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Capacity Building Workshop on the Notification of Quantitative Restrictions

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Jurisprudence on the Scope and Meaning of the Obligation under GATT Article XI (Quantitative Restrictions) and Justifications

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Article XI: General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Significance of Article XI in the GATT framework

(DS34) Panel Report, *Turkey – Textiles*, para. 9.63

Panel Report circulated: 1999

Appellate Body Report circulated: 1999 (Article XI panel findings not appealed)

> "The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. … The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent."

Scope of Article XI

(BISD 35S/116) *Japan – Semi-Conductors*, para. 104

Report circulated: 1988

> "[The] wording [of Article XI] [is] comprehensive: it applie[s] to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges."

Article XIII: non-discriminatory application of quantitative restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

Importation

Article XI:1 “prohibitions or restrictions”

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

“prohibitions or restrictions”

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 319

Panel Report circulated: 2011

Appellate Body Report circulated: 2012

> “The term ‘prohibition’ is defined as a ‘legal ban on the trade or importation of a specified commodity’. The second component of the phrase ‘[e]xport prohibitions or restrictions’ is the noun ‘restriction’, which is defined as ‘[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation’, and thus refers generally to something that has a limiting effect.”

"restrictions"

(DS146, 175) Panel Report, *India – Autos*, para. 7.270

Panel Report circulated: 2001

Appellate Body Report circulated: 2002 (Article XI panel findings not appealed)

> "On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both 'prohibition or restriction'. Furthermore, the Panel considers that the expression 'limiting condition' used by the *India – Quantitative Restrictions* panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself."

"restrictions"

(DS155) Panel Report, *Argentina – Hides and Leather*, para. 6.451

Panel Report circulated: 2000

> "The panel in *China – Raw Materials* indicated that, to assess whether a measure has a 'limiting effect' or imposes a 'limiting condition' on imports, a panel must examine the design and structure of the measure at issue. This assessment shall not be based solely on how a measure is labelled. The panel in *Colombia – Ports of Entry* additionally noted that an analysis under Article XI:1 of the GATT 1994 must be 'based on the design of the measure and its potential to adversely affect importation'."

Import licensing: in general

Under Article XI:1 of the GATT 1994, "import licenses" are a form of a "restriction", referring to both substantive obligations and procedures:

> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Import licensing: in general

(DS27) Appellate Body Report, *EC – Bananas III*, paras. 197-198

Panel Report circulated: 1997

Appellate Body Report circulated: 1997

> "As a matter of fact, none of the provisions of the Licensing Agreement concerns import licensing rules, per se. As is made clear by the title of the Licensing Agreement, it concerns import licensing procedures. The preamble of the Licensing Agreement indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the Licensing Agreement defines its scope as the administrative procedures used for the operation of import licensing regimes. We conclude, therefore, that the Panel erred in finding that Article 1.3 of the Licensing Agreement precludes the imposition of different import licensing systems on like products when imported from different Members."

Therefore, the Import License Agreement governs import licensing procedures.

Import licensing: in general

(DS484) Panel Report, *Indonesia – Chicken*, para. 7.353

Panel Report circulated: 2017 (findings not appealed)

> "[W]e note that Article XI:1 of the GATT 1994 imposes a substantive obligation on Members to refrain from imposing prohibitions or restrictions on the importation or the exportation of goods. In contrast, Article 3.2 of the Import Licensing Agreement deals with the administration of import licensing procedures. Regarding which of these provisions is *lex specialis*, previous panels have considered that provisions of the covered agreement that deal with the substantive content of a measure, such as Article XI:1 of the GATT 1994, are more specific than those that deal with the application and administration of a measure, such as Article 3.2 of the Import Licensing Agreement."

Therefore, the Panel in *Indonesia – Chicken* interpreted the findings of the Appellate Body in *EC – Bananas III* and *Argentina – Import Measures* to mean that:

- Where there are claims both under Article XI:1 GATT 1994 and under articles of the Import Licensing Agreement concerning the *application and administration of the measure*, then the *claims under the Import Licensing Agreement should be examined first*.
- Where there are claims under provisions that *set out substantive obligations*, such as Article XI:1 GATT 1994 as well as claims under provisions pertaining to the administration and application of measures, such as Article 3.2 of the Import Licensing Agreement, then Article XI:1 GATT 1994 is *lex specialis* to Articles of the Import Licensing Agreement.

Import licensing: automatic

(DS90) Panel Report, *India – Quantitative Restrictions*, para. 5.130

Panel Report circulated: 1999

Appellate Body Report circulated: 1999 (Article XI panel findings not appealed)

"Under the GATT 1947, panels have examined whether import and export licensing systems are restrictions under Article XI:1. For example, in a case involving a so called 'SLQ' regime, which concerned products subject in principle to quantitative restrictions, but for which no quota amount had been set either in quantity or value, permit applications being granted upon request, the panel noted 'that the SLQ regime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the automatic issuance of licences'."

Import licensing: non-automatic

"Non-automatic import licensing" is defined in Article 3.1 of the Import Licensing Agreement as "import licensing not falling within the definition contained in paragraph 1 of Article 2". *Hence*, these "non-automatic import licensing" procedures are in principle permitted if they do not violate Article 3 of the Import Licensing Agreement.

Import licensing: discretionary (non-automatic)

(DS161) Panel Report, *Korea – Various Measures on Beef*, para. 782

Panel Report circulated: 2000

Appellate Body Report circulated: 2000 (Article XI panel findings not appealed)

"[W]here a quota is in place, the use of a discretionary licensing system need not necessarily result in any additional restriction. Where a discretionary licensing system is implemented in conjunction with other restrictions, such as in the present dispute, the manner in which the discretionary licensing system is operated may create additional restrictions independent of those imposed by the principal restriction. Since this issue was not considered in the *India - Quantitative Restrictions* report, that case does not provide authority for the proposition that a discretionary licensing system, used in conjunction with a quantitative restriction, necessarily provides some additional level of restriction over and above the inherent restriction on access created through the imposition of a quantitative restriction."

Summary: import licensing

1. Automatic import licensing procedures may, in certain circumstances, be within the scope of Article XI
2. Non-automatic import licensing procedures should not add to the restriction
3. Discretionary import licensing procedures are within the scope of Article XI

De facto measures

(DS155) Panel Report, *Argentina – Hides and Leather*, para. 11.17

Panel Report circulated: 2000 (findings not appealed)

> "There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature."

Article XI:1 “other than duties, taxes or other charges”

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Non-fiscal measures

(DS453) Appellate Body Report, *Argentina – Financial Services*, para. 7.1067

Panel Report circulated: 2015

Appellate Body Report circulated: 2016 (Article XI panel findings not appealed)

> "We recall that measure 3 consists in the application of transaction valuation methods based on transfer prices for the purpose of determining the tax base for the gains tax payable by Argentine taxpayers in connection with transactions effected with persons from non-cooperative countries. Therefore, measure 3 is a tool for determining the tax base for the tax on the gains of the Argentine taxpayer. Argentina maintains this measure under paragraph 5 of Article 8 of the LIG.1356 As Argentina points out1357, both provisions come within the framework of Chapter I of the LIG entitled 'Subject and Object of the Tax', so that they form part of the provisions that govern two of the elements of a tax. As Argentina also points out (and as we have previously explained) the 'Principios Constitucionales en Materia Tributaria' (Constitutional Principles on Tax Matters) specify that 'there can be no tax without a legal basis' and that 'the law must define the taxable event and the elements thereof: subject, object, tax base and tax rate'. In our view, the nature of a tool used to calculate the tax base, that is, one of the elements of gains tax, cannot, in the present case, be other than fiscal. Consequently, we consider that the fiscal nature of measure 3 excludes it from the scope of application of Article XI:1 of the GATT 1994."

Article XI:1 “made effective through”

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

“made effective through”

(DS348, 444, 445) Appellate Body Report, *Argentina – Import Measures*, para. 5.218

Panel Report circulated: 2014

Appellate Body Report circulated: 2015

> “The Appellate Body has described the word ‘effective’, when relating to a legal instrument, as ‘in operation at a given time’. We note that the definition of the term ‘effective’ also includes something ‘[t]hat is concerned in the production of an event or condition’. Moreover, the Appellate Body has described the words ‘made effective’, when used in connection with governmental measures, as something that may refer to a measure being ‘operative’, ‘in force’, or as having ‘come into effect’. In Article XI:1, the expression ‘made effective through’ precedes the terms ‘quotas, import or export licences or other measures’. This suggests to us that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.”

Conditions on importation

(DS348, 444, 445) Appellate Body Report, *Argentina – Import Measures*, para. 5.218

Panel Report circulated: 2014

Appellate Body Report circulated: 2015

> "[N]ot every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. [To determine whether there is such a limitation, the Panel noted that] it need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue concerned in its relevant context."

Example “restrictions” covered by Article XI:1

Measures that:	Dispute and measure at issue
• restrict market access for imports	In *Canada – Provincial Liquor Boards (US)*, the GATT panel found that a restriction on access of imported beer to points of sale was a restriction under Article XI:1
• create uncertainties	In *China – Raw Materials*, a measure amounted to a quantitative restriction because it gave governmental agencies an open-ended discretion to request other documents in reviewing export license applications
• make importation prohibitively costly	In *Brazil – Retreaded Tyres*, a law that imposed high fines on importation of retreaded and used tires acted as a ”disincentive to importation” and “significant enough to have a restrictive effect on importation”
• condition the right to import on trade balancing requirements	In *India – Autos*, a “trade balancing requirement”, which required importers to compensate imports with an equivalent amount of exports to gain right to import products, amounted to an import restriction because there would be a practical threshold to each amount of exports a manufacturer could make • See also *Argentina – Import Measures* (trade-related requirements (TRRs) as a condition to import into Argentina or to obtain certain benefits)

Article XI:2 “carve-out”

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Article XI:2 “carve-out”

(DS477) Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.76

Panel Report circulated: 2016

Appellate Body Report circulated: 2017 (upheld panel’s findings related to Article XI:2(c))

> “Furthermore, while Article XI:2 of the GATT 1994 provides that '[t]he provisions of paragraph 1 of this Article shall not extend to' the kinds of '[i]mport restrictions' mentioned in subparagraph 2(c), these '[i]mport restrictions' are not disqualified from being quantitative restrictions. As noted above, the Appellate Body has explained that the word 'quantitative' in the title of Article XI of the GATT 1994 informs the interpretation of the words 'prohibitions' and 'restrictions' in both Article XI:1 and Article XI:2. In this light, the reference to '[i]mport restrictions' in Article XI:2(c) is clearly a reference to a certain specified class of measures that fall within quantitative (import) restrictions, but are exempted from the prohibition under Article XI:1 because they are necessary to the enforcement of certain governmental measures. While it is the function of Article XI:2(c) to carve out certain quantitative restrictions from the prohibition contained in Article XI:1, this does not change the fact that they are quantitative restrictions.”

Summary: importation

Both “prohibitions” and “restrictions” (including some licenses) are covered within the scope of Article XI

- Restrictions may take many forms

Article XI applies to:

- *De facto* and *de jure* measures
- Non-fiscal measures
- Conditions on importation

Article XI:2 includes a “carve-out”

Exceptions

Exceptions

Exceptions for non-economic reasons:

- General exceptions, Article XX of the GATT 1994
- Security exception, Article XXI of the GATT 1994

Exceptions for economic reasons:

- Balance of payment exceptions, Articles XVIII and XII of the GATT 1994
- Safeguard measures, Article XIX of the GATT 1994

Other:

- Waiver of obligations, Article IX:3 of the Marrakesh Agreement Establishing the WTO

Exceptions: Article XX

Exceptions for non-economic reasons:

- General exceptions, Article XX of the GATT 1994
- Security exception, Article XXI of the GATT 1994

Exceptions for economic reasons:

- Balance of payment exceptions, Articles XVIII and XII of the GATT 1994
- Safeguard measures, Article XIX of the GATT 1994

Other:

- Waiver of obligations, Article IX:3 of the Marrakesh Agreement Establishing the WTO

Article XX

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 sub-paragraph not later than 30 June 1960.

Example: *EC – Seal Products*

(DS400, 401) Appellate Body Report, *EC – Seal Products*, para. 5.289

Panel Report circulated: 2013

Appellate Body Report circulated: 2014 (found ban to be provisionally justified under Article XX(a) but did not meet the requirements of the chapeau)

> "The Panel correctly focused its analysis on the question of whether the prohibitive and permissive components of the EU Seal Regime are necessary to protect EU public moral concerns. The Panel then conducted a relational analysis in which it evaluated the importance of the objective of addressing EU public moral concerns regarding seal welfare, the trade-restrictiveness of the EU Seal Regime, the contribution of the EU Seal Regime to the objective, and whether the alternative measure proposed by the complainants was reasonably available. In that context, having focused on and assessed the specific claims of error advanced by Canada and Norway, we consider that the Panel did not err in concluding that the EU Seal Regime "is capable of making and does make some contribution" to its objective, or that it does so 'to a certain extent'. We further consider that the Panel did not err in concluding that, although the alternative measure was less trade restrictive than the EU Seal Regime, it was not reasonably available given *inter alia* the inherent animal welfare risks and challenges found to exist in seal hunting. Overall, in the light of the specific circumstances of this case, and the particular nature of the measure at issue, we have endorsed the Panel's analysis of the EU Seal Regime under Article XX(a) of the GATT 1994."

Exceptions: Article XIX

Exceptions for non-economic reasons:

- General exceptions, Article XX of the GATT 1994
- Security exception, Article XXI of the GATT 1994

Exceptions for economic reasons:

- Balance of payment exceptions, Articles XVIII and XII of the GATT 1994
- Safeguard measures, Article XIX of the GATT 1994

Other:

- Waiver of obligations, Article IX:3 of the Marrakesh Agreement Establishing the WTO

Article XIX: Emergency Action on the Imports of Particular Products [safeguards]

1.(a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Exceptions: Article XVIII

Exceptions for non-economic reasons:

- General exceptions, Article XX of the GATT 1994
- Security exception, Article XXI of the GATT 1994

Exceptions for economic reasons:

- Balance of payment exceptions, Articles XVIII and XII of the GATT 1994
- Safeguard measures, Article XIX of the GATT 1994

Other:

- Waiver of obligations, Article IX:3 of the Marrakesh Agreement Establishing the WTO

Article XVIII: Governmental Assistance to Economic Development [infant industry protection]

Section C

13. If a contracting party … finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. …

Exportation

Article XI: General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

“export prohibitions or restrictions”

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 334

Panel Report circulated: 2011

Appellate Body Report circulated: 2012 (upheld panel’s findings on Article XI)

> “Turning to the phrase ‘[e]xport prohibitions or restrictions’ in Article XI:2(a), we note that the words ‘prohibition’ and ‘restriction’ in that subparagraph are both qualified by the word ‘export’. Thus, Article XI:2(a) covers any measure prohibiting or restricting the exportation of certain goods. Accordingly, we understand the words ‘prohibitions or restrictions’ to refer to the same types of measures in both paragraph 1 and subparagraph 2(a), with the difference that subparagraph 2(a) is limited to prohibitions or restrictions on exportation, while paragraph 1 also covers measures relating to importation. We further note that ‘duties, taxes, or other charges’ are excluded from the scope of Article XI:1. Thus, by virtue of the link between Article XI:1 and Article XI:2, the term ‘restrictions’ in Article XI:2(a) also excludes ‘duties, taxes, or other charges’. Hence, if a restriction does not fall within the scope of Article XI:1, then Article XI:2 will also not apply to it.”

Article XI:2

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

“temporarily applied”

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 323

Panel Report circulated: 2011

Appellate Body Report circulated: 2012

> “[W]e note that the term ‘temporarily’ in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term ‘applied’. The word ‘temporary’ is defined as ‘[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need’. Thus, when employed in connection with the word ‘applied’, it describes a measure applied for a limited time, a measure taken to bridge a ‘passing need’. As we see it, the definitional element of ‘supply[ing] a passing need’ suggests that Article XI:2(a) refers to measures that are applied in the interim.”

"essential"

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 326

Panel Report circulated: 2011

Appellate Body Report circulated: 2012

> "For Article XI:2(a) to apply, the shortage, in turn, must relate to 'foodstuffs or other products essential to the exporting Member'. Foodstuff is defined as 'an item of food, a substance used as food'. The term 'essential' is defined as '[a]bsolutely indispensable or necessary'. Accordingly, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word 'foodstuffs', Article XI:2(a) provides a measure of what might be considered a product 'essential to the exporting Member' but it does not limit the scope of other essential products to only foodstuffs."

“prevent or relieve critical shortages”

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 324

Panel Report circulated: 2011

Appellate Body Report circulated: 2012

> “Turning next to consider the meaning of the term ‘critical shortage’, we note that the noun ‘shortage’ is defined as ‘[d]eficiency in quantity; an amount lacking’ and is qualified by the adjective ‘critical’, which, in turn, is defined as ‘[o]f, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense’. The term ‘crisis’ describes ‘[a] turningpoint, a vitally important or decisive stage; a time of trouble, danger or suspense in politics, commerce, etc.’ Taken together, ‘critical shortage’ thus refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.”

Article XX and Article XI:2

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 334

Panel Report circulated: 2011

Appellate Body Report circulated: 2012

> "In any event, we have some doubts as to the validity of the Panel's concern that, if Article XI:2(a) is not interpreted as confined to measures of limited duration, Members could 'resort indistinguishably to either Article XI:2(a) or to Article XX(g) to address the problem of an exhaustible natural resource'. Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions shall not extend to the items listed under subparagraphs (a) to (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists."

Article XX and Article XI:2

(DS394, 395, 398) Appellate Body Report, *China – Raw Materials*, para. 337

Panel Report circulated: 2011

Appellate Body Report circulated: 2012

> "We do not agree with China that these statements by the Panel indicate that the Panel presumed that a shortage of an exhaustible non-renewable resource cannot be 'critical' within the meaning of Article XI:2(a). The Panel noted instead, correctly in our view, that the reach of Article XI:2(a) is not the same as that of Article XX(g), adding that these provisions are 'intended to address different situations and thus must mean different things'. Articles XI:2(a) and XX(g) have different functions and contain different obligations. Article XI:2(a) addresses measures taken to prevent or relieve "critical shortages" of foodstuffs or other essential products. Article XX(g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources. We do not exclude that a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource. It would seem that Article XI:2(a) measures could be imposed, for example, if a natural disaster caused a 'critical shortage' of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product. Moreover, because the reach of Article XI:2(a) is different from that of Article XX(g), an Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g)."