Communities which it could reasonably be expected to employ and which are not inconsistent with GATT 1994 to ensure that products using a registered GI comply with their specifications:

"[T]he European Communities has not explained how and to what extent compliance with [the requirements of government participation in inspection structures] cannot be assessed through reporting requirements or through an inspection of the physical characteristics of products on import by designated bodies located within the European Communities. The Panel accepts that there might be a reason why compliance with these specific requirements must be assessed in the place of production outside the European Communities' territory and that, in these cases, it may be reasonable for the European Communities, as an importing country, to expect certain cooperation from exporting country governments, in particular with respect to information related to the production methods of an agricultural product or foodstuff, in accordance with the provisions of covered agreements.

However, the European Communities has not explained why the cooperation that it requires from third country governments must take the form of establishing a mandatory inspection structure in which the government plays a central role. It confirms that governments, including third country governments, must carry out inspections to ensure compliance with product specifications in an EC GI registration, or ascertain that a private inspection body can effectively ensure that products comply with the specification and remain responsible for continued monitoring that the private body meets the requirements of the Regulation and, where they are third country governments, provide declarations that they have done so. It asserts, but has not demonstrated, that "[o]nly through some form of public oversight can it be ensured that the inspection body will at all times carry out its functions duly and appropriately in accordance with the requirements of the Regulation". However, in response to a question from the Panel, it was unable to identify any EC Directives governing assessment of conformity to EC technical regulations in the goods area that require third country government participation in the designation and approval of conformity assessment bodies. It has not explained what aspect of GI protection distinguishes it from these other areas and makes it necessary to require government participation, including third country government participation, to the extent that it does.

The European Communities argues that it does not itself have the inspection bodies that are needed to conduct inspection outside its territory. It also notes that the costs of inspection must be borne by the producer as stipulated in Article 10(7) of the Regulation. It argues that if it were to carry out inspections of imported products bearing a GI, this would result in less favourable treatment for products of domestic origin. The Panel's findings do not imply that the European Communities must establish inspection bodies outside its territory nor that it cannot continue to require producers to bear the costs. The Panel sees these issues as separate from the extent of government participation in inspections required by the Regulation.¹⁷⁹

153. In *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body explained that an assessment of whether a reasonably available alternative to the measure at issue is available, involves a weighing and balancing of the above-mentioned factors as well as consideration of

¹⁷⁸ Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.226.

¹⁷⁹ Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.458–7.460

whether a measure is "merely theoretical in nature", imposes an undue burden, or prevents a Member from achieving its desired level of protection:

"The weighing and balancing process of these three factors also informs the determination whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO inconsistent measure is reasonably available. Furthermore, in *US – Gambling*, the Appellate Body indicated:

'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 ...'."¹⁸⁰

154. The Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* upheld the Panel's determination of the existence of a reasonable alternative to the requirement to affix stamps under the supervision of tax authorities, in light of consideration of the above-mentioned factors:

"In light of its analysis of the relevant factors, especially the measure's contribution to the realization of the end pursued, the Panel opined that the alternative of providing secure tax stamps to foreign exporters, so that those tax stamps could be affixed on cigarette packets in the course of their own production process, prior to importation, would be equivalent to the tax stamp requirement in terms of allowing the Dominican Republic to secure the high level of enforcement it pursues with regard to tax collection and the prevention of cigarette smuggling. The Panel gave substantial weight to its finding that the tax stamp requirement is of limited effectiveness in preventing tax evasion and cigarette smuggling; in particular, it found 'no evidence to conclude that the tax stamp requirement secures a zero tolerance level of enforcement with regard to tax collection and the prevention of cigarette smuggling.' We consider that the Panel conducted an appropriate analysis, following the approach set out in *Korea – Various Measures on Beef* and in *EC – Asbestos*, and affirmed in *US – Gambling*. We see no reason to disturb the Panel's conclusions in respect of the existence of a reasonably available alternative measure to the tax stamp requirement."¹⁸¹

155. The Panel in *Dominican Republic – Import and Sale of Cigarettes* held that there was a reasonably available WTO-consistent alternatives available to the requirement that tax stamps be affixed to cigarette packets in the Dominican Republic under the supervision of the tax authorities considering that, "in and of itself, [such requirement] would not prevent the forgery of tax stamps, nor smuggling and tax evasion":

"In the opinion of the Panel, the tax stamp requirement, as currently in place in the Dominican Republic, would only serve to guarantee that those tobacco products that enter legally into the country and go through the proper customs procedures will carry authentic tax stamps as a proof that the appropriate tax has been paid. That requirement, in and of itself, would not prevent the forgery of tax stamps, nor smuggling and tax evasion. From the evidence submitted by the Dominican Republic itself, the Panel would be inclined to believe that other factors, such as security features incorporated into the tax stamps (to avoid forgery of stamps or make it more costly) and police controls on roads and at different commercial levels (such as at the points of production, introduction into the country, distribution, and sale), may play a

¹⁸⁰ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

¹⁸¹ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 72.

more important role in preventing the forgery of tax stamps, the tax evasion, and the smuggling of tobacco products." ¹⁸²

156. The Panel in *Indonesia – Raw Materials* declined to exclude an alternative measure using a remedial approach, and found such an alternative measure as making the same level of contribution as the challenged measures:

"The Panel does not see a reason to exclude without evaluation an alternative measure using a remedial approach. Such a measure would only be excluded if the respondent demonstrates that it cannot make an equivalent contribution to the objective pursued. In this regard, the Appellate Body has found that a panel should take into account the capacity of a Member to implement remedial measures, particularly if they involved prohibitive costs or substantial technical difficulties.

...

... The Panel has found that the alternative achieves at least the same level of contribution as the challenged measures. Indonesia has opted for a preventive measure because it considers it easier to enforce. This issue is more properly dealt with under the alternative measure's reasonable availability and will be discussed further below." ¹⁸³

157. The Panel in *Indonesia – Raw Materials* also found that the respondent had not demonstrated why it was unable to implement the proposed alternative measure:

"The Panel notes that the implementation of the proposed alternative measure may entail costs and some technical difficulty, as usually happens when a new measure is implemented. In this regard, the Panel recalls that the Appellate Body has found that an alternative measure is not reasonably available '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'. Indonesia states that Indonesian border officials cannot determine at the point of exportation from physical inspection of the nickel ore whether it has been mined in conformity with sustainable mining and mineral resource management requirements. In this regard, the Panel notes that the alternative presented by the European Union does not refer to a physical inspection of each consignment upon exportation, but rather a system whereby exporters produce relevant documentation, prior to exportation, to certify compliance with the relevant requirements. These documents could then be verified against the RKABs of the relevant mines. The Panel therefore considers that Indonesia has failed to explain why it is not able to implement the proposed alternative measure or why the costs or technical difficulties associated with its implementation are prohibitive or substantial. Indonesia notes that not having to deal with exports makes enforcement easier. Just because the alternative may not be as easy to implement as the challenged measures does not mean that it is not technically or economically feasible." ¹⁸⁴

1.7 Paragraph (g)

1.7.1 General; burden of proof; jurisdictional limitations

158. The Appellate Body in *EC – Tariff Preferences* stated:

"As the Appellate Body observed in *US – Shrimp*, WTO Members retained Article XX(g) from the General Agreement on Tariffs and Trade 1947 (the 'GATT 1947') without alteration after the conclusion of the Uruguay Round, being 'fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy'. Article XX(g) of the GATT 1994 permits Members, subject to

¹⁸² Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.226.

¹⁸³ Panel Report, *Indonesia – Raw Materials*, paras. 7.329 and 7.334.

¹⁸⁴ Panel Report, *Indonesia – Raw Materials*, para. 7.340.

certain conditions, to take measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. It is well-established that Article XX(g) is an exception in relation to which the responding party bears the burden of proof. Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the WTO Agreement, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defence to otherwise WTO-inconsistent measures. Likewise, characterizing the Enabling Clause as an exception, in our view, does not undermine the importance of the Enabling Clause within the overall framework of the covered agreements and as a 'positive effort' to enhance economic development of developing-country Members. Nor does it 'discourag[e]' developed countries from adopting measures in favour of developing countries under the Enabling Clause."¹⁸⁵

159. In *US – Shrimp*, the Appellate Body reviewed the Panel's finding concerning a United States' measure that banned imports of shrimps and shrimp products harvested by vessels of foreign nations, where such exporting country had not been certified by the United States' authorities as using methods not leading to the incidental killing of sea turtles above certain levels. The Panel had found that the United States could not justify its measure under Article XX(g). Noting that sea turtles migrate to, or traverse, waters subject to the jurisdiction of the United States, the Appellate Body held:

"We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."¹⁸⁶

1.7.2 Analytical framework

160. In *China – Rare Earths*, the Appellate Body held that to justify a measure pursuant to Article XX(g), a WTO Member must show that it satisfies all the requirements set out in that provision. The Appellate Body considered that the text of Article XX(g) suggests a "holistic assessment of its component elements":

"In sum, Article XX(g) permits the adoption or enforcement of trade measures that have 'a close and genuine relationship of ends and means' to the conservation of exhaustible natural resources, when such trade measures are brought into operation, adopted, or applied and 'work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource'. In order to justify a measure pursuant to Article XX(g), a WTO Member must show that it satisfies all the requirements set out in that provision. Indeed, the text of Article XX(g), particularly its use of the conjunctive 'if', suggests a holistic assessment of its component elements, as the Panel rightly recognized.

While Article XX(g) calls for a holistic assessment, the provision itself must be applied on a case-by-case basis, through careful scrutiny of the factual and legal context in a given dispute, including the exhaustible natural resource concerned and the specific conservation objectives of the Member seeking to rely upon Article XX(g). Due regard must be paid to the words used by the WTO Members to express their intent and purpose¹⁸⁷, but a panel cannot limit its analysis to the text of the measure at issue, or simply accept, without question, a Member's characterization of its measure"¹⁸⁸

161. The Appellate Body in *China – Rare Earths* explained that while Article XX(g) does not prescribe a specific analytical framework, in past disputes, the Appellate Body had emphasized the importance of the design and structure of the measure at issue:

¹⁸⁵ Appellate Body Report, *EC – Tariff Preferences*, para. 95.

¹⁸⁶ Appellate Body Report, *US – Shrimp*, para. 133.

¹⁸⁷ Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, p. 17.

¹⁸⁸ Appellate Body Reports, *China – Rare Earths*, para. 5.94.

"The text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision. All the same, we observe that, in past disputes, the Appellate Body has emphasized the importance of the design and structure of the challenged measure to a proper assessment of whether a measure satisfies the requirements of Article XX(g). Assessing a measure based on its design and structure is an objective methodology that also helps to determine whether or not a measure does what it purports to do. For instance, a measure declared to serve the purpose of conservation may, through an examination of its design and structure, be found not to genuinely serve that purpose. The analysis of a measure's design and structure allows a panel or the Appellate Body to go beyond the text of the measure and either confirm that the measure is indeed related to conservation, or determine that, despite the text of the measure, its design and structure reveals that it is not genuinely related to conservation. This is so because the design and structure of a measure do not vary, and are not contingent on the occurrence of subsequent events. In sum, we consider that, by focusing on the design and structure of the measure, particularly where a measure is challenged 'as such', a panel or the Appellate Body has the benefit of an objective methodology for assessing whether a measure satisfies the requirements of Article XX(g)."¹⁸⁹

162. In *China – Rare Earths*, however, the Appellate Body stressed that the analysis of the design and structure of the measure cannot be undertaken in isolation from the conditions of the market in which the measure operates:

"At the same time, the analysis of the design and structure of the measure cannot be undertaken in isolation from the conditions of the market in which the measure operates. Due regard should also be given to key features of the relevant market. Since the characteristics and structure of the market would normally influence a Member's choice and design of a measure, such market features may also shed light on whether a given measure, in its design and structure, satisfies the requirements of Article XX(g). Relevant market features could include not only the exhaustible natural resource to be conserved, but also the market structure, the product and geographical scope of the market, and the significance of the role that foreign and domestic market participants play."¹⁹⁰

163. The Appellate Body in *China – Rare Earths* held that there is no requirement to apply an "empirical effects test" under Article XX(g):

"Furthermore, the Appellate Body has clarified that there is no requirement to apply an 'empirical effects test' under Article XX(g). In *US – Gasoline*, the Appellate Body identified two primary challenges that a panel, as trier of fact, would face if it were required to evaluate 'effects':

In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable."¹⁹¹

164. The Appellate Body in *China – Rare Earths* went on to state:

"We also observe that the measures that may be justified pursuant to Article XX(g) are those already found to be inconsistent with obligations contained in the GATT 1994. Such measures may themselves have had a distorting effect in the marketplace. This, to our minds, compounds the problems of determining causation, and reinforces the need for caution in relying on an 'empirical effects test' in the context of Article XX(g)

¹⁸⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.96.

¹⁹⁰ Appellate Body Reports, *China – Rare Earths*, para. 5.97.

¹⁹¹ Appellate Body Reports, *China – Rare Earths*, para. 5.98.

The Appellate Body has nevertheless acknowledged that consideration of the predictable effects of a measure may be relevant for the analysis under Article XX(g). In referring to 'predictable effects' in *US – Gasoline*, the Appellate Body was denoting effects that careful evaluation of the design and structure of the measure reveals are likely to or will occur in the future. Although 'predictable effects' might be understood also to encompass future effects projected on the basis of empirical data of actual effects, reliance upon such effects in assessing a measure's compliance with Article XX(g) would also be fraught with the causation difficulties identified by the Appellate Body in *US – Gasoline*.¹⁹²

1.7.3 "relating to the conservation of exhaustible natural resources"

1.7.3.1 "relating to"

165. As regards the aspect of the measure to be justified as "relating to", the Panel in *US – Gasoline* held that the United States' measure at issue could not be justified in the light of Article XX(g) as a measure "relating to the conservation of exhaustible natural resources". More specifically, the Panel held that it "saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the United States objective of improving air quality in the United States" and that "the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources".¹⁹³ The Appellate Body reversed the Panel's finding and held that the United States' measure was justified under Article XX(g), although it ultimately found that the measure was inconsistent with the chapeau of Article XX. See also paragraph 206 below. The Appellate Body held that the Panel was in error in searching for a link between the *discriminatory aspect* of the United States' measure (rather than the *measure itself*) and the policy goal embodied in Article XX(g):

"[The] problem with the reasoning in that paragraph is that the Panel asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided 'less favourable treatment' under Article III:4 before the Panel examined the 'General Exceptions' contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment'."¹⁹⁴

166. In interpreting the term "relating to" under Article XX(g), the Appellate Body in *US – Gasoline* noted that all the parties and participants to the appeal agreed that this term was equivalent to "primarily aimed at":

"All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be 'primarily aimed at' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."¹⁹⁵

167. The Panel in *US – Gasoline* found that "being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources." The Appellate Body criticised the Panel's analysis which had focused on whether the discriminatory aspect of the United States' measure was related to the

¹⁹² Appellate Body Reports, *China – Rare Earths*, paras. 5.99-5.100.

¹⁹³ Panel Report, *US – Gasoline*, para. 6.40.

¹⁹⁴ Appellate Body Report, *US – Gasoline*, p. 16. See also paras. 79 and 117 above.

¹⁹⁵ Appellate Body Report, *US – Gasoline*, p. 18.

stated policy goal. The Appellate Body then opined that the Panel had transposed the concept of "necessary" from Article XX(b) into its analysis under Article XX(g):

"[T]he Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not 'necessary' for the protection of human, animal or plant life. The Panel Report, it will be recalled, found that the baseline establishment rules had not been shown by the United States to be 'necessary' under Article XX(b) since alternative measures either consistent or less inconsistent with the *General Agreement* were reasonably available to the United States for achieving its aim of protecting human, animal or plant life. In other words, the Panel Report appears to have applied the 'necessary' test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g)."¹⁹⁶

168. In reversing the Panel's findings on Article XX(g), the Appellate Body began by recalling the principles of treaty interpretation and comparing the terms used in each paragraph of Article XX. See the quote referenced in paragraph 8 above. The Appellate Body subsequently considered the relationship between Articles III:4 and XX of the GATT 1994:

"Article XX(g) and its phrase, 'relating to the conservation of exhaustible natural resources,' need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."¹⁹⁷

169. The Appellate Body in *US – Gasoline* examined whether the United States' baseline establishment rules were appropriately regarded as "primarily aimed at" the conservation of natural resources within the meaning of Article XX(g). The Appellate Body answered this question in the affirmative:

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

¹⁹⁶ Appellate Body Report, *US – Gasoline*, p. 16.

¹⁹⁷ Appellate Body Report, *US – Gasoline*, p. 18.

incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g)."¹⁹⁸

170. In *US – Shrimp*, in holding that the United States' measure was "primarily aimed at" the conservation of natural resources, the Appellate Body opined that the measure was not a "simple, blanket prohibition" and that a reasonable "means and ends relationship" existed between the measure and the policy of natural resource conservation:

"In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one.

In our view, therefore, Section 609 is a measure 'relating to' the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994."¹⁹⁹

171. In *China – Rare Earths*, the Appellate Body held that the term "relating to" requires "a close and genuine relationship of ends and means":

"Turning to the term 'relating to', we recall that, for a measure to 'relate to' conservation in the sense of Article XX(g), there must be 'a close and genuine relationship of ends and means' between that measure and the conservation objective of the Member maintaining the measure. Hence, a GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the 'relating to' requirement of Article XX(g). Furthermore, the absence of a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, may be relevant to an assessment of whether the challenged measure 'relates to' conservation."²⁰⁰

1.7.3.2 "conservation of exhaustible natural resources"

172. In *US – Shrimp*, the Appellate Body addressed the meaning of the term "'exhaustible natural resources" contained in Article XX(g). The Appellate Body emphasized the need for a dynamic rather than static interpretation of the term "exhaustible", noting the need to interpret this term "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment":

"Textually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be 'exhaustible' natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources."²⁰¹

¹⁹⁸ Appellate Body Report, *US – Gasoline*, p. 19.

¹⁹⁹ Appellate Body Report, *US – Shrimp*, paras. 141-142.

²⁰⁰ Appellate Body Reports, *China – Rare Earths*, para. 5.90.

²⁰¹ (*footnote original*) We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet" World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges 'the objective of *sustainable development* ...':

...

From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'.²⁰² It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.²⁰³ ...

...

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.²⁰⁴ Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)."²⁰⁵

173. The Appellate Body in *China – Raw Materials* held that the word "conservation" means "the preservation of the environment, especially of natural resources".²⁰⁶

174. In *China – Rare Earths*, the Appellate Body stated:

"With respect to the first clause of Article XX(g), 'relating to the conservation of exhaustible natural resources', the Appellate Body has remarked, with reference to the preamble of the Marrakesh Agreement, that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference, but is rather, 'by definition, evolutionary'. The word 'conservation', in turn, means 'the preservation of the environment, especially of natural resources'. It seems to us that, for the purposes of

²⁰² (footnote original) See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978-I) 159 *Recueil des Cours* 1, p. 49.

²⁰³ Following this sentence, the Appellate Body refers to 1982 United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261, Arts. 56, 61 and 62; Agenda 21, adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, ff; and Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15.

²⁰⁴ (footnote original) Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude "living" natural resources from the scope of application of Article XX(g).

²⁰⁵ Appellate Body Report, *US – Shrimp*, paras. 128-131.

²⁰⁶ Appellate Body Reports, *China – Raw Materials*, para. 355.

Article XX(g), the precise contours of the word 'conservation' can only be fully understood in the context of the exhaustible natural resource at issue in a given dispute. For example, 'conservation' in the context of an exhaustible mineral resource may entail preservation through a reduction in the pace of its extraction, or by stopping its extraction altogether. In respect of the 'conservation' of a living natural resource, such as a species facing the threat of extinction, the word may encompass not only limiting or halting the activities creating the danger of extinction, but also facilitating the replenishment of that endangered species.²⁰⁷²⁰⁸

175. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel noted, and agreed with, the common view of the parties that dolphins were an "exhaustible natural resource".²⁰⁹

1.7.4 "made effective in conjunction with"

176. In *US – Gasoline*, the Appellate Body described the term "measures made effective in conjunction with" as a "requirement of *even-handedness* in the imposition of restrictions":

"Viewed in this light, the ordinary or natural meaning of 'made effective' when used in connection with a measure - a governmental act or regulation - may be seen to refer to such measure being 'operative', as 'in force', or as having 'come into effect.' 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 or consumption of natural resources. Put in a slightly different manner, we believe that the clause 'if such measures are made effective in conjunction with restrictions on domestic product or consumption' is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."²¹⁰

177. The Appellate Body made clear that the "requirement of even-handedness" embodied in Article XX(g) did not amount to a requirement of "identity of treatment":

"There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.

In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for - generally speaking - individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of 'dirty' gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded 'less favourable treatment' than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also

²⁰⁷ (footnote original) We note that the Panel engaged in an extensive discussion of the scope of the word "conservation" in Article XX(g), ultimately finding that this word has a "rather broad meaning". We also note that the Panel's interpretation of the word "conservation" in Article XX(g) is not appealed. Consequently, we neither endorse nor reject the Panel's statements in this regard. (See Panel Reports, paras. 7.252-7.277)

²⁰⁸ Appellate Body Report, *China – Rare Earths*, para. 5.89.

²⁰⁹ Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.521.

²¹⁰ Appellate Body Report, *US – Gasoline*, p. 20.

be noted that the second clause of Article XX(g) speaks disjunctively of 'domestic production or consumption.'²¹¹

178. The Appellate Body further rejected the argument that the term "made effective" was designed to require an "empirical effects test" and that the measure at issue had to produce some measurable "positive effects":

"We do not believe ... that the clause 'if made effective in conjunction with restrictions on domestic production or consumption' was intended to establish an empirical 'effects test' for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been 'primarily aimed at' conservation of natural resources at all."²¹²

179. Citing its own finding in *US – Gasoline* that the phrase "if such measures are made effective in conjunction with restrictions on domestic product or consumption" in Article XX(g) was a "requirement of *even-handedness*" (see paragraph 176 above), the Appellate Body in *US – Shrimp* held that the United States measure at issue was justified under Article XX(g):

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

Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g)."²¹³

180. The Appellate Body in *China – Raw Materials* held that Article XX(g) does not require that the conservation measure "be 'primarily aimed' at making effective the restrictions on domestic production or consumption:

"Article XX(g) further requires that conservation measures be 'made effective in conjunction with restrictions on domestic production or consumption'. The word 'effective' as relating to a legal instrument is defined as 'in operation at a given time'. We consider that the term 'made effective', when used in connection with a legal instrument, describes measures brought into operation, adopted, or applied. The Spanish and French equivalents of 'made effective'—namely 'se aplicuen' and 'sont appliquées'—confirm this understanding of 'made effective'. The term 'in conjunction' is defined as 'together, jointly, (with)'. Accordingly, the trade restriction must operate

²¹¹ Appellate Body Report, *US – Gasoline*, p. 21.

²¹² Appellate Body Report, *US – Gasoline*, p. 21.

²¹³ Appellate Body Report, *US – Shrimp*, paras. 144-145.

jointly with the restrictions on domestic production or consumption. Article XX(g) thus permits trade measures relating to the conservation of exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource. By its terms, Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption."²¹⁴

181. The Appellate Body in *China – Raw Materials* held that Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures "work together" with restrictions on domestic production or consumption:

"As explained above, we see nothing in the text of Article XX(g) to suggest that, in addition to being 'made effective in conjunction with restrictions on domestic production or consumption', a trade restriction must be aimed at ensuring the effectiveness of domestic restrictions, as the Panel found. Instead, we have found above that Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource."²¹⁵

182. The Appellate Body in *China – Rare Earths* held that to comply with the "made effective" clause in Article XX(g), the Member concerned must impose a "real" restriction on domestic production or consumption that reinforces and complements the restriction on international trade:

"The second clause of Article XX(g) requires that the GATT-inconsistent conservation measure be 'made effective in conjunction with restrictions on domestic production or consumption'. Accordingly, Article XX(g) requires that, when international trade is restricted, restrictions be imposed also on domestic production or consumption. The Appellate Body has described a 'restriction' as '[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation'.

In addition, the words 'made effective', when used in connection with a governmental measure, refer to a measure being 'operative', 'in force', or having 'come into effect'. It must be 'in operation at a given time' in the sense of being 'brought into operation, adopted, or applied'. The phrase 'in conjunction with' signifies 'together with' or 'jointly with'. Taking both of these elements together, the second clause of Article XX(g) refers to governmental measures that are promulgated or brought into effect, and that operate together with restrictions on domestic production or consumption of exhaustible natural resources. Thus, the requirement that restrictions be made effective 'in conjunction' suggests that, in their joint operation towards a conservation objective, such restrictions limit not only international trade, but must also limit domestic production or consumption. Moreover, in order to comply with the 'made effective' element of the second clause of Article XX(g), it would not be sufficient for domestic production or consumption to be subject to a possible limitation at some undefined point in the future. Rather, a Member must impose a 'real' restriction on domestic production or consumption that reinforces and complements the restriction on international trade.

Accordingly, the second clause of Article XX(g) is appropriately read as a requirement that a Member seeking to rely upon Article XX(g) in its pursuit of a conservation objective must demonstrate that it imposes restrictions, not only in respect of international trade, but also in respect of domestic production or consumption. In other words, the trade restrictions must operate jointly with the restrictions on domestic production or consumption. Such restrictions must place effective limitations on domestic production or consumption and thus operate so as to reinforce and complement the restrictions imposed on international trade. In that sense, subparagraph (g) 'is a requirement of *even-handedness* in the imposition of

²¹⁴ Appellate Body Reports, *China – Raw Materials*, para. 356.

²¹⁵ Appellate Body Reports, *China – Raw Materials*, para. 360.

restrictions, in the pursuit of conservation, upon the production or consumption of exhaustible natural resources."²¹⁶

183. The Appellate Body in *China – Rare Earths* went on to state:

"We recall our interpretation of the clause 'made effective in conjunction with restrictions on domestic production or consumption' in Article XX(g). We consider that the phrase 'made effective in conjunction with' requires that, when international trade is restricted, effective restrictions are also imposed on domestic production or consumption. Just as GATT-inconsistent measures impose limitations on international trade, domestic restrictions must impose limitations on domestic production or consumption. In other words, to comply with the 'made effective' element of the second clause of Article XX(g), a Member must impose 'real' restrictions on domestic production or consumption that reinforce and complement the restriction on international trade, and particularly so in circumstances where domestic consumption accounts for a major part of the exhaustible natural resource to be conserved."²¹⁷

184. The Appellate Body in *China – Rare Earths* held that Article XX(g) does not require that the burden of conservation be evenly distributed. The Appellate Body considered, however, that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g):

"In previous appeals, in which Members sought to justify measures imposing restrictions on imported goods under Article XX(g), the Appellate Body has examined in some detail the restrictive nature of the measures imposed on domestic producers. In *US – Gasoline* and *US – Shrimp*, for example, consideration of the restrictive nature of the measures imposed on domestic producers was relevant to the Appellate Body's analysis of whether the measures affecting domestic producers were restrictions, as well as to the Appellate Body's analysis under the chapeau of Article XX. However, the Appellate Body neither assessed whether the burden of conservation was evenly distributed between foreign producers, on the one hand, and domestic producers or consumers, on the other hand, nor suggested that such an assessment was required.

In other words, the Appellate Body's reasoning does not suggest that Article XX(g) contains a requirement that the burden of conservation be evenly distributed, for instance, in the case of export quotas, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. Having said that, we note that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g)."²¹⁸

185. The Appellate Body in *China – Rare Earths* found that the Panel had erred to the extent that it found that the burden of conservation must be evenly distributed:

"Accordingly, we consider that the clause 'made effective in conjunction with restrictions on domestic production or consumption' requires that, when GATT-inconsistent measures are in place, effective restrictions must also be imposed on domestic production or consumption. Just as GATT-inconsistent measures impose limitations on international trade, domestic restrictions must impose limitations on domestic production or consumption. Such restrictions must be 'real' rather than existing merely 'on the books', particularly in circumstances where domestic consumption accounts for a major part of the exhaustible natural resources to be conserved. Moreover, such restrictions on domestic production or consumption must reinforce and complement the restriction on international trade. However, we have also clarified that Article XX(g) does not require a Member seeking to justify its measure to establish that its regulatory regime achieves an even distribution of the burden of conservation. Accordingly, we find that the Panel erred to the extent that it

²¹⁶ Appellate Body Reports, *China – Rare Earths*, paras. 5.93-5.94.

²¹⁷ Appellate Body Reports, *China – Rare Earths*, para. 5.132.

²¹⁸ Appellate Body Reports, *China – Rare Earths*, paras. 5.133-5.134.

found that the burden of conservation must be evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand."²¹⁹

1.7.5 Paragraph (g) and chapeau

186. The Panel in *China – Rare Earths* recalled that in conducting an analysis under the chapeau of Article XX of a measure provisionally justified under subparagraph (g), the Appellate Body had looked at whether a WTO-consistent or less trade-restrictive alternative would be available:

"It is well settled that discrimination can also be arbitrary or unjustifiable where alternative measures exist that would have avoided or at least diminished the discriminatory treatment. In the context of conducting an analysis under the chapeau of Article XX of a measure provisionally justified under subparagraph (g), the Appellate Body has examined whether a WTO-consistent or less trade-restrictive alternative would be available and would enable the regulating Member to achieve its legitimate policy goals with the same degree of efficiency and efficacy."²²⁰

1.8 Paragraph (j)

1.8.1 Analytical framework; design and necessity

187. In *India – Solar Cells*, the Appellate Body recognized that this was the first case that the Appellate Body had been called upon to interpret Article XX(j). The Appellate Body considered that the analytical framework for the "design" and "necessity" elements of the analysis contemplated under Article XX(d) was relevant *mutatis mutandis* also to Article XX(j):

"Since this is the first case in which the Appellate Body is called upon to interpret Article XX(j) of the GATT 1994, we review briefly our jurisprudence under the other paragraphs of Article XX, and in particular our recent jurisprudence under Article XX(d), for the purpose of assessing its possible relevance to Article XX(j). As to the first element of the analysis contemplated under Article XX(d), the Appellate Body has stated that the responding party has the burden of demonstrating that: there are 'laws or regulations'; such 'laws or regulations' are 'not inconsistent with the provisions of' the GATT 1994; and the measure sought to be justified is designed 'to secure compliance' with such 'laws or regulations'. An examination of a defence under Article XX(d) thus includes an initial, threshold examination of the relationship between the challenged measure and the 'laws or regulations' that are not GATT-inconsistent so as to determine whether the former is designed 'to secure compliance' with specific rules, obligations, or requirements under the relevant provisions of such 'laws or regulations'. If the assessment of the design of a measure, including its content, structure, and expected operation, reveals that the measure is 'incapable' of securing compliance with specific rules, obligations, or requirements under the relevant provisions of such 'laws or regulations' that are not GATT-inconsistent, then the measure cannot be justified under Article XX(d), and this would be the end of the inquiry.

...

The analytical framework for the 'design' and 'necessity' elements of the analysis contemplated under Article XX(d) is relevant *mutatis mutandis* also under Article XX(j). As with Article XX(d), the examination of a defence under Article XX(j) would appear to include an initial, threshold examination of the 'design' of the measure at issue, including its content, structure, and expected operation. In the case of Article XX(j), the responding party must identify the relationship between the measure and 'the acquisition or distribution of products in general or local short supply', whereas, in the case of Article XX(d), a panel must examine the relationship between the measure and 'securing compliance' with relevant provisions of laws or regulations that are not

²¹⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.136.

²²⁰ Panel Reports, *China – Rare Earths*, para. 7.664.

GATT-inconsistent.²²¹ If the assessment of the design of a measure, including its content, structure, and expected operation, reveals that the measure is 'incapable', in the case of Article XX(j), of addressing 'the acquisition or distribution of products in general or local short supply', or, in the case of Article XX(d), 'secur[ing] compliance with [relevant provisions of] laws or regulations that are not inconsistent' with the GATT 1994, there is no relationship that meets the requirements of the 'design' element. In either situation, further analysis with regard to whether the measure is 'necessary' or 'essential' would not be required. This is because there can be no justification under Article XX(j) for a measure that is not 'designed' to address the 'acquisition or distribution of products in general or local short supply', just as there can be no justification under Article XX(d) for a measure that is not 'designed' to secure compliance with relevant provisions of laws or regulations that are not GATT-inconsistent."²²²

188. The Appellate Body in *India – Solar Cells* went on to state:

"We recall that, while the 'design' and 'necessity' elements may provide a useful analytical framework for assessing whether a measure is provisionally justified under Article XX(d), they are 'conceptually distinct'. Yet, they are related aspects of the overall inquiry to be carried out into whether a respondent has established that the measure at issue is 'necessary to secure compliance with laws or regulations which are not inconsistent' with the GATT 1994, and that the structure of the analysis under Article XX(d) therefore does not have to follow a 'rigid path'. Thus, the way a panel organizes its examination of these elements may be influenced not only by the measures at issue or the laws or regulations identified by the respondent, but also by the manner in which the parties present their respective arguments and evidence. These considerations are equally relevant for the analysis under Article XX(j) in assessing whether a measure is 'essential to the acquisition or distribution of products in general or local short supply'."²²³

189. The Panel in *EU – Energy Package* noted that in line with the analytical framework set out by the Appellate Body in *India – Solar Cells*, the respondent must demonstrate that the measure is provisionally justified under paragraph (j) of Article XX, and that it satisfies the requirements of its chapeau. To satisfy these two requirements, the Panel observed that:

"Based on the text of Article XX(j), the provisional justification of a measure under paragraph (j) of Article XX also includes two additional elements: (i) that the measure must 'be consistent with the principle that all Members are entitled to an equitable share of the international supply of the products concerned'; and (ii) that the measure inconsistent with the other provisions of the GATT 1994 must be 'discontinued as soon as the conditions giving rise to [the measure] have ceased to exist'.

In order to demonstrate that the challenged measure provisionally justified under paragraph (j) of Article XX satisfies the requirements of the chapeau of Article XX of the GATT 1994, the responding Member must show that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."²²⁴

1.8.2 "essential"; "weighing and balancing"

190. With regard to the meaning of "essential" in Article XX(j), the Appellate Body in *India – Solar Cells* stated:

²²¹ (footnote original) See Appellate Body Report, *Colombia – Textiles*, para. 5.126. The Appellate Body has remarked that the objectives of, or the common interests or values protected by, the relevant law or regulation may assist in elucidating the content of specific rules, obligations, or requirements in such law or regulation. (Appellate Body Report, *Colombia – Textiles*, fn 272 to para. 5.126 (referring to Appellate Body Report, *Argentina – Financial Services*, fn 495 to para. 6.203))

²²² Appellate Body Report, *India – Solar Cells*, paras. 5.58 and 5.60.

²²³ Appellate Body Report, *India – Solar Cells*, para. 5.61.

²²⁴ Panel Report, *EU – Energy Package*, paras. 7.247-7.248.

"The participants in the present case disagree as to whether the term 'essential' in Article XX(j) introduces a more stringent legal threshold than the necessity analysis under Article XX(d). The Appellate Body has explained in this regard that, in a continuum ranging from 'indispensable' to 'making a contribution to', a 'necessary' measure is 'located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'. The word 'essential' in turn is defined as '[a]bsolutely indispensable or necessary'. The plain meaning of the term thus suggests that this word is located at least as close to the 'indispensable' end of the continuum as the word 'necessary'.

Having said this, we recall that a 'necessity' analysis under Article XX(d) involves a process of 'weighing and balancing' a series of factors. We consider that the same process of weighing and balancing is relevant in assessing whether a measure is 'essential' within the meaning of Article XX(j). In particular, we consider it relevant to assess the extent to which the measure sought to be justified contributes to: 'the acquisition or distribution of products in general or local short supply'; the relative importance of the societal interests or values that the measure is intended to protect; and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken."²²⁵

191. The Appellate Body in *India – Solar Cells* held that the same "necessity" analysis under Article XX(d) is relevant in assessing whether a measure is "essential" within the meaning of Article XX(j):

"Having said this, we recall that a 'necessity' analysis under Article XX(d) involves a process of 'weighing and balancing' a series of factors. We consider that the same process of weighing and balancing is relevant in assessing whether a measure is 'essential' within the meaning of Article XX(j). In particular, we consider it relevant to assess the extent to which the measure sought to be justified contributes to: 'the acquisition or distribution of products in general or local short supply'; the relative importance of the societal interests or values that the measure is intended to protect; and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken."²²⁶

1.8.3 "products in general or local short supply"

192. With regard to the meaning of "products in general or local short supply", the Appellate Body in *India – Solar Cells* stated:

"Beginning with the phrase 'products in ... short supply', we note that this language refers generally to products 'available only in limited quantity, scarce'. We understand the phrase 'products ... in short supply' to refer therefore to products in respect of which there is a 'shortage', that is, a '[d]eficiency in quantity; an amount lacking'. This understanding is reinforced by the fact that the French and Spanish versions of Article XX(j) refer to '*pénurie*' and '*penuria*', respectively, which translate best as 'shortage' in English.

We note that 'supply' is defined as the 'amount of any commodity *actually produced and available for purchase*', and that, in its ordinary meaning, the word 'supply' is the 'correlative' of the word 'demand'. An assessment of whether there is a 'deficiency' or 'amount lacking' in the 'quantity' of a product that is *available* would therefore appear to involve a comparison between 'supply' and 'demand', such that products can be said to be 'in short supply' when the 'quantity' of a product that is 'available' does not meet 'demand' for that product."²²⁷

²²⁵ Appellate Body Report, *India – Solar Cells*, paras. 5.62-5.63. See also Panel Report, *EU – Energy Package*, para. 7.1359.

²²⁶ Appellate Body Report, *India – Solar Cells*, para. 5.63.

²²⁷ Appellate Body Report, *India – Solar Cells*, paras. 5.65-5.66.

193. The Appellate Body in *India – Solar Cells* held that an assessment of whether products are "in general or local short supply" reflects a balance of different considerations to be taken into account:

"In light of the above, we read Article XX(j) of the GATT 1994 as reflecting a balance of different considerations to be taken into account when assessing whether products are 'in general or local short supply'. In particular, a panel should examine the extent to which a particular product is 'available' for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the product that is alleged to be 'in general or local short supply', but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be 'available' to meet demand in a particular geographical area or market. It may thus be relevant to consider the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains. Whether and which factors are relevant will necessarily depend on the particularities of each case. Just as there may be factors that have a bearing on 'availability' of imports in a particular case, it is also possible that, despite the existence of manufacturing capacity, domestic products are not 'available' in all parts of a particular country, or are not 'available' in sufficient quantities to meet demand. In all cases, the responding party has the burden of demonstrating that the quantity of 'available' supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand."²²⁸

194. The Appellate Body in *India – Solar Cells* held that the assessment of whether there is a situation of "products in general or local short supply" should not focus exclusively on availability of supply from "domestic", as opposed to foreign or "international", sources.²²⁹

195. The Appellate Body in *India – Solar Cells* disagreed with India's position that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market:

"Based on the foregoing, we disagree with India to the extent that it argues that 'short supply' can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market. Rather, as noted, we read Article XX(j) of the GATT 1994 as reflecting a balance of different considerations to be taken into account when assessing whether products are 'in general or local short supply'. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be 'in general or local short supply', but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be 'available' to meet demand in a particular geographical area or market. Whether and which factors are relevant will necessarily depend on the particularities of each case."²³⁰

²²⁸ Appellate Body Report, *India – Solar Cells*, para. 5.71. See also Panel Report, *EU – Energy Package*, paras. 7.1331-7.1335.

²²⁹ Appellate Body Report, *India – Solar Cells*, para. 5.69.

²³⁰ Appellate Body Report, *India – Solar Cells*, para. 5.83.

1.9 Chapeau of Article XX

1.9.1 Purpose

196. In *US – Gasoline*, the Appellate Body held that the chapeau has been worded so to prevent the abuse of the exceptions under Article XX:

"The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX].' This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."²³¹

197. In *US – Shrimp*, the Appellate Body elaborated on the notion of preventing abuse or misuse of the exceptions under Article XX. The Appellate Body found that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members"²³², as referenced in paragraph 3 above, and went on to state:

"In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau. This interpretation of the chapeau is confirmed by its negotiating history.²³³ The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional. Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications. In November 1946, the United Kingdom proposed that 'in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]', the chapeau of this provision should be qualified. This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947."²³⁴

198. The Appellate Body then linked the balance of rights and obligations under the chapeau of Article XX to the general principle of good faith:

"The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of

²³¹ Appellate Body Report, *US – Gasoline*, p. 22

²³² Appellate Body Report, *US – Shrimp*, para. 156.

²³³ (footnote original) Article 32 of the Vienna Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

²³⁴ Appellate Body Report, *US – Shrimp*, para. 157.

international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."²³⁵

199. In *US – Shrimp*, before elaborating on the general significance of the chapeau of Article XX, as quoted in paragraphs 197-198 above, the Appellate Body discussed the significance of the Preamble of the WTO Agreement for its interpretative approach to the chapeau:

"[T]he language of the WTO Preamble] demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.

We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the 'CTE').

...

[W]e must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular."²³⁶

1.9.2 Order of analysis: subparagraphs of Article XX and chapeau

200. In *Indonesia – Import Licensing Regimes*, the Appellate Body recalled that Article XX sets out a two-tier test, which involves, first, an assessment of whether the measure falls under at least one of the ten exceptions listed in the paragraphs of Article XX, and, second, an assessment of whether the measure satisfies the requirements of the *chapeau* of that provision:

²³⁵ Appellate Body Report, *US – Shrimp*, paras. 158-159.

²³⁶ Appellate Body Report, *US – Shrimp*, paras. 153-155. In this context, the Appellate Body pointed out that the Decision refers to the Rio Declaration on Environment and Development, and Agenda 21.

"It follows from the relationship between the *chapeau* of Article XX and the paragraphs thereof that Article XX sets out a two-tier test for determining whether a measure that would otherwise be inconsistent with GATT obligations can be justified under that provision. This test involves, first, an assessment of whether the measure falls under at least one of the ten exceptions listed in the paragraphs of Article XX, and, second, an assessment of whether the measure satisfies the requirements of the *chapeau* of that provision. This sequence reflects the fact that considering first the measure at issue under the applicable paragraphs of Article XX provides panels with the necessary tools to assess that measure under the *chapeau* of Article XX. In particular, in the analysis under the applicable paragraph, panels determine whether the objective of the measure at issue is one that is protected under the paragraphs of Article XX. If the measure is found to be provisionally justified under one of the paragraphs of Article XX, that objective is then relevant in assessing the measure under the *chapeau*. Other elements of the analysis under the applicable paragraphs of Article XX might be relevant in assessing a measure under the *chapeau*."²³⁷

201. The Appellate Body in *Indonesia – Import Licensing Regimes* held however that depending on the particular circumstances of a case, a panel might be able to identify and analyse the elements under the applicable paragraphs of Article XX that are relevant for assessing the requirements of the *chapeau* even when the sequence of analysis under Article XX has not been followed:

"We accept that, depending on the particular circumstances of the case at hand, including the way in which the defence is presented, a panel might be able to identify and analyse the elements under the applicable paragraphs of Article XX that are relevant to assess the requirements of the *chapeau* even when the sequence of analysis under Article XX has not been followed. Therefore, depending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of *chapeau*. However, in light of our analysis above, we consider that the task of assessing a particular measure under the *chapeau* so as to prevent the abuse of the exceptions provided for in Article XX is rendered difficult where the panel has not first identified and examined the specific exception at issue. Following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau* in respect of a particular measure. Moreover, a finding that a Member has failed to comply with the requirements of the applicable paragraph of Article XX may not have the same implications regarding implementation as compared to a finding that a Member has failed to comply with the requirements of the *chapeau*."²³⁸

1.9.3 "measures"

202. In *EC – Seal Products*, the Appellate Body recalled that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994:

"We begin by noting that the general exceptions of Article XX apply to 'measures' that are to be analysed under the subparagraphs and *chapeau*, not to any inconsistency with the GATT 1994 that might arise from such measures. In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994. Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that the analysis of the Article XX(d) defence in that case should focus on the 'differences in the regulation of imports and of like domestic products' giving rise to the finding of less favourable treatment under Article III:4. Thus, the aspects of a measure to be justified under the subparagraphs

²³⁷ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.96.

²³⁸ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.100.

of Article XX are those that give rise to the finding of inconsistency under the GATT 1994."²³⁹

1.9.4 "applied"

203. The Appellate Body in *EC – Seal Products* held that whether a measure is *applied* in a particular manner can be discerned from the design, the architecture, and the revealing structure of a measure:

"By its terms, the chapeau of Article XX is concerned with the 'manner' in which a measure that falls under one of the subparagraphs of Article XX is 'applied'. Although this suggests that the focus of the inquiry is on the manner in which the measure is *applied*, the Appellate Body has noted that whether a measure is *applied* in a particular manner 'can most often be discerned from the design, the architecture, and the revealing structure of a measure'. It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This involves a consideration of 'both substantive and procedural requirements' under the measure at issue."²⁴⁰

1.9.5 "arbitrary or unjustifiable discrimination between countries where the same conditions prevail"

1.9.5.1 Constitutive elements

204. The Appellate Body in *US – Shrimp* provided an overview regarding the three constitutive elements of the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail":

"In order for a measure to be applied in a manner which would constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned."²⁴¹

1.9.5.1.1 discrimination; "arbitrary or unjustifiable" discrimination

205. The Appellate Body in *US – Gasoline* considered the appropriate discrimination standard relevant under the chapeau Article XX and held that this standard must be different from the standard applied under Article III:4:

"The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the *General Agreement*. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its

²³⁹ Appellate Body Reports, *EC – Seal Products*, para. 5.185.

²⁴⁰ Appellate Body Reports, *EC – Seal Products*, para. 5.302.

²⁴¹ Appellate Body Report, *US – Shrimp*, para. 150.

contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

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

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

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards it contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application."²⁴²

206. After noting that "[t]he enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4" as referenced in paragraph 205 above, the Appellate Body in *US – Gasoline* examined the United States conduct with respect to other Members' governments and its failure to consider the costs imposed by its measures upon foreign refiners. The Appellate Body then held that these "two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place":

"We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute 'unjustifiable discrimination' and a 'disguised restriction on international trade.' We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole."²⁴³

207. In *US – Shrimp*, the Appellate Body listed three elements of "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX. See also paragraph 204 above. In respect of the first element, it reiterated its findings from *US – Gasoline* concerning the difference in discrimination under the chapeau of Article XX and other GATT provisions:

"As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already

²⁴² Appellate Body Report, *US – Gasoline*, p. 23.

²⁴³ Appellate Body Report, *US – Gasoline*, pp. 28-29.

found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI."^{244,245}

1.9.5.1.1.1 "discrimination" under the chapeau of Article XX vs. "discrimination" under the non-discrimination obligations of the GATT 1994

208. The Appellate Body in *EC – Seal Products* stated:

"With respect to the type of 'discrimination' that is at issue under the chapeau, the Appellate Body noted in *US – Gasoline* that '[t]he 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'. A finding that a measure is inconsistent with one of the non-discrimination obligations of the GATT 1994, such as those contained in Articles I and III, is thus not dispositive of the question of whether the measure gives rise to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' under the chapeau of Article XX of the GATT 1994. Moreover, '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'. This does not mean, however, that the circumstances that bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994."^{246,247}

209. The Appellate Body in *EC – Seal Products* found that the causes of the discrimination under Article I:1 of the GATT 1994 were the same as those that were to be examined under the chapeau of Article XX.²⁴⁸

1.9.5.1.1.2 "arbitrary and unjustifiable discrimination"

210. In *Brazil – Retreaded Tyres*, the Appellate Body disagreed with the Panel's approach which focused exclusively on the assessment of the effects of the discrimination. The Appellate Body held, however, that in certain cases the effects of the discrimination may be a relevant factor, among others, in determining whether discrimination was justifiable:

"The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is 'unjustifiable' will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term 'unjustifiable' does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the effects of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of 'arbitrary or unjustifiable discrimination' in previous cases.

Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above, the chapeau of

²⁴⁴ (footnote original) In *US – Gasoline*, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

²⁴⁵ Appellate Body Report, *US – Shrimp*, para. 150.

²⁴⁶ (footnote original) In *US – Gasoline*, the Appellate Body concluded that the baseline establishment rules, which the panel in that dispute had found to be discriminatory under Article III:4 of the GATT 1994, also resulted in "unjustifiable discrimination", since certain omissions by the United States went "well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place". (Appellate Body Report, *US – Gasoline*, pp. 28-29, DSR 1996:I, p. 27)

²⁴⁷ Appellate Body Reports, *EC – Seal Products*, para. 5.298.

²⁴⁸ Appellate Body Reports, *EC – Seal Products*, para. 5.318.

Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character."²⁴⁹

211. Referring to relevant jurisprudence, the Appellate Body in *US – Tuna II (Mexico) (Art. 21.5 - Mexico)*, held that the analysis of whether discrimination is arbitrary or unjustifiable "must focus on the cause of the discrimination, or the rationale put forward to explain its existence":

"The Appellate Body has stated that the analysis of whether discrimination is arbitrary or unjustifiable 'should focus on the cause of the discrimination, or the rationale put forward to explain its existence'. The Appellate Body has explained that such an analysis 'should be made in the light of the objective of the measure', and that discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination 'bear no rational connection to the objective' or 'would go against that objective'. Thus, '[o]ne of the most important factors' in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. This factor is 'particularly relevant in assessing the merits of the explanations provided by the respondent as to the cause of the discrimination'. The Appellate Body has explained, however, that this is not the sole test, and that, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. Prior Appellate Body jurisprudence therefore underscores the importance of examining the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. In addition, however, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors could also be relevant to the analysis."²⁵⁰

1.9.5.1.1.3 Examples of arbitrary and unjustifiable discrimination

212. In *US – Shrimp*, in analysing the United States measure at issue in the light of the chapeau of Article XX, the Appellate Body noted the "intended and actual coercive effect on other governments" to "adopt *essentially the same* policy" as the United States:

"Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers."²⁵¹

213. The Appellate Body in *US – Shrimp* acknowledged that "the United States ... applie[d] a uniform standard throughout its territories regardless of the particular conditions existing in certain parts of the country"²⁵², but held that such a uniform standard cannot be permissible in international trade relations. The Appellate Body held that "discrimination exists", *inter alia*, "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries":

"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

²⁴⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229-230.

²⁵⁰ Appellate Body Report, *US – Tuna II (Mexico) (Article. 21.5 - Mexico)*, para. 7.316.

²⁵¹ Appellate Body Report, *US – Shrimp*, para. 161.

²⁵² Appellate Body Report, *US – Shrimp*, para. 164.

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.

Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."²⁵³

214. The Appellate Body in *US – Shrimp* further criticised the "single, rigid and unbending requirement" that countries applying for certification – required under the United States measure at issue in order to import shrimps into the United States – were faced with. The Appellate Body also noted a lack of flexibility in how officials were making the determination for certification:

"Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute 'arbitrary discrimination' within the meaning of the chapeau."²⁵⁴

215. Another aspect which the Appellate Body in *US – Shrimp* considered in determining whether the United States measure at issue constituted "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" was the concept of "due process". The Appellate Body found that the procedures under which United States authorities were granting the certification which foreign countries were required to obtain in order for their nationals to import shrimps into the United States were "informal" and "casual" and not "transparent" and "predictable":

"[W]ith respect to neither type of certification under [the measure at issue requiring certification] is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service. With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C). Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied also do not receive notice of such denial (other than by

²⁵³ Appellate Body Report, *US – Shrimp*, paras. 164-165.

²⁵⁴ Appellate Body Report, *US – Shrimp*, para. 177.

omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application is provided.

The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification." ²⁵⁵

216. The Panel in *EC – Tariff Preferences* analysed whether the European Communities' Drug Arrangements were justified under Article XX(b). As one of the steps in assessing this, the Panel examined whether the measure was applied in a manner consistent with the chapeau of Article XX. Specifically, the Panel looked at the inclusion of Pakistan, as of 2002, as a beneficiary of the Drug Arrangements preference scheme and the exclusion of Iran, and found that no objective criteria could be discerned in the selection process. Consequently, the Panel was not satisfied that conditions in the 12 beneficiary countries were the same or similar and that they were not the same with those prevailing in other countries:

"First, the Panel notes the European Communities' argument that the assessment of the gravity of the drug issue is based on available statistics on the production and/or trafficking of drugs in each country. The Panel notes, however, from the statistics provided by the European Communities itself in support of its argument that the 12 beneficiaries are the most seriously drug-affected countries, that the seizures of opium and of heroin in Iran are substantially higher than, for example, the seizures of these drugs in Pakistan throughout the period 1994-2000. Iran is not covered as a beneficiary under the Drug Arrangements. Such treatment of Iran, and possibly of other countries, in the view of the Panel, is discriminatory. Bearing in mind the well-established rule that it is for the party invoking Article XX to demonstrate the consistency of its measure with the chapeau, the Panel notes that the European Communities has not provided any justification for such discriminatory treatment *vis-à-vis* Iran. Moreover, the European Communities has not shown that such discrimination is not arbitrary and not unjustifiable as between countries where the same conditions prevail.

Second, the Panel also notes, based upon statistics provided by the European Communities, that seizures of opium in Pakistan were 14,663 kilograms in 1994, as compared to 8,867 kilograms in 2000. Seizures of heroin in Pakistan were 6,444 kilograms in 1994 and 9,492 kilograms in 2000. The overall drug problem in Pakistan in 1994 and thereafter was no less serious than in 2000. The Panel considers that the conditions in terms of the seriousness of the drug problem prevailing in Pakistan in 1994 and thereafter were very similar to those prevailing in Pakistan in the year 2000. Accordingly, the Panel fails to see how the application of the same claimed objective criteria justified the exclusion of Pakistan prior to 2002 and, at the same time, its inclusion as of that year. And, given that the Panel cannot discern any change in the criteria used for the selection of beneficiaries under the Drug Arrangements since 1990, the Panel cannot conclude that the criteria applied for the inclusion of Pakistan are objective or non-discriminatory. Moreover, the European Communities has provided no evidence on the existence of any such criteria.

...

Given the European Communities' unconvincing explanations as to why it included Pakistan in the Drug Arrangements in 2002 and the fact that Iran was not included as a beneficiary, the Panel is unable to identify the specific criteria and the objectivity of such criteria the European Communities has applied in its selection of beneficiaries under the Drug Arrangements.

²⁵⁵ Appellate Body Report, *US – Shrimp*, paras. 180-181.

...

The Panel finds no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing countries not covered by any other preferential tariff schemes are *not* the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries."²⁵⁶

217. The Appellate Body in *Brazil – Retreaded Tyres* reviewed the Panel's determination that the exemption from the application of an import ban on remoulded tyres originating in MERCOSUR countries resulted did not result in arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT 1994. The Panel determined that the MERCOSUR exemption to the import ban "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."²⁵⁷ The Panel further determined that the discrimination arising from the MERCOSUR exemption was not "a priori unreasonable", because this discrimination arose in the context of an agreement recognized under Article XXIV of the GATT 1994 that permits preferential treatment for members. The Appellate Body noted that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should be based on the cause of the discrimination and not exclusively the effects of such discrimination. The Appellate Body then explained that discrimination resulting from the application of an import ban that was introduced as a consequence of a ruling by a MERCOSUR tribunal was not acceptable because the ruling did not bear a relationship to the legitimate objective pursued by the import ban, and even worked against the objective:

"The Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision. In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market) was 'difficult to reconcile with the declared objective of protecting and conserving sea turtles'. Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

²⁵⁶ Panel Report, *EC – Tariff Preferences*, paras. 7.228-7.229, 7.232 and 7.234.

²⁵⁷ Panel Report, *Brazil – Retreaded Tyres*, para. 7.272.

In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination."²⁵⁸

218. The Appellate Body in *Brazil – Retreaded Tyres* emphasized that the determination of whether a measure is discriminatory in violation of the chapeau of Article XX should not depend exclusively on its quantitative impact, without consideration of whether the rationale for the discrimination relates to the legitimate objective of the measure:

"The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be 'unjustifiable' only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined'. The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is 'unjustifiable' will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term 'unjustifiable' does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the effects of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases."

Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above, the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character."²⁵⁹

219. The Appellate Body in *Brazil – Retreaded Tyres* also overturned the Panel's assessment of whether the application of the exemption to the import ban for MERCOSUR countries was arbitrary based solely on consideration of whether its application was "random" or "capricious". The Appellate Body concluded that discrimination can be considered arbitrary from the fact that the rationale of a measure has no relation with the objective of a measure provisionally justified:

"We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be 'capricious' or 'random' because it was adopted further to a ruling within the framework of MERCOSUR.

Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as 'capricious' or 'random'. Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—

²⁵⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-228.

²⁵⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229-230.

can hardly be characterized as a decision that is 'capricious' or 'random'. However, discrimination can result from a rational decision or behaviour, and still be 'arbitrary or unjustifiable', because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective."²⁶⁰

220. Similar to the determination that exemption from the application of an import ban on remoulded tyres originating in MERCOSUR countries resulted in arbitrary and unjustifiable discrimination, the Appellate Body in *Brazil – Retreaded Tyres* concluded that the imports of used tyres through court injunctions resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination, as no relationship existed with the objective of the Import Ban:

"As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination. For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions. We observe that this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we find that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination."²⁶¹

1.9.5.1.1.4 Relevance of the context of the word "discrimination" in other WTO provisions

221. In *EU – Poultry Meat (China)*, the Panel interpreted the Ad Note to Article XXVIII:1 of the GATT 1994 concerning "discriminatory quantitative restrictions" as follows:

"The term 'discrimination' is used in some WTO provisions accompanied by the associated terms 'arbitrary or unjustifiable' (or comparable terms) and 'where the same conditions prevail' (or comparable terms).²⁶² In the context of certain provisions, the term discrimination is accompanied by one of those associated terms, but not the other.²⁶³ In the context of some other provisions, such as paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, the term 'discriminatory' or 'discrimination' is not accompanied by the qualifying terms 'arbitrary or unjustifiable', or by the terms 'between countries where the same conditions prevail'. China argues that the phrase 'discriminatory quantitative restrictions' should therefore be interpreted to cover 'both arbitrary or unjustifiable discrimination, as well as non-arbitrary or justifiable discrimination -- regardless of the application to countries where the same conditions prevail'.

We agree with the premise that when the same term is accompanied by qualifying terms that narrow or broaden the ordinary meaning of that term in the context of some provisions, but that same term is used in the context of other provisions

²⁶⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 231-232.

²⁶¹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 246.

²⁶² (footnote original) For example, the chapeau of Article XX of the GATT 1994 refers to "arbitrary or unjustifiable" discrimination between countries "where the same conditions prevail", and the sixth recital of the preamble to the TBT Agreement uses identical terminology, as does the first recital to the SPS Agreement; the chapeau of Article XIV of the GATS refers to "arbitrary or unjustifiable" discrimination between countries "where like conditions prevail"; Article 2.3 of the SPS Agreement refers to "arbitrary or unjustifiable" discrimination between countries "where identical or similar conditions prevail".

²⁶³ (footnote original) For example, Article 5.5 of the SPS Agreement refers to certain "arbitrary or unjustifiable distinctions", insofar as such distinctions "result in discrimination".

unaccompanied by any such qualifying language, then the omission of the qualifying language must be given meaning and, all else being equal, it must be interpreted in accordance with its unqualified ordinary meaning. However, the function of qualifying terms is not always to narrow or broaden the ordinary meaning of the term. To the contrary, qualifying language may serve the purpose of bringing greater precision to how a general concept or legal standard is to be applied in a given provision or context, when the ordinary meaning of that term is general enough to accommodate an interpretative range with different shades of meaning. The foregoing consideration is particularly relevant in the context of interpreting a general concept such as 'discrimination'. It appears to us that when the term "discrimination" is accompanied by the qualifying terms 'arbitrary or unjustifiable' (or comparable terms) and 'where the same conditions prevail' (or comparable terms) in certain provisions, these additional terms serve the purpose of bringing greater precision to how the general concept and legal standard of 'discrimination' is to be applied in a given provision or context. These qualifying terms do not, in our view, serve the purpose of narrowing the ordinary meaning of the term 'discrimination' in the manner suggested by China."²⁶⁴

222. With regard to the relationship between the chapeau of Article XX and Article 2.1 of the TBT Agreement, the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 - Mexico)* stated:

"We are mindful that there are both similarities and differences between the analyses under the chapeau of Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement. In *EC – Seal Products*, the Appellate Body noted parallels between the two legal standards, in particular, the fact that the concepts of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' is found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement. At the same time, the Appellate Body recognized differences between the analyses required under Article 2.1 and under the chapeau of Article XX, including the fact that the legal standards applicable under the two provisions differ.

...

We agree that, so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other. The Panel itself conducted its analyses under Article 2.1 and Article XX on the basis of a legal test developed in the context of assessing arbitrary or unjustifiable discrimination, namely, whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified. We note, in this regard, that the United States has consistently maintained that any differences in treatment under the amended tuna measure are justified by reference to the objective of dolphin protection because such differences reflect the differences in, or are calibrated to, the risks arising in different fisheries."²⁶⁵

223. In *US – Animals*, the Panel assessed whether discrimination entailed by the United States' measures was arbitrary or unjustifiable, inconsistently with Article 2.3 of the SPS Agreement. The Panel stated that:

"[T]he language of the chapeau of Article XX of the GATT 1994 presents a number of similarities with that of Article 2.3. As noted by the panel in *India – Agricultural Products*, both provisions speak of arbitrary and unjustifiable discrimination, and a comparison between the 'conditions' prevailing in different Members.²⁶⁶ We also observe that the last recital of the Preamble of the SPS Agreement states that the Agreement 'elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of

²⁶⁴ Panel Report, *EU – Poultry Meat (China)*, paras. 7.200-7.201.

²⁶⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.345 and 7.347.

²⁶⁶ Panel Report, *India – Agricultural Products*, para. 7.400.

Article XX(b)', which includes the chapeau.²⁶⁷ Therefore, we consider that the chapeau of Article XX provides useful context for our interpretation of the terms of Article 2.3."²⁶⁸

224. Similarly, in *India – Agricultural Products*, the Panel stated:

"We note that the language of Article 2.3 of the SPS Agreement is similar to that of the chapeau to Article XX. Both provisions speak of 'arbitrary' and 'unjustifiable' discrimination, and a comparison between conditions prevailing in different 'countries' (in the context of Article XX) or 'Members' (in the context of Article 2.3). We also note that the last recital of the preamble to the SPS Agreement states that the SPS Agreement 'elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)', which includes the chapeau. Given the similarities between these provisions and the reference to Article XX of the GATT 1994 in the preamble of the SPS Agreement, we consider it appropriate to interpret 'discrimination' in Article 2.3 of the SPS Agreement in a manner similar to that which the Appellate Body adopted in the context of Article XX of the GATT 1994. Hence, in the context of Article 2.3 of the SPS Agreement, we consider that discrimination may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure, and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country."²⁶⁹

225. The Appellate Body in *India – Agricultural Products* clarified that:

"[N]otwithstanding certain similarities between its language and that of the chapeau of Article XX of the GATT 1994, Article 2.3, first sentence, of the SPS Agreement, sets out an obligation and is not expressed in the form of an exception. Thus, a complainant raising a claim that a Member's SPS measure is inconsistent with Article 2.3, first sentence, bears the overall burden of establishing its *prima facie* case of inconsistency."²⁷⁰

1.9.5.1.2 "between countries where the same conditions prevail"

226. In *US – Shrimp*, the Appellate Body confirmed its finding in *US – Gasoline* on the type of discrimination covered by the chapeau Article XX:

"In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned."²⁷¹

227. In *EC – Seal Products* the Appellate Body examined the term "condition" and concluded that this term must be understood in the specific context in which it appears in the chapeau of Article XX. The Appellate Body explained that the identification of the relevant conditions must be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. Furthermore, if a respondent considers that the conditions prevailing in different countries are not "the same" in relevant respects, it bears the burden of proving that assertion:

"We note that the term 'condition' has a number of meanings, including 'a way of living or existing'; 'the state of something'; 'the physical state of something'; and 'the physical or mental state of a person or thing'. The term 'conditions' could thus

²⁶⁷ See Panel Report, *India – Agricultural Products*, para. 7.400.

²⁶⁸ Panel Report, *US – Animals*, para. 7.570.

²⁶⁹ Panel Report, *India – Agricultural Products*, para. 7.400.

²⁷⁰ Appellate Body Report, *India – Agricultural Products*, para. 5.260.

²⁷¹ Appellate Body Report, *US – Shrimp*, para. 150.

potentially encompass a number of circumstances facing a country. In order further to define and circumscribe the meaning of the term 'conditions', the treaty interpreter should therefore seek guidance from the specific context in which that term appears in the chapeau. As we see it, only 'conditions' that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau. The question is thus whether the conditions prevailing in different countries are *relevantly* 'the same'.

We consider that, in determining which 'conditions' prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. In other words, 'conditions' relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau. Subject to the particular nature of the measure and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which 'conditions' prevailing in different countries are relevant in the context of the chapeau. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail in them.

We recall that the function of the chapeau is to maintain the equilibrium between the obligations under the GATT 1994 and the exceptions provided under each subparagraph of Article XX. This also lends support to our view that the identification of the relevant 'conditions' under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. If a respondent considers that the conditions prevailing in different countries are not 'the same' in relevant respects, it bears the burden of proving that claim"²⁷²

228. Citing past jurisprudence, the Appellate Body in *Indonesia – Import Licensing Regimes* stated:

"In the same vein, in *EC – Seal Products*, the Appellate Body stated that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the *chapeau* of Article XX 'should focus on the cause of the discrimination, or the rationale put forward to explain its existence'. ... Moreover, in that case, the Appellate Body stated that, 'in determining which 'conditions' prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context.' In other words, the relevant 'conditions' for the analysis under the *chapeau* are the ones that relate to the particular policy objective under the applicable paragraph of Article XX. The Appellate Body further recalled that the function of the *chapeau* is to maintain the equilibrium between the obligations under the GATT 1994 and the exceptions provided under each paragraph of Article XX. As the Appellate Body considered, this confirms that 'the identification of the relevant 'conditions' under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found."²⁷³

1.9.6 "disguised restriction on international trade"

229. In *US – Gasoline*, the Appellate Body held that the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" were related concepts which "imparted meaning to one another":

²⁷² Appellate Body Reports, *EC – Seal Products*, paras. 5.299-5.301.

²⁷³ Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.99.

"Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."²⁷⁴

230. See also the excerpt from the report of the Appellate Body in *US – Gasoline* referenced in paragraph 206 above.

231. The Appellate Body in *Brazil – Retreaded Tyres* reversed a finding by the Panel that an exemption from an import ban for MERCOSUR countries had not been shown to date to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade" under the chapeau of Article XX. The Appellate Body noted that the Panel had relied on a quantitative assessment of the volume of imports occurring as a result of the exemption, which was previously reversed by the Appellate Body:

"[T]he Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also reverse the Panel's findings, in paragraphs 7.354 and 7.355 of the Panel Report, that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."²⁷⁵

232. The Appellate Body in *Brazil – Retreaded Tyres* also reversed a finding by the Panel in the same dispute that the importation of used tyres under court injunctions to the benefit of the domestic retreading industry was applied in a manner that constitutes a disguised restriction on international trade, noting that the Panel had similarly conditioned a finding of a disguised restriction on international trade on the existence of imports of used tyres in amounts that would significantly undermine the achievement of the objective of the ban.²⁷⁶

1.10 Relationship with other WTO Agreements

1.10.1 Anti-Dumping Agreement

233. The Appellate Body in *US – Shrimp (Thailand)/US – Customs Bond Directive* addressed an argument that a defence under Article XX(d) is not available when it is found that a measure is a "specific action against dumping" in violation of Article 18.1 of the Anti-Dumping Agreement, and not in accordance with the Ad Note to Article VI:2 and 3 of the GATT 1994. The Appellate Body upheld the Panel's findings that the measure at issue was not "necessary" to secure compliance in

²⁷⁴ Appellate Body Report, *US – Gasoline*, p. 25.

²⁷⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 239.

²⁷⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 251.

the sense of Article XX(d); it then declined to express a view on whether a defence under Article XX(d) was available to the United States.²⁷⁷

1.10.2 GATS

234. In *US – Gambling*, the Appellate Body held that previous decisions under Article XX of the GATT 1994 were relevant in its analysis under Article XIV of the GATS:

"Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions, notably the term 'necessary' and the requirements set out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS."²⁷⁸

235. The Appellate Body in *US – Gambling* stressed however the difference between Article XX of the GATT 1994 and Article XIV(a) of the GATS:

"Notwithstanding the general similarity in language between the two provisions, we note that Article XIV(a) of the GATS expressly enables Members to adopt measures 'necessary to protect public morals or to maintain public order', whereas the corresponding exception in the GATT 1994, Article XX(a), speaks of measures 'necessary to protect public morals'.²⁷⁹

1.10.3 SPS Agreement

236. The Panel in *US – Poultry (China)* examined an affirmative defence under Article XX(b) that the measure at issue was enacted "to protect human and animal life and health from the risk posed by the importation of poultry products from China." The Panel had found that the measure was an SPS measure that was inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the SPS Agreement. Examining the relationship between the SPS Agreement and Article XX(b) of the GATT 1994, the Panel concluded that a measure that has been found inconsistent with Articles 2 and 5 of the SPS Agreement cannot be justified under Article XX(b) of the GATT 1994:

"Given our conclusion that the *SPS Agreement* explains the provisions of Article XX(b) in further detail and because the *SPS Agreement* only applies to SPS measures, the *SPS Agreement* thus explains in detail the provisions of Article XX(b) in respect of SPS measures. Since that is the case, we have difficulty in accepting that an SPS measure which is found inconsistent with provisions of the *SPS Agreement* such as Articles 2 and 5, which are explanations of the disciplines of Article XX(b), could be justified under that same provision of the GATT 1994. Additionally, we recall that Article 2.1 of the *SPS Agreement* provides that Members have a right to take SPS measures necessary for the protection of human, animal, or plant life or health, provided that such measures are not inconsistent with the provisions of the *SPS Agreement*. Therefore, the Panel is of the view that an SPS measure which has been found inconsistent with Articles 2 and 5 of the *SPS Agreement*, cannot be justified under Article XX(b) of the GATT 1994."²⁸⁰

237. See also the discussions in paragraphs 222, 224 and 225 above.

²⁷⁷ Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, paras. 310-319.

²⁷⁸ Appellate Body Report, *US – Gambling*, para. 291.

²⁷⁹ Appellate Body Report, *US – Gambling*, fn 349.

²⁸⁰ Panel Report, *US – Poultry (China)*, para. 7.481.

1.10.4 TBT Agreement

238. With regard to the relationship between the chapeau of Article XX and Article 2.1 of the TBT Agreement, the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 - Mexico)* stated:

"We are mindful that there are both similarities and differences between the analyses under the chapeau of Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement. In *EC – Seal Products*, the Appellate Body noted parallels between the two legal standards, in particular, the fact that the concepts of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' is found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement. At the same time, the Appellate Body recognized differences between the analyses required under Article 2.1 and under the chapeau of Article XX, including the fact that the legal standards applicable under the two provisions differ.

...

We agree that, so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other. The Panel itself conducted its analyses under Article 2.1 and Article XX on the basis of a legal test developed in the context of assessing arbitrary or unjustifiable discrimination, namely, whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified. We note, in this regard, that the United States has consistently maintained that any differences in treatment under the amended tuna measure are justified by reference to the objective of dolphin protection because such differences reflect the differences in, or are calibrated to, the risks arising in different fisheries."²⁸¹

239. See also the discussion in Section 1.9.5.1.1.4 above.

1.10.5 Special provisions in Protocols of Accession

240. In *China – Publications and Audiovisual Products*, China argued that because its obligations under paragraph 5.1 of China's Accession Protocol in respect of the right to trade were subject to a proviso concerning "China's right to regulate trade in a manner consistent with the WTO Agreement", China's "right to regulate trade" must be interpreted in conjunction with WTO agreements applicable to trade in goods, including Article XX. The Panel assumed *arguendo* that Article XX(a) was available as a defence, and found that China's measures were not "necessary" to protect public morals under Article XX(a). On appeal, the Appellate Body found that the introductory clause of paragraph 5.1 of the Accession Protocol allows China to assert a defence under Article XX(a), based on the following interpretation:

"Any exercise of China's right to regulate trade will be protected under the introductory clause of paragraph 5.1 only if it is consistent with the WTO Agreement. This will be the case when China's measures regulating trade are of a type that the WTO Agreement recognizes that Members may take when they satisfy prescribed disciplines and meet specified conditions. Yet, these are not the only types of WTO-consistent measures that may be protected under the introductory clause of paragraph 5.1. Whether a measure regulating those who may engage in the import and export of goods falls within the scope of China's right to regulate trade may also depend on whether the measure has a clearly discernable, objective link to the regulation of trade in the goods at issue. In considering whether such a link is discernable, it may be relevant whether the measure regulating who may engage in trade is clearly and intrinsically related to the objective of regulating the goods that are traded. In addition, such a link may often be discerned from the fact that the measure in question regulates the right to import and export particular goods. This is

²⁸¹ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.345 and 7.347.

because the regulation of who may import and export specific goods will normally be objectively related to, and will often form part of, the regulation of trade in those goods. Whether the necessary objective link exists in a specific case needs to be established through careful scrutiny of the nature, design, structure, and function of the measure, often in conjunction with an examination of the regulatory context within which it is situated. When such a link exists, then China may seek to show that, because its measure complies with the conditions of a GATT 1994 exception, the measure represents an exercise of China's power to regulate trade in a manner consistent with the WTO Agreement and, as such, may not be impaired by China's trading rights commitments".

...

... [W]e consider that the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and China's regulation of trade in the relevant products, we find that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. Successful justification of these provisions, however, requires China to have demonstrated that they comply with the requirements of Article XX of the GATT 1994 and, therefore, constitute the exercise of its right to regulate trade *in a manner consistent with the WTO Agreement*.²⁸²

241. Because the Panel in *China – Publications and Audiovisual Products* proceeded on the assumption that Article XX was available as a defence for measures inconsistent with China's trading right commitments, the Panel also decided, in a finding upheld by the Appellate Body, that it "should weigh not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade. In the Panel's view, "if Article XX is assumed to be a direct defence for measures in breach of trading rights commitments, it makes sense to consider how much these measures restrict the right to import".²⁸³

242. The Panel in *China – Raw Materials* examined the question of whether China could invoke Article XX in relation to violations of Paragraph 11.3 of China's Accession Protocol, and stated:

"In contrast to the language of Paragraph 5.1 of the Accession Protocol before the Appellate Body in *China – Publications and Audiovisual Products*, there is no general reference to the WTO Agreement or even to the GATT 1994. While it would have been possible to include a reference to the GATT 1994 or to Article XX, WTO Members evidently decided not to do so. The deliberate choice of language providing for exceptions in Paragraph 11.3, together with the omission of general references to the WTO Agreement or to the GATT 1994, suggest to us that the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defences set out in Article XX of the GATT 1994."²⁸⁴

243. Further addressing the issue of whether Article XX of the GATT 1994 can be invoked to justify a violation of a provision falling outside the GATT 1994, the Panel noted:

"Article XX provides that 'nothing in this Agreement should be construed to prevent the adoption or enforcement ... of [certain] measures ...'. A *priori*, the reference to *this* 'Agreement' suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements. On occasion, WTO Members have incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements. This was done, for example, with the TRIMs Agreement, which explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994. In the Panel's view, the legal basis for applying Article XX exceptions to TRIMs

²⁸² Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 230 and 233.

²⁸³ Panel Report, *China – Publications and Audiovisual Products*, para. 7.788.

²⁸⁴ Panel Reports, *China – Raw Materials*, para. 7.129.

obligations is the text of the incorporation of the TRIMs Agreement, not the text of Article XX of the GATT 1994. Other WTO agreements include their own exceptions. For example, general exceptions are provided for in Article XIV of the GATS for GATS violations. Other covered agreements, like TRIPS, the TBT or the SPS agreements, include their own flexibilities and exceptions."²⁸⁵

244. The Panel then concluded:

"For the Panel, the wording and the context of Paragraph 11.3 precludes the possibility for China to invoke the defence of Article XX of the GATT 1994 for violations of the obligations contained in Paragraph 11.3 of China's Accession Protocol.

For the foregoing reasons, the Panel concludes that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol. To allow such exceptions to justify a violation when no exception was apparently envisaged or provided for, would change the content and alter the careful balance achieved in the negotiation of China's Accession Protocol. It would thus undermine the predictability and legal security of the international trading system.

The Panel is mindful that excluding the applicability of Article XX justifications from the obligations contained in Paragraph 11.3 means that China is in a position unlike that of most other WTO Members who are not prohibited from using export duties, either via the terms of their respective accession protocols or their membership to the WTO at the time of its inception. However, based on the text before us, the Panel can only assume that this was the intention of China and the WTO Members when negotiating China's Accession Protocol. The situation created by this provision taken in isolation may be perceived as imbalanced, but the Panel can find no legal basis in the Protocol or otherwise to interpret Paragraph 11.3 of China's Accession Protocol as permitting resort to Article XX of the GATT 1994."²⁸⁶

245. In *China – Raw Materials*, the Appellate Body found that the Panel had not erred in finding that there was no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of China's Accession Protocol:

"In our analysis above, we have, in accordance with Article 3.2 of the DSU, applied the customary rules of interpretation of public international law as codified in the *Vienna Convention* in a holistic manner to ascertain whether China may have recourse to the provisions of Article XX of the GATT 1994 to justify export duties that are found to be inconsistent with Paragraph 11.3 of China's Accession Protocol. As we have found, a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994."²⁸⁷

246. In *China – Rare Earths*, the Appellate Body held that the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the relevant provisions of these agreements:

"This jurisprudence indicates that the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the relevant provisions of these agreements. In other words, this specific relationship must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship

²⁸⁵ Panel Reports, *China – Raw Materials*, para. 7.154.

²⁸⁶ Panel Reports, *China – Raw Materials*, paras. 7.158-7.160.

²⁸⁷ Appellate Body Reports, *China – Raw Materials*, para. 307.

between the provisions of different instruments (such as the General Interpretative Note to Annex 1A)."²⁸⁸

Current as of: December 2023

²⁸⁸ Appellate Body Reports, *China – Rare Earths*, para. 5.55.