WTO Rules and Environmental Policies

ESTIMATED TIME: 7 hours

OBJECTIVES OF MODULE 6

- Provide an overview of Article XX of the GATT 1994 addressing, in particular, its role in allowing WTO Members to adopt trade-related measures to protect the environment

- Identify some key WTO disciplines and explain their relation with the exceptions contained in Article XX of the GATT 1994

- Identify other provisions contained in various WTO Agreements that are relevant for the protection of the environment

- Provide an overview of the existing environment-related panel and Appellate Body decisions, and determine whether, in light of this jurisprudence, Members can adopt measures to address environmental concerns without infringing upon their GATT and WTO commitments
I. OVERVIEW OF GATT ARTICLE XX

I.A. INTRODUCTION

IN BRIEF

WTO Members can adopt trade-related measures to protect the environment and human health and life, as long as such measures comply with GATT rules or fall under the exceptions to these rules.

Article XX on General Exceptions lays down a number of specific instances in which WTO Members may be exempted from GATT rules.

IN DETAIL

Measures aimed at protecting the environment come in various shapes and forms. Under WTO rules, as confirmed by WTO jurisprudence, Members can adopt trade-related measures aimed at protecting the environment, subject to certain specified conditions. It is not uncommon for some of these measures to be raised and discussed at the WTO Committee level (e.g. at the TBT Committee). However, certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other Members. They may violate basic trade rules, such as the non-discrimination obligation and the prohibition of quantitative restrictions. The Appellate Body in Brazil – Retreaded Tyres recognized that such a tension may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns. This is why exceptions to such rules are particularly important in the trade and environment context.

These exceptions exist to ensure a balance between the right of Members to take regulatory measures, including trade restrictions, to achieve legitimate policy objectives (e.g. the protection of human, animal or plant life and health, and natural resources) and the rights of other WTO Members under basic trade rules (such as non-discrimination). Since the entry into force of the WTO in 1995, the WTO dispute settlement body has had to deal with a number of disputes concerning such measures. Four disputes are of particular relevance: the US – Gasoline case (clean air), the US – Shrimp case (turtles), the EC – Asbestos case (human life and health), the Brazil – Retreaded Tyres case (human, animal and plant life and health) and US – Tuna II (dolphins).

So far, most of these disputes have been brought in relation to the application of GATT rules. Several other WTO agreements may be relevant to the protection of the environment as well. In particular, the TBT Agreement and the SPS Agreement seek to ensure that environmental product requirements do not create unnecessary obstacles to international trade. At the same time, these agreements explicitly recognize Members’ rights to protect animal or plant health, and the environment, at the level they choose. In light of

---

1 However, more recently, the US - Tuna II dispute also involved claims under the TBT Agreement.
the jurisprudence to date, it is fair to say that WTO rules provide ample space for environmental concerns to be accommodated. Even if a measure is found to be inconsistent with basic disciplines, it may be justifiable under one of the exceptions contained in Article XX, for example, if it pursues an environmental or human health objective, and its application does not reveal protectionist intent.

I.A.1. WTO MEMBERS HAVE THE RIGHT TO ADOPT TRADE-RELATED MEASURES TO PROTECT THE ENVIRONMENT...

WTO Members can adopt trade-related measures to protect the environment and human health and life as long as such measures comply with GATT rules or fall under their exceptions. This right has been reaffirmed by panels and the Appellate Body time and again.

In the first case decided by the new WTO dispute settlement body, US – Gasoline, the Appellate Body asserted WTO Members’ autonomy to determine their own environmental policies. The Appellate Body cautioned, however, that a balance needed to be maintained between market access obligations, on the one hand, and the right of Members to invoke the environmental justifications foreseen in the GATT, on the other, so that one objective is not eroded or compromised by the pursuit of another.

More recently, in US – Clove Cigarettes and US – Tuna II, the Appellate Body has also clarified that, as expressed by the sixth recital of the preamble of the TBT Agreement, a balance must exist between, on one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members’ right to regulate.

I.A.2. ... AND EVEN TO BE EXEMPTED FROM BASIC GATT PROVISIONS, AS LONG AS THE MEASURES ARE JUSTIFIED UNDER ARTICLE XX

GATT Article XX on General Exceptions lays down a number of specific instances in which WTO Members may be exempted from GATT rules. Two exceptions are of particular relevance to environmental and human health protection: Articles XX(b) and (g) allow WTO Members to justify GATT-inconsistent measures if these are either necessary to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources, respectively.

In addition, the introductory paragraph of Article XX (or its “chapeau”, as it is commonly referred to) has been designed to prevent the misuse of trade-related measures. Pursuant to the chapeau, an environmental measure may not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” These additional safeguards seek mainly to ensure that, by allowing a measure to be inconsistent with GATT rules through the use of exceptions, protectionism is not introduced through the back door.

EXERCISES

1. Please briefly explain whether it is possible under the GATT 1994 to adopt measures aimed at protecting the environment, even if those measures have trade-restrictive effects that contravene GATT disciplines.
I.B. KEY GATT DISCIPLINES

IN BRIEF

Certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other Members. They may violate basic trade rules, such as the non-discrimination obligation and the prohibition of quantitative restrictions. This is why exceptions to such rules, as contained in Article XX, are particularly important in the trade and environment context. Article XX being an exception clause, comes into play only once a measure is found to be inconsistent with GATT rules.

I.B.1. THE PRINCIPLE OF NON-DISCRIMINATION

In the GATT, the principle of non-discrimination stipulates that a Member shall not discriminate:

- between "like" products from different trading partners (giving them equally "most favoured-nation" or MFN status; GATT Article I); and
- between its own and "like" foreign products (giving them "national treatment"; GATT Article III).

This principle is also enshrined in provisions contained in other WTO Agreements, such as in Article 2.1 of the TBT Agreement, Article 2.3 of the SPS Agreement, Articles 3 and 4 of the TRIPS Agreement and Article II of GATS.

“LIKE” PRODUCTS

If trade-related environmental or health measures are to be consistent with WTO rules, they cannot result in discrimination between "like" products. Therefore, the principle of non-discrimination raises two key questions: Are products at issue "like" products? If so, is the foreign product treated less favourably than the domestic product or than another foreign product?

To take an example from public health protection, in the EC – Asbestos case, which dealt with measures (prohibiting the import, sale and use of asbestos) to address the dangers posed to human health from an exposure to asbestos and products containing asbestos, Canada – the complainant – had to prove that products (containing asbestos) imported from Canada to France were "like" French domestic substitutes (PVA, cellulose and glass fibres) and that the French regulation accorded imported products "less favourable treatment" than "like" domestic products.

In fact, in this case, the panel found that domestic and imported products were "like". However, the Appellate Body modified this finding and explained that several criteria should have been taken into account by the panel in the determination of "likeness" in this specific case, including not only the "competitive relationship" between products, but also the "risk" to health posed by the two products, due to their different physical characteristics.
In WTO case law, four main, non-exhaustive, criteria have been used in determining whether products are "like":

(i) the **physical characteristics** of the products;

(ii) the extent to which the products are capable of serving the same or similar **end-uses**;

(iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions, in order to satisfy a particular want or demand (**consumers' tastes and habits**); and

(iv) the international **tariff classification** of the products at issue.

It is important to bear in mind that, as recently explained by the Appellate Body, ultimately, the examination of the above "likeness" criteria is done in order to determine the nature and extent of the "competitive relationship" of the products at issue.

If two products are found to be "like", the question remains whether imported products are treated in a less favourable manner than domestic products. In the **US - Gasoline** case, for instance, the panel ruled that a US measure aimed at regulating the composition and emission effects of gasoline in order to reduce air pollution in the United States violated Article III:4 of the GATT: imported gasoline was effectively prevented from benefiting from sales conditions as favourable as domestic gasoline; therefore, the panel found that imported gasoline was treated less favourably than domestic gasoline.

**A RELATED QUESTION: THE ISSUE OF PROCESSES AND PRODUCTION METHODS (PPMs)**

An important question in relation to environmental measures is whether, under WTO law, products may be treated differently because of the way in which they have been produced. In other words, whether in determining if two products are "like", it is relevant to consider the **processes and production methods (PPMs)** used to produce them. The WTO jurisprudence indicates that the fact that different PPMs were used in the manufacture of two products do not, per se, render them "unlike". In the WTO dispute **US - Tuna II**, although dealing with a TBT not a GATT claim, the US labelling scheme established the conditions for the use of the dolphin-safe label in tuna products based on the different PPMs (i.e. the fishing technique) used to harvest this fish. Nevertheless, despite the fact that different PPMs were used to harvest the fish, for the purpose of assessing whether the measure had discriminated against tuna products imported from Mexico, the panel considered all tuna products "like". As previously mentioned, a determination of "likeness" must be based on the competitive relationship between and among products, rather than on the regulatory objectives of the

---

2 In **Philippines - Distilled Spirits** and **US - Clove Cigarettes**, with respect to "likeness" under GATT and the TBT Agreement.

3 See Module 5 for background information on PPMs.

4 For a complete summary of the US - Tuna II dispute, see section [II.E], below.
measure. This analysis should be also always carried out on a case-by-case basis, as pointed out by the Appellate Body in EC – Asbestos.\(^5\)

Another important question is whether WTO rules cover measures based on \textit{non-product related PPMs (nprPPMs)}, i.e. those that do not leave a trace in the final product. In other words, when nprPPMs are used, the characteristics of the final products being compared are not affected even though they were produced using different PPMs. The \textit{US - Shrimp} dispute provides an interesting example of a measure that provided for different treatment to products on the basis of nprPPMs but which was nevertheless provisionally justifiable under Article XX(g) of the GATT. The dispute concerned the manner in which fishermen harvested shrimp. Certain production methods, involving the use of fishing nets and shrimp trawl vessels, resulted in a high rate of incidental killing of sea turtles, as turtles can be trapped and drowned by the nets used to harvest shrimp. The United States aimed to reduce the killing of turtles by imposing an import ban on shrimp harvested by methods which may lead to the incidental killing of sea turtles. In order to avoid the ban, exporters were required to demonstrate the use of TEDs (turtle excluder devices which limit the incidental catch of endangered sea turtles), or similar equipment, when harvesting shrimp. However, the various fishing techniques to catch shrimp did not have any traceable effect on the characteristics of the harvested shrimp, the final product (i.e. they were nprPPMs). The Appellate Body viewed the United States’ measure as directly connected to the policy of conservation of sea turtles and the measure was thus considered to be provisionally justified under Article XX(g).\(^6\)

More recently in \textit{US – Tuna II}, although the Appellate Body ultimately considered that the US dolphin-safe label was discriminatory and therefore inconsistent with Article 2.1 of the TBT Agreement, it did not base its conclusion on the fact that the measure distinguished among tuna products on the basis of the different PPMs used to harvest the tuna. Moreover, protecting dolphins by discouraging the use of certain fishing techniques (PPMs) that are harmful to dolphins (through the use of a dolphin-safe label) was considered by the panel to be a legitimate regulatory objective.

\textbf{I.B.2. THE PROHIBITION OF QUANTITATIVE RESTRICTIONS}

Certain environmental measures (such as bans) may also violate another key discipline of the GATT, which is contained in Article XI and provides, among other things, that restrictions on the importation or sale of products from other WTO Members are prohibited. In the \textit{US – Shrimp} case, already mentioned above, the US embargo was found to be inconsistent with Article XI: the United States had prohibited the import of shrimp originating from non-certified countries, i.e. countries that did not use a technology known as TEDs. More recently, in the \textit{Brazil – Retreaded Tyres} dispute, Brazil’s import ban on retreaded tyres was also found to be inconsistent with Article XI.

This does not mean, however, that WTO Members are barred from restricting imports (or exports) on the basis of environmental concerns. For instance, in the above-mentioned \textit{Retreaded Tyres} dispute, Brazil successfully proved that the ban on these products, although a violation of Article XI, was nevertheless \textit{necessary} to protect human, animal or plant life or health, against the risks arising from the accumulation of waste tyres under

\(^5\) For a complete summary of the EC - Asbestos dispute, see section [II.A], below.

\(^6\) For a complete summary of the US - Shrimp dispute, see section [II.B], below.
GATT Article XX(b). GATT Article XX, explained in more detail immediately below, contains the main exceptions to the GATT obligations.

**EXERCISES**

1. Please briefly explain what the principle of non-discrimination requires in relation to domestic and imported products.

2. In WTO case law, four criteria have been used in determining whether products are “like”. What are these criteria?
I.C. GATT ARTICLE XX GENERAL EXCEPTIONS

IN BRIEF

GATT Article XX on General Exceptions lays down a number of specific instances in which WTO Members may be exempted from GATT rules. Two exceptions are of particular relevance to the protection of the environment: those contained in paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO Members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)).

GATT Article XX on General Exceptions consists of two cumulative requirements. For a GATT-inconsistent environmental measure to be justified under Article XX, a Member must perform a two-tier analysis proving:

First, that its measure falls under at least one of the exceptions (e.g. paragraphs (b) or (g), two of the ten exceptions under Article XX) and,

Second, that the measure satisfies the requirements of the introductory paragraph (the “chapeau” of Article XX), i.e. that it is not applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”, and is not "a disguised restriction on international trade”.

I.C.1. ENVIRONMENTAL POLICIES COVERED BY ARTICLE XX

WTO Members’ autonomy to determine their own environmental objectives has been reaffirmed on a number of occasions (e.g. in US – Gasoline, Brazil – Retreaded Tyres). The Appellate Body also noted, in the US – Shrimp case, that conditioning market access on whether exporting Members comply with a policy unilaterally prescribed by the importing Member was a common aspect of measures falling within the scope of one or other of the exceptions of Article XX.

In past cases, a number of public health and environmental policies have been found to fall within the realm of these two exceptions:

- policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing risks to human health posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tyres (under Article XX(b)); and

- policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air (under Article XX(g)).

Interestingly, the phrase “exhaustible natural resources” under Article XX(g) has been interpreted broadly to include not only “mineral” or “non-living” resources but also living species which may be susceptible to depletion, such as sea turtles. To support this interpretation, the Appellate Body noted, in the US – Shrimp case, that modern international conventions and declarations made frequent references to natural resources as embracing both living and non-living resources. Moreover, in order to demonstrate the exhaustible character of
sea turtles, the Appellate Body noted that sea turtles were included in Appendix 1 on species threatened with extinction of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

Also in the US – Shrimp case, the Appellate Body accepted as a policy covered by Article XX(g), one that applied not only to turtles within the United States waters but also to those living beyond its national boundaries. The Appellate Body found that there was a sufficient nexus between the migratory and endangered marine populations at issue and the United States, for purposes of Article XX(g).

Moreover, the panel in China – Raw Materials found that "a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development".

I.C.2. DEGREE OF CONNECTION BETWEEN THE MEANS AND THE ENVIRONMENTAL POLICY OBJECTIVE

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

- *necessary* for the protection of human, animal or plant life or health (paragraph (b)); or
- *relating to* the conservation of exhaustible natural resources (paragraph (g)).

To determine whether a measure is "necessary" to protect human, animal or plant life or health under Article XX(b), a process of weighing and balancing a series of factors has been used by the Appellate Body. This process is commonly known as the "necessity" analysis.

First, a panel must weigh and balance certain factors that include: (i) the *importance* of the common interests or values protected by the measure; (ii) the *contribution* made by the environmental measure to the policy objective, and (iii) the *impact* of the measure on international trade.

If the above 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.
GATT ARTICLE XX(B) - NECESSARY FOR THE PROTECTION OF HUMAN, ANIMAL OR PLANT LIFE OR HEALTH

The Appellate Body in Korea - Various Measures on Beef found that when assessing a measure claimed to be "necessary", account may be taken of the relative importance of the common interests or values that the measure is intended to protect. The Appellate Body added, "[t]he more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument". Regarding the contribution aspect of the necessity analysis required by Article XX(b), in Korea - Various Measures on Beef, the Appellate Body observed that the greater the contribution of the measure to the realization of the end pursued, the more easily that measure might be considered to be "necessary". This was further clarified in Brazil - Retreaded Tyres, where the Appellate Body stated that "[s]uch a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".

Moreover, the analysis of the contribution of a measure does not necessarily require the quantification of such contribution. As clarified by the Appellate Body in Brazil – Retreaded Tyres, "[t]he selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought"; and it ultimately depends "on the nature, quantity, and quality of evidence existing at the time the analysis is made". In relation to the assessment of the impact of the measure, the Appellate Body in Korea - Various Measures on Beef has clarified 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" (emphasis added). In Brazil - Retreaded Tyres, the Appellate Body also observed that "when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, 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".

As mentioned before, if the "weighing and balancing" of the various factors taken into consideration in a necessity analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible less-trade restrictive alternatives. A "reasonably available" alternative measure is one that preserves for the responding Member its right to achieve its desired level of protection with respect to the health or environmental objective pursued. Thus, 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. In the Brazil – Retreaded Tyres case, for instance, the Appellate Body found that the proposed alternatives, which were mostly remedial in nature (i.e. waste management and disposal), were not real alternatives to the import ban, which could prevent the accumulation of tyres. Furthermore, the Appellate Body also recognized that certain complex environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. Finally, the Appellate Body pointed out that the results obtained from certain actions – for instance, measures adopted in order to address global warming and climate change – can only be evaluated with the benefit of time.

GATT ARTICLE XX(G) - RELATING TO THE CONSERVATION OF EXHAUSTIBLE NATURAL RESOURCES

For a measure to be "relating" to the conservation of natural resources, a substantial relationship between the measure and the conservation of exhaustible natural resources needs to be established. In the words of the Appellate Body, a Member has to establish that the means (i.e. the chosen measure) are "reasonably related" to the ends (i.e. the stated policy goal of conservation of exhaustible natural resources). Moreover, in order to
be justified under Article XX(g), a measure affecting imports must be applied “in conjunction with restrictions on domestic production or consumption” (the even-handedness requirement).

In the US – Gasoline case, the United States had adopted a measure regulating the composition and emission effects of gasoline in order to reduce air pollution in the United States. The Appellate Body found that the chosen measure was "primarily aimed at" the policy goal of conservation of clean air in the United States and thus fell within the scope of paragraph (g) of Article XX. As far as the second requirement of paragraph (g) is concerned, the Appellate Body ruled that the measure met the “even-handedness” requirement, as it affected both imported and domestic products.

In the US – Shrimp case, the Appellate Body considered that the general structure and design of the measure in question were “fairly narrowly focused” and that it was not a blanket prohibition of the importation of shrimp imposed without regard to the consequences to sea turtles; thus, the Appellate Body concluded that the regulation in question was a measure “relating to” the conservation of an exhaustible natural resource within the meaning of Article XX(g). The Appellate Body also found that the measure in question had been made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).

RECALL

- WTO Members’ autonomy to determine their own environmental objectives.
- In order for a trade-related environmental measure to be eligible for an exception under Article XX, paragraphs (b) and (g), a Member has to establish that the measure is necessary for the protection of human, animal or plant life or health (paragraph (b)), or that it relates to the conservation of exhaustible natural resources (paragraph (g)).

I.C.3. ARTICLE XX CHAPEAU: THE MANNER IN WHICH ENVIRONMENTAL MEASURES ARE APPLIED

The introductory clause of Article XX (the "chapeau") emphasizes the manner in which the measure in question is applied. Specifically, the application of the measure must not constitute a “means of arbitrary or unjustifiable discrimination” or a "disguised restriction on international trade”.

The chapeau requires the measure not to constitute an abuse or misuse of the provisional justification made available under one of the paragraphs of Article XX, that is to say, to be applied in good faith. In Brazil - Retreaded Tyres, the Appellate Body recalled that the chapeau serves to ensure that Members’ right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, not as a means to circumvent one Member’s obligations towards other WTO Members. In other words, Article XX embodies the recognition by WTO Members of the need to maintain a balance between the right of a Member to invoke an exception and the rights of the other Members under the GATT.

WTO jurisprudence has highlighted some of the circumstances which may help to demonstrate that the measure is applied in accordance with the chapeau. These include whether:

- The lack of serious efforts into international cooperative arrangements constitutes unjustifiable discrimination;
- The flexibility of the measure allows it to take into account different situations in different countries as well as;
- The rationale put forward to explain the existence of discrimination bears a connection to the stated objective of the measure at issue;
- The design of the measure reveals a disguised restriction to international trade.

These circumstances are explained in more detail below.

In the US – Gasoline decision, the Appellate Body considered that the United States had not sufficiently explored the possibility of entering into cooperative arrangements with affected countries in order to mitigate the administrative problems raised by the United States in their justification of the discriminatory treatment. Moreover, in the US – Shrimp case, the fact that the United States had “treated WTO Members differently” by adopting a cooperative approach regarding the protection of sea turtles with some Members but not with others, also showed that the measure was applied in a manner that discriminated among WTO Members in an unjustifiable manner. At the compliance stage (i.e. under Article 21.5 of the DSU), in US – Shrimp (Article 21.5), the Appellate Body found that, in view of the serious, good faith efforts, made by the United States to negotiate an international agreement on the protection of sea turtles with others, including with the complainant, the measure was no longer applied in a manner that constitutes a means of unjustifiable or arbitrary discrimination.

Further, in the US – Shrimp case, the Appellate Body was of the view that rigidity and inflexibility in the application of the measure (e.g. by overlooking the conditions in other countries) constituted unjustifiable discrimination. It was deemed not acceptable that a Member would require another Member to adopt essentially the same regulatory programme without taking into consideration that conditions in other Members could be different and that the policy solutions might be ill-adapted to their particular conditions. In order to implement the panel and Appellate Body recommendations, the United States revised its measure and conditioned market access on the adoption of a programme “comparable in effectiveness” to that of the United States. In this regard, the Appellate Body, in US – Shrimp (Article 21.5), stated that there was an important difference between, on the one hand, conditioning market access on the adoption of “essentially the same programme and, on the other, conditioning market access on the adoption of a programme comparable in effectiveness. The Appellate Body considered that the latter was acceptable as it would give “sufficient latitude” to the exporting Member to adopt a programme that could achieve the level of effectiveness required and which would be “suitable to the specific conditions prevailing in its territory.

Additionally, finding support in its previous reports in US – Gasoline, US – Shrimp, and US – Shrimp (Article 21.5 – Malaysia), the Appellate Body concluded in Brazil – Retreaded Tyres that analysing whether discrimination is arbitrary or unjustifiable under the chapeau of Article XX, usually involves an analysis that relates primarily to the cause or the rationale put forward to explain the existence of that discrimination. Accordingly, it considered difficult to understand how discrimination may 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. Thus, the Appellate Body considered, in that particular case, that the fact that imports of used tyres from Europe and retreaded tyres from MERCOSUR countries were allowed while imports of retreaded tyres from Europe were prohibited, constituted unjustified discrimination. Moreover, it found that the fact that those exceptions were imposed by the rulings of domestic and international tribunals was not an acceptable rationale for the discrimination, because such fact bore no relation to the legitimate objective pursued by the import ban on retreaded tyres, and even went against such objective.

Finally, the Appellate Body in US – Gasoline noted that the terms "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction on international trade" should be read side-by-side, because they
impart meaning to one another. In the Appellate Body's view, "disguised restriction" includes disguised *discrimination* in international trade. However, concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction" under the chapeau of Article XX. In sum, an environmental measure must not constitute a "disguised restriction on international trade", i.e. must not result in protectionism. In past cases, it was found that the protective application of a measure could most often be discerned from its *"design, architecture and revealing structure"*. For instance, in *US – Shrimp (Article 21.5)*, the fact that the revised measure allowed exporting countries to apply programmes not based on the mandatory use of TEDs, and offered technical assistance to develop the use of TEDs in third countries, showed that the measure was not applied so as to constitute a disguised restriction on international trade. More recently, the panel in *Brazil – Retreaded Tyres* found that the existence of a "disguised restriction on international trade" might be derived from a variety of situations where a restriction on international trade, arising in the application of a measure provisionally justified under a specific paragraph of Article XX, would lead to that exception being abused or illegitimately used.

![Figure 1: Analysis under article XX of GATT](image-url)
RECALL

In sum, the analysis under GATT Article XX in relation to environmental measures is two-tiered:

- Under the first step, it is necessary to determine whether the measure in question falls within paragraph (b) as a measure aimed at protecting human and animal or plant life and health, or paragraph (g) as a measure intended to preserve exhaustible natural resources. This includes assessing the degree of connection between the measure and its stated objective, to determine whether the measure is “necessary” within the meaning of paragraph (b) or “relating to” according to paragraph (g). This first step also involves an evaluation of whether there are less trade restrictive alternatives that are reasonably available and that equally achieve the stated objective of the measure.

- Under the second step, it must be assessed whether the measure is not applied in a manner that constitutes “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail, or a “disguised restriction on international trade”.

EXERCISES

3. How does the two-tiered analysis to determine whether a measure is justifiable under GATT Article XX apply in a hypothetical case of an import ban on pesticides which pollute groundwater aquifers?

4. Please indicate whether each one of the following trade-related measures could be more appropriately covered by either paragraph (b) or paragraph (g), or both paragraphs, of Article XX (for example, a measure prohibiting the importation of carcinogenic products could be more adequately covered by paragraph (b) of Article XX; a measure imposing an import ban on portable heat radiators that generate considerable air pollution would be more appropriately covered by paragraph (g) of Article XX):

   (i) A measure that restricts the marketing of toys made with lead-containing paint;

   (ii) A measure that prohibits the importation of tuna that is caught using a fishing technique that is harmful to dolphins;

   (iii) A measure that establishes quantitative restrictions on the importation of pesticides that pollute groundwater reservoirs;

   (iv) A measure that requires that imported products bearing a label informing the carbon emissions generated during their fabrication.

   (v) A measure that bans the imports of batteries on the grounds that disposing of these products when they become waste is particularly complicated.

5. Please describe the process of “weighing and balancing” to determine whether a measure is “necessary” to protect human, animal or plant life or health under Article XX(b) of the GATT 1994.

6. What is the meaning of the term “relating” in GATT Article XX(g)?

7. How was a measure considered as constituting a means of arbitrary or unjustifiable discrimination in the US – Shrimp case?
I.D. OTHER RELEVANT WTO TEXTS

IN BRIEF

The interface between trade and environment is also addressed in a number of different WTO Agreements and Decisions. These include the General Agreement on Trade in Services (GATS), the Agreement on Technical Barriers to Trade (TBT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), the Agreement on Subsidies and Countervailing Measures, the Agreement on Agriculture, the April 1994 Marrakesh Ministerial Decision on Trade and Environment, and the December 1993 Marrakesh Ministerial Decision on Trade in Services and the Environment.

I.D.1. THE GENERAL AGREEMENT ON TRADE IN SERVICES

The General Agreement on Trade in Services (GATS) contains a “general exceptions” clause, Article XIV, similar to GATT Article XX. The GATS Article starts with an introduction (“chapeau”) that is almost identical to that of GATT Article XX.

Addressing environmental concerns, paragraph (b) allows WTO Members to adopt policy measures that would normally be inconsistent with GATS if this is “necessary to protect human, animal or plant life or health” (identical to GATT Article XX(b)). As under GATT, this must not result in arbitrary or unjustifiable discrimination and must not constitute a disguised restriction on trade in services.

I.D.2. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT)

The TBT Agreement and its relevance for measures intended to protect the environment, such as those providing for environmental labels, are discussed in further detail in Module 5 of this course. It suffices here to recall that the TBT Agreement seeks to ensure that product specifications, whether mandatory or voluntary (known respectively as “technical regulations” and “standards”), as well as procedures to assess compliance with those specifications (known as “conformity assessment procedures”), are not discriminatory and do not create unnecessary obstacles to trade.

The sixth recital of the preamble to the TBT Agreement recognizes that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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.
In line with the sixth recital, these same legitimate objectives, including the protection of the environment, have been enshrined in Article 2.2 of the TBT Agreement, which states:

"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products."

Among the TBT Agreement’s important principles applicable to TBT measures taken for the protection of the environment are:

- non-discrimination in the preparation, adoption and application of technical regulations, standards, and conformity assessment procedures;
- avoiding unnecessary obstacles to trade;
- harmonizing specifications and procedures with relevant international standards as far as possible;
- the transparency of TBT measures, through governments notifying them to the WTO Secretariat and establishing national enquiry points.

I.D.3. THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (SPS)

The SPS Agreement deals with food safety, and human, animal and plant health and safety regulations. It recognizes Members’ rights to adopt SPS measures but stipulates that they must be based on a risk assessment, should not create unnecessary obstacles to trade (should be applied only to the extent necessary to protect human, animal or plant life or health), and should not arbitrarily or unjustifiably discriminate between Members where similar conditions prevail. The Agreement encourages Members to adopt their SPS measures to the areas (regions, countries or parts of countries) that supply their imports.

The SPS Agreement complements the TBT Agreement. It allows Members to adopt SPS measures for environmental purposes, but subject to such requirements as risk assessment, non-discrimination and transparency.

Previous sections of this course (see subsection I.C.1 of Module 5) describe the operation of the SPS Committee and the notifications submitted by the Members, and specific trade concerns that are raised in relation to measures establishing environmental requirements that are covered by the SPS Agreement.

---

7 References to the protection of the environment also appear in other provisions of the TBT Agreement, such as Articles 2.10, 5.4, 5.7 and Annex 3(L).
I.D.4. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)\(^8\)

The Doha Ministerial Declaration (paragraph 32(ii)) instructs the CTE, in pursuing work on all agenda items within its current terms of reference, to give particular attention to three items, including the relevant provisions of the TRIPS Agreement.

*Environmental-related provisions: optional exceptions to patentability*

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains one explicit reference to the protection of the *environment*, which is contained in the provisions of the Agreement dealing with the possibility Members have to exclude certain inventions from patentability. TRIPS Article 27.2 states that "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* (public order) or morality, including to protect (...) *human, animal or plant life or health* or to avoid serious prejudice to the *environment* (...)." The use of this exception is subject to the condition that the "commercial exploitation" of the invention must be prevented and this prevention must be necessary to, for instance, avoid "serious prejudice to the environment". Thus, this provision does not allow Members to exclude from patentability inventions simply because their exploitation is prohibited by law. In other words, inventions cannot be excluded from patentability merely because, for example, they have not yet received marketing approval from health regulatory authorities under the law. Some countries have availed themselves of such exceptions. For example, in some jurisdictions, either on moral or public order grounds, patents are not available in respect of process for the cloning of human beings or for modifying the germ line identity of humans or animals.

There is also another environment-related optional exclusion from patentability allowed under the TRIPS Agreement. Under Article 27.3(b), Members are not required to provide patent protection for inventions of 1) plants and animals and 2) essentially biological processes for their production. They are, however, required to provide patent protection for 1) micro-organisms and 2) non-biological and microbiological processes for the production of plants and animals. Where Members do not provide patent protection for new plant varieties, they are required to protect plant varieties through an effective *sui generis* system (i.e. a system created especially for this purpose). Members also have the option of using a combination of both systems of protection, namely patents and a *sui generis* system. There is no further explicit guidance in the TRIPS Agreement as to what is to be considered an effective *sui generis* system.\(^9\) Article 27.3(b) also provides for this provision to be reviewed four years after the entry into force of the WTO Agreement. The TRIPS Council accordingly began a review of Article 27.3(b) in 1999.\(^10\)

---


\(^9\) The main existing *sui generis* system for the protection of plant varieties at the international level is that contained in the convention establishing, in 1961, the International Union for the Protection of New Plant Varieties (the UPOV Convention). Many WTO Members have chosen to meet their TRIPS obligations in this area by joining UPOV upon adopting systems based on it. However, it is generally understood that there are other ways in which the TRIPS option of "effective *sui generis* system" can be met and there is no presumption that Members should join UPOV.

\(^10\) The Secretariat has prepared a summary of the points made and issues discussed under the review of Article 27.3(b), which is available in IP/C/W/369/Rev.1.
There have been discussions on the relationship between, on the one hand, the TRIPS Agreement and, on the other hand, the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore. The work on these matters was formalised in the 2001 Doha Declaration which mandated the TRIPS Council to work on them. Work in the WTO on these issues, especially on the relationship between the TRIPS Agreement and the Convention on Biological Diversity, has also been undertaken pursuant to the provisions of the Doha Ministerial Declaration on the so-called "outstanding implementation issues" identified by developing countries.\(^{11}\)

### I.D.5. THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM)

The SCM Agreement, which applies to non-agricultural products, is designed to regulate the use of subsidies. Under the Agreement, certain subsidies referred to as "non-actionable" (i.e., protected from countervailing-duty or dispute-settlement actions by other WTO Members) are generally allowed. Amongst the non-actionable subsidies that had been provided for under Article 8 were subsidies used to promote the adaptation of existing facilities to new environmental requirements (Article 8.2(c)). However, this provision expired in its entirety at the end of 1999. It was intended to allow Members to capture "positive environmental externalities" when they arose.

### I.D.6. THE AGREEMENT ON AGRICULTURE

Adopted during the 1986–94 Uruguay Round, the WTO Agriculture Agreement seeks to reform trade in agricultural products, and provides a basis for market-oriented policies. In its preamble, the Agreement reiterates Members’ commitment to reform agriculture in a manner that protects the environment.

Under the Agreement, domestic support measures with minimal impact on trade (known as “green box” policies) are allowed and are excluded from reduction commitments – they are listed in Annex 2 of the Agreement. Among them are expenditures under environmental programmes, provided that they meet certain conditions. Again, the exemption enables governments to capture "positive environmental externalities".

### I.D.7. RELEVANT DECISIONS

Two ministerial decisions addressing environmental issues were adopted at the end of the Uruguay Round. A ministerial Decision on Trade and Environment, taken in April 1994, created the Committee on Trade and Environment (CTE) with the aim of making international trade and environmental policies support each other.

\(^{11}\) The Secretariat has prepared two summary notes of the points made and issues discussed: 1) on relationship between the TRIPS Agreement and the CBD, available in IP/C/W/368/Rev.1; and 2) on the protection of traditional knowledge and folklore, available in IP/C/W/370/Rev.1.
The decision contains the work programme of the CTE. This Decision is discussed in more details in other Modules of this course, in particular Module 2.

Ministers also adopted a Decision on Trade in Services and the Environment. It instructs the CTE to examine and report on the relationship between trade in services and the environment, including the issue of sustainable development, in order to determine if any modifications of GATS Article XIV are required. The CTE has taken up this issue as part of its work programme. Module 4 of this course discusses the environmental services negotiations in more detail.

EXERCISES

8. Please establish the argument that a technical regulation, which requires certain electronic products to perform at certain energy efficiency levels, would be acceptable under one or more WTO agreements, even if this measure may have adverse impacts on trade.
II. ENVIRONMENT-RELATED DISPUTES IN GATT/WTO

IN BRIEF

Since the entry into force of the WTO in 1995, various panel and Appellate Body reports have examined environmental or health-related measures. Five disputes are particularly relevant in this respect: the US – Gasoline case (clean air), the US – Shrimp case (turtles), the EC – Asbestos case (human life and health), the Brazil – Retreaded Tyres case (human, animal and plant life and health), and the US – Tuna II case (dolphins).

II.A. EC – ASBESTOS

IN BRIEF

This case was brought by Canada against the European Communities (European Communities – Measures Affecting Asbestos and Asbestos-containing Products, WTO dispute DS135). The decisions rejected Canada's challenge to France's import ban on asbestos and asbestos-containing products, reinforcing the view that the WTO Agreements support Members' ability to protect human health and safety at the level of protection they deem appropriate. The Appellate Body and panel reports were adopted in 2001.

II.A.1. INTRODUCTION

In 1998, Canada, among the world's largest exporters of asbestos, challenged the French ban on importation of asbestos and products containing asbestos fibres. The French Government imposed the ban in 1997 in response to concerns about the serious consequences for human health caused by exposure to asbestos fibres.

Asbestos is the name of a group of highly fibrous minerals with separable, long and thin fibres. Chrysotile asbestos is generally considered to be a highly toxic material, exposure to which poses significant threats to human health (such as asbestosis, lung cancer and mesothelioma). However, due to certain qualities (such as resistance to very high temperature), Chrysotile asbestos has been widely used in various industrial sectors.

Canada claimed that the ban violated France's WTO obligations. Although Canada did not dispute the health risks associated with exposure to Chrysotile asbestos, it argued that a distinction should be made between Chrysotile fibres and Chrysotile asbestos secured within a cement matrix. Canada challenged the French Decree insofar as it prohibited, among other things, the use of cement-based products containing Chrysotile asbestos fibers. Canada argued that the Decree altered the conditions of competition between, on the one hand, substitute fibres of French origin and, on the other hand, Chrysotile fibres from Canada. Accordingly, Canada submitted that the Decree breached France's national treatment obligations under Article III of the GATT, because it imposed less favourable treatment on imported products containing asbestos as compared to "like" domestic products containing substitutes for asbestos. But the European Communities (on behalf of France) argued that France wanted to halt the spread of asbestos-related health risks, particularly for those exposed occasionally and very often unwittingly to asbestos when working with products containing asbestos, and that a ban on products containing asbestos was the only way to achieve its chosen level of
protection. The EC requested the panel to confirm that the French Decree was compatible with GATT Article III:4, or alternatively, was justified to protect human health within the meaning of Article XX(b).

II.A.2. PANEL

The panel found that France's measures violated Article III:4 of the GATT on the basis that France was in effect discriminating between supposedly "like products". The panel was persuaded that cement-based products that contained asbestos fibres, and cement-based products that didn't, were "like products" and thus comparable under Article III:4. In coming to this conclusion, the panel relied inter alia on the end-uses of the respective products, noting that they were the same, but excluded from its consideration the health risks associated with asbestos fibres. However, the panel then agreed with the EC that the measure was justified under Article XX(b) because it was necessary to protect human life and health.

II.A.3. APPELLATE BODY

In response, Canada appealed the panel's decision. The Appellate Body essentially upheld panel's ruling in favour of the EC, but modified the reasoning in a number of important ways. First, the Appellate Body considered that the very serious health risks inherent in products containing asbestos should have been taken into consideration by the panel when it assessed "like products" under Article III:4. The key is assessing the competitive relationship between allegedly "like products". The Appellate Body considered that the carcinogenic nature of asbestos fibres meant that a product containing asbestos fibres has quite different physical properties to a product that does not. Moreover, the Appellate Body was persuaded that the health risks associated with products containing asbestos fibres would influence consumers' behaviour in relation to those products. Thus, the products compared were not "like" and the EC had consequently not breached Article III:4.

The Appellate Body then examined the arguments made with respect to Article XX, and reaffirmed the panel's finding that most scientific opinions agreed that asbestos represents a serious risk to human health. The Appellate Body considered that the objective pursued by France, namely the preservation of human life or health, is "both vital and important in the highest degree" and consequently it was easier for the EC to prove the necessity of the asbestos ban. The Appellate Body also confirmed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation, and upheld the panel's finding that there was no reasonable alternative available to France (e.g. the controlled use of asbestos products as suggested by Canada) to achieve its objective.

II.B. US – SHRIMP

IN BRIEF

This case was brought by India, Malaysia, Pakistan and Thailand against the US (WTO dispute DS58). The measure at issue was an import ban imposed by the United States on shrimp and shrimp products. According to the United States, this measure was related to the conservation of sea turtles that the United States considered as exhaustible natural resources. The panel and Appellate Body reports were adopted in 1998 and the compliance reports in 2001 (the compliance case was only brought by Malaysia).
II.B.1. INTRODUCTION

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products. The protection of sea turtles was at the heart of the ban.

A US regulation of 1973 listed, as endangered or threatened, five species of sea turtles that occur in US waters, and prohibited their "take" within the US, its territorial sea and the high seas. "Take" means the harassment, hunting, capture, killing, or attempting to do any of these acts to the animals.

Sea turtles live around the world in subtropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and nesting grounds. In 1998, all species of sea turtles were included in Appendix I of the 1973 Convention on International Trade in Endangered Species (CITES). Sea turtles have been adversely affected by human activity, either directly (their meat, shells and eggs have been exploited), or indirectly (incidental capture in fisheries, destruction of their habitats, pollution of the oceans). In particular, shrimp may be harvested with commercial fishing technologies which adversely affect sea turtles.

To reduce the number of incidental killing of sea turtles by trawlers, under this regulation, the US required that US shrimp trawlers use "turtle excluder devices" (TEDs) in their nets when fishing in waters where there is a significant likelihood of encountering sea turtles. A TED is a trap door installed inside a trawling net that is designed to allow shrimp to pass to the back of the net while directing sea turtles and other unintentionally caught large objects out of the net.

In 1989, in an attempt to prevent the incidental killing of sea turtles by shrimp trawlers elsewhere in the world, the US prohibited the imports of shrimp and shrimp products unless the exporting country was certified that it had adopted essentially the same policy as the one applied to US shrimp trawlers, i.e. the use of TEDs.

II.B.2. 1998 DECISION

India, Malaysia, Pakistan and Thailand took the case to the WTO. In a 1998 WTO panel, the US ban was found to be inconsistent with GATT Article XI (which prohibits the use of import restrictions) and not justified under the general exceptions of Article XX (including those for certain environmental reasons. The Appellate Body upheld the panel's finding that although the US measure was found to serve an environmental objective that was recognized as legitimate under paragraph (g) of Article XX (which concerns the conservation of exhaustible natural resources), it did not fulfill the requirements of the chapeau of Article XX.

The Appellate Body interpreted the phrase "exhaustible natural resources" under Article XX(g) broadly to include not only mineral resources but also living species which may be susceptible of depletion. Moreover, the Appellate Body accepted as a policy covered by paragraph (g) of Article XX, one that applied not only to turtles within the US waters but also to those living beyond its national boundaries, provided that a "sufficient nexus" existed between migratory and endangered sea turtles and the United States.

In reaching its conclusion that the US measure did not fulfill the requirements of the chapeau of Article XX, the Appellate Body relied on several elements. The implementation of the measure lacked flexibility: it essentially required shrimp trawlers in exporting Members to use TEDs (and be certified) if they wished to export to the US. Moreover, the US provided countries in the western hemisphere – mainly in the Caribbean – assistance and longer transition periods for their fishermen to start using TEDs. It did not give the same treatment to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.
The Appellate Body also held that a multilateral approach was preferable to unilateral trade measures to address environmental problems reaching beyond national boundaries: the US should have engaged in negotiations on the protection and conservation of sea turtles with all exporting Members, before enforcing the import prohibition.

Therefore, the US measure was found inconsistent with GATT Article XX, not because it sought to protect the environment (which was considered a legitimate basis for the measure) but because of the way in which the US applied its measure.

Following this ruling, the United States revised its measure relating to the protection of sea turtles and set forth new criteria for the certification of shrimp exporters.

II.B.3. COMPLIANCE STAGE

In 2000, Malaysia, once again, took legal action against the US since it was not satisfied with the corrective measures that the US had taken to implement the findings of the Appellate Body. According to Malaysia, the application of the new US measure resulted in arbitrary or unjustifiable discrimination because it still lacked flexibility (the US continued to "unilaterally" impose its domestic standards on exporters) and because the US had not negotiated and concluded an international agreement on the protection and conservation of sea turtles.

The panel and the Appellate Body disagreed with Malaysia. They found that the revised measure was now applied in a manner that indeed met the requirements of Article XX and thus complied with the ruling of the Appellate Body. The US won the case because the revised measure was no longer applied in a manner that constituted a means of arbitrary discrimination. First, the US demonstrated that it had made serious "good faith" efforts to negotiate an international agreement for the protection of sea turtles with the parties to the dispute. The Appellate Body pointed out that all that was required of the US was to provide all exporting countries "similar opportunities to negotiate", and not necessarily to conclude, an international agreement. Second, the new measure allowed "sufficient flexibility" by requiring that other Members' programmes simply be "comparable in effectiveness" to the US programme, as opposed to the previous standard that they be "essentially the same", i.e. require the use of TEDs.

II.C. US – GASOLINE

IN BRIEF

This case was brought by Venezuela and Brazil against the US (United States – Standards for Reformulated and Conventional Gasoline, WTO dispute DS2). This dispute concerned certain requirements imposed by the United States for the marketing of gasoline. However, domestic and foreign refiners of gasoline were subject to different obligations. The United States sought to justify its measure under Article XX of the GATT 1994. The panel and the Appellate Body reports were adopted in 1996.
II.C.1. INTRODUCTION

Following a 1990 amendment to the Clean Air Act, the US Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the US. From 1 January 1995 (coincidentally, also the date that the WTO came into being), the Gasoline Rule permitted only gasoline of a specified cleanliness ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold.

The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. It required any domestic refiner that operated for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990.

The Environmental Protection Agency also established a statutory baseline, intended to reflect average US 1990 gasoline quality. The statutory baseline was assigned to those refiners who did not operate for at least six months in 1990, and to importers and blenders of gasoline. Compliance with the baselines was measured on an average annual basis.

In 1995, Venezuela and Brazil initiated disputes against the United States challenging the consistency of the Clean Air Act of 1990 ("CAA") with WTO rules. The two countries argued that the CAA discriminated against foreign gasoline producers by applying stricter standards to imported gasoline than domestically refined gasoline. Although this case dealt primarily with discrimination between foreign and domestic products, the final Appellate Body report had important implications for the role of environmental measures in the WTO trading system.

Under the CAA, the Environmental Protection Agency developed rules on the cleanliness and quality of gasoline, with the aim of reducing air pollution in the United States. This Gasoline Rule mandated the sale and use of cleaner "reformulated gasoline" in the most polluted areas of the country. In the rest of the country, "conventional gasoline" could be sold so long as it was no dirtier than that sold in 1990.

To determine the appropriate level of cleanliness, the law required those US domestic gasoline refiners that were in operation in 1990 to establish an individual refinery baseline representing the quality of their gasoline in 1990. Imported gasoline, on the other hand, was required to comply with a "statutory baseline", which reflected the average quality of US gasoline in 1990.

II.C.2. PANEL STAGE

Venezuela and Brazil argued that the CAA Gasoline Rule violated WTO obligations because it treated foreign products less favourably than domestic products under Article III of the GATT 1994. They also argued that this discrimination could not be justified under any of the exceptions provided for health and environmental measures under Article XX of the GATT 1994.

The panel agreed with Venezuela and Brazil. The panel found that where the imported and domestic gasoline products were chemically identical, they were "like products" for purposes of GATT Article III (national treatment) and therefore must be treated the same. Because domestic gasoline producers were measured against their own individual standard, while imported gasoline was held to a different standard of cleanliness, the panel determined that the Gasoline Rule treated foreign gasoline less favourably than "like" domestic gasoline.
The panel also found that the CAA did not satisfy the requirements under any of the health and environment exceptions provided for under Article XX of the GATT. The panel held that there was "no direct connection" between the CAA Gasoline Rule and the environmental policy objectives cited by the United States, and that the law was not the least trade-restrictive means of achieving the US objectives.

II.C.3. APPELLATE BODY STAGE

The only ruling appealed by the United States was the panel's conclusion that the Gasoline Rule was not justified as an environmental protection measure under Article XX. Although the Appellate Body ultimately upheld the panel's determination that the US measure was not consistent with WTO rules, it made important changes to the panel's reasoning in this regard.

The Appellate Body determined that the US measure would have been justified as a legitimate environmental measure had it not discriminated against imported gasoline unjustifiably. It explained that Article XX involves a two-part test. First, a law must satisfy one of the ten exceptions relating to non-trade interests set out in Article XX. In this case that was XX(g): measures "relating to the conservation of exhaustible natural resources". The second step involves testing the manner in which the law is applied under the introductory paragraph (also known as "chapeau") of Article XX. The purpose of the two-part test is to ensure that the exceptions in Article XX are not "abused or misused".

Applying the above test, the Appellate Body first held that the panel erred when it applied a test of "necessity" under Article XX(g) by requiring the US to choose the "least trade restrictive" option. Instead, the Appellate Body required only that the measure be "related to" the environmental policy objective, as specifically provided for in the provision. And while the panel reasoned that the "less favourable treatment" of imported gasoline had to be "primarily aimed at" the conservation of natural resources, the Appellate Body stated that the entire measure, taken as a whole, had to be primarily aimed at environmental conservation. Overturning the panel on this point, the Appellate Body found that the Gasoline Rule as a whole was primarily aimed at environmental conservation, and therefore provisionally satisfied Article XX(g).

Under step two of the test, the Appellate Body assessed whether the application of the Gasoline Rule was free of "arbitrary or unjustifiable discrimination", as required under the "chapeau" of Article XX. Because the US did not provide sufficient justification for the discriminatory effect of the Gasoline Rule, and since it could have been formulated in a non-discriminatory way, the Appellate Body concluded that the treatment of gasoline imports constituted "unjustifiable discrimination". Thus, the Gasoline Rule was inconsistent with the US' WTO obligations and not justified under Article XX.

II.D. BRAZIL – RETREADED TYRES

IN BRIEF

This case was brought by the European Communities against Brazil (Brazil – Measures Affecting Imports of Retreaded Tyres, WTO dispute DS332). The measure at issue was Brazil's import ban on retreaded tyres. Brazil argued that this measure was necessary to protect human, animal and plant life or health. According to Brazil, the importation and use of retreaded tyres contributed to the accumulation of waste tyres with serious health and environmental consequences. The panel and Appellate Body reports were adopted in 2007.
II.D.1. INTRODUCTION

At the end of 2005, the European Communities initiated a complaint in the WTO against a ban imposed by Brazil on the importation of retreaded tyres. The objective of this ban was to reduce the accumulation of waste tyres in Brazil, thereby reducing the risks posed to human health and the environment by mosquito-borne diseases, tyre fires and toxic leaching. Brazil sought to prevent the further generation of waste tyres as much as possible.

Retreaded tyres are produced by reconditioning used tyres by stripping the worn tread from a used tyre's skeleton and replacing it with new material. Under international safety standards, passenger car tyres may only be retreaded once. In Brazil's tropical climate, discarded tyres provide a breeding ground for mosquitoes because they collect rainwater. Mosquitoes then contribute to the spread of diseases such as dengue, malaria and yellow fever. Stockpiles of tyres also pose a risk of fires that may result in the emission of hazardous chemicals, as well as toxic leaching into the ground.

II.D.2. WAS THE MEASURE NECESSARY TO PROTECT HUMAN, ANIMAL OR PLANT LIFE OR HEALTH AGAINST RISKS ARISING FROM THE ACCUMULATION OF WASTE TYRES? THE PROVISIONAL JUSTIFICATION UNDER ARTICLE XX(B)

Brazil's import ban was found to be inconsistent with GATT Article XI (general elimination of quantitative restrictions). However, Brazil sought justification under the general exceptions of Article XX. The panel, later upheld by the Appellate Body, found that Brazil's ban was provisionally justified under paragraph (b) of Article XX as it was a measure "necessary to protect human, animal or plant life or health" against risks arising from the accumulation of waste tyres.

Brazil's ban targeted retreaded tyres because they have a shorter lifespan and would become waste sooner than new tyres. Therefore, the product subject to the import ban (i.e. retreaded tyre) was not the product (i.e. waste tyre) generating the risks to human, animal or plant life or health, that the import ban purports to address. The panel took the view that the risk being addressed need not involve the exact product affected by the measure. The panel found therefore that the policy goal of Brazil's measure fell within the range of policies covered by Article XX(b) on the basis of the existence of health risks of mosquito-borne diseases, tyre fires and toxic leaching associated with the accumulation of waste tyres in Brazil.

The panel also found that the measure was "necessary" to achieve its policy goal. In previous cases, the Appellate Body explained that the "necessity" of a measure should be assessed by weighing and balancing a series of factors, including: (i) the relative importance of the common interests or values the measure is intended to protect; (ii) the extent to which the measure contributes to achieving its objective; and (iii) the trade-restrictiveness of the measure. Following this analysis, the panel concluded that, in the light of the importance of the interests protected by the objective of the import ban, the contribution of the ban to the achievement of its objective outweighed its trade restrictiveness.

As to how much the import ban contributes to the achievement of Brazil's aim (of reducing waste tyres to reduce risks to health and the environment), the panel conducted a qualitative analysis. It found that the import ban on retreaded tyres can encourage Brazilian producers to retread local used tyres, which would not have been retreaded otherwise; and the use of imported retreaded tyres may be substituted for by new tyres, which have a longer lifespan. Thus, the import ban was found capable of contributing to the reduction of waste.
tyres in Brazil, which in turn would lead to a reduction in risks to health and the environment. The Appellate Body confirmed this finding and noted that the "material contribution" of an import ban could consist of a quantitative or qualitative analysis.

A measure can however not be considered "necessary" (in line with Article XX(b)), if a WTO-consistent alternative measure, or less WTO-inconsistent measure, is "reasonably available" and would achieve the same objective. The panel examined the alternatives suggested by the European Communities, such as domestic measures to reduce the number of waste tyres (e.g. to encourage domestic retreading and improve retreadability of domestic used tyres) or to improve the management of waste tyres (e.g. collection and disposal methods), and concluded that they did not constitute reasonably available alternatives to the import ban.

II.D.3. WAS THE MEASURE APPLIED IN A MANNER THAT CONSTITUTED A MEANS OF UNJUSTIFIABLE DISCRIMINATION OR A DISGUISED RESTRICTION TO TRADE? THE "CHAPEAU" OF ARTICLE XX

Although provisionally justified under paragraph (b) of Article XX, Brazil's import ban was found to be applied in a manner that constituted a means of unjustifiable discrimination and a disguised restriction to trade, as prohibited by the introductory clause of Article XX. Therefore, Brazil's ban was in the end found not to be justified under Article XX(b).

Unjustifiable and arbitrary discrimination was found to arise from two situations: (i) the exemption from the import ban on retreaded tyres of tyres originating from MERCOSUR countries; and (ii) the importation of used tyres through domestic court injunctions (obtained to override the general ban on importing used and retreaded tyres) as used tyres, like retreaded tyres, are likely to become waste sooner than new tyres.

Concerning the MERCOSUR exemption, the Appellate Body, reversing the panel's ruling, found that the fact that the exemption resulted from a decision of the MERCOSUR arbitral tribunal was not an acceptable rationale for the discrimination, because it bears no relation with the legitimate objective pursued by the import ban, and even goes against this objective. The Appellate Body also disagreed with the panel's conclusion that the fact that the MERCOSUR exemption give rise to only a very limited number of imports of retreaded tyres did not result in a situation of arbitrary or unjustifiable discrimination (following a quantitative approach to the evaluation of discrimination).

In relation to the imports of used tyres under court injunctions, the Appellate Body disagreed with the panel that these imports have resulted in the import ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the import ban. The Appellate Body also considered the panel's finding that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and found instead, that the imports of used tyres under court injunctions resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX.
II.E. US – TUNA II

IN BRIEF

This case was brought by Mexico against the US (United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WTO dispute DS381). The case concerned the dolphin-safe labelling requirements contained in the Dolphin Protection and Consumer Information Act (DPCI A) enacted by the United States (US) in 1990. According to these requirements, tuna products from tuna caught by using the fishing technique of “setting on dolphins” - which consists of chasing and encircling schools of dolphins to catch the tuna that swim underneath - cannot be labelled "dolphin-safe". In relation to other fishing techniques, the US dolphin-safe provisions established requirements for the use of the dolphin-safe label that varied depending on the oceanic region concerned. The most stringent requirements applied to the Eastern Tropical Pacific (ETP), where the phenomenon of tuna-dolphin association is most frequent, and where most of the Mexican fleet fish for tuna by "setting on dolphins".

II.E.1. INTRODUCTION

Together, the US measures in question established the conditions that tuna products had to comply with in order to be labelled dolphin-safe. These conditions varied depending on the area where the tuna contained in the tuna product is caught (i.e. inside or outside the eastern tropical Pacific Ocean (ETP)), and the type of vessel and fishing method by which it is harvested (with or without the use of the so-called "purse seine nets"). In particular, tuna products made from tuna caught by "setting on dolphins" (that is, chasing and encircling dolphins with a net in order to catch the tuna associating with them) were not eligible for a "dolphin-safe" label in the United States.

This case was brought by Mexico against the United States. In 2011 the panel found that under the US measures as they were applied, tuna caught by large vessels (boats with 363 metric tons carrying capacity) in the ETP (the area where the Mexican fleet normally fished for tuna), could only be labelled dolphin-safe if an independent observer certified that the tuna was not caught by "setting on dolphins"; and that no dolphins were killed or seriously injured during the fishing trip where the tuna was caught. For tuna harvested outside the ETP, the US measures simply required a certification by the captain of the vessel that the tuna was not caught by setting on dolphins.

According to the United States, the objectives of the US dolphin-safe provisions were two. On one hand, ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affected dolphins; and on the other hand, contributing to the protection of dolphins, by ensuring that the US market was not used to encourage fishing fleets to catch tuna in a manner that adversely affected dolphins.

II.E.2. PANEL STAGE

The panel first determined whether the US dolphin-safe labelling provisions constitute a technical regulation under the TBT Agreement. The panel found that they do, and in particular that the measures are mandatory within the meaning of Annex 1.1 of the Agreement. One of the members of the panel expressed a dissenting
opinion on this particular issue but sided with the majority for the rest of the report. The panel then examined Mexico’s claims under Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

The panel then rejected Mexico’s first claim by finding that the US dolphin-safe labelling provisions do not discriminate against Mexican tuna products and are therefore not inconsistent with Article 2.1 of the TBT Agreement. Despite finding that Mexican tuna products are like tuna products originating in the United States or any other country within the meaning of Article 2.1 of the TBT Agreement, the panel concluded that Mexican tuna products are not afforded less favourable treatment than tuna products of US and other origins in respect of the US dolphin safe labelling provisions on the basis of their origin.

With respect to Mexico’s claim under Article 2.2 of the TBT Agreement, the panel found that Mexico had demonstrated that the US dolphin-safe labelling provisions were more trade-restrictive than necessary to fulfil the legitimate objectives of: (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affected dolphins; and (ii) contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affected dolphins, taking account of the risks non-fulfilment would create. The panel's conclusion was based on the following two findings: (i) that the US dolphin-safe labelling provisions only partly addressed the legitimate objectives pursued by the United States; and (ii) that Mexico had provided the panel with a less trade restrictive alternative, namely the “dolphin-safe” definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program (AIDCP), capable of achieving the same level of protection of the objective pursued by the US dolphin-safe labelling provisions.

Regarding Mexico’s claim under Article 2.4 of the TBT Agreement, the panel found that the US dolphin-safe labelling provisions were not in violation of such provision, which requires technical regulations to be based on relevant international standards, where this is possible. Despite finding that the standard referred to by Mexico was a relevant international standard for the purposes of the US dolphin-safe provisions and that the United States had not used it as basis for its measures, the panel concluded that this standard was not appropriate or effective to achieve the US objectives.

The panel declined to rule in addition on Mexico’s non-discrimination claims under the GATT, and therefore exercised judicial economy with respect to Mexico’s claims under Articles I:1 and III:4.

II.E.3. APPELLATE BODY STAGE

First, the Appellate Body upheld the panel’s finding that the the US "dolphin-safe" labelling measure was a “technical regulation” within the meaning of the TBT Agreement. The Appellate Body noted that the measure consisted of legislative, regulatory, and judicial acts of the US federal authorities and included administrative provisions. The Appellate Body added that the measure established a single and legally mandated definition of a "dolphin-safe" tuna product and prescribed in a broad and exhaustive manner the conditions that apply for making any assertion as to the "dolphin-safety" of a tuna product. The Appellate Body found, on this basis, that the panel did not err in characterizing the measure as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

Second, the Appellate Body reversed the panel's finding that the US "dolphin-safe" labelling provisions were not inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body reasoned that there was an inconsistency because, first, by excluding most Mexican tuna products from access to the "dolphin-safe" label while granting access to most US tuna products and tuna products from other countries, the measure modified
the conditions of competition in the US market to the detriment of Mexican tuna products. Next, the Appellate Body scrutinized whether, in the light of the factual findings made by the panel and undisputed facts on the record, the detrimental impact from the measure stemmed exclusively from a "legitimate regulatory distinction". In particular, the Appellate Body examined whether the different conditions for access to a "dolphin-safe" label were "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean, as the United States had claimed. The Appellate Body noted the panel's finding that the fishing technique of "setting on dolphins" was particularly harmful to dolphins and that this fishing method had the capacity of resulting in observed and unobserved adverse effects on dolphins. At the same time, the panel was not persuaded that the risks to dolphins from other fishing techniques were insignificant and do not under some circumstances rise to the same level as the risks from setting on dolphins. The Appellate Body further noted the panel's finding that, while the US measure fully addressed the adverse effects on dolphins resulting (including observed and unobserved effects) from "setting on dolphins" in the ETP, it did not address mortality arising from fishing methods other than setting on dolphins in other areas of the ocean. Under these circumstances, the Appellate Body found that the measure at issue was not even-handed in the manner in which it addressed the risks to dolphins arising from different fishing techniques in different areas of the ocean.

Regarding Mexico's claim under Article 2.2 of the TBT Agreement, the Appellate Body reversed the panel's finding that Mexico had demonstrated that the US "dolphin-safe" labelling provisions were more trade restrictive than necessary to fulfil the United States' legitimate objectives. In doing so, the Appellate Body reasoned, inter alia, that the panel had not conducted a proper analysis and comparison between the challenged measure and the alternative measure proposed by Mexico, and also noted that the latter would not make an equivalent contribution to the United States' objectives as the former in all ocean areas. On this basis, the Appellate Body reversed the panel's finding that the measure was inconsistent with Article 2.2 of the TBT Agreement.

Finally, the Appellate Body did not disagree with the panel's conclusion that the US measure at issue was not inconsistent with Article 2.4 of the TBT Agreement. The Appellate Body reversed however the panel's intermediate finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program (AIDCP) was a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. In particular, the Appellate Body concluded that the panel erred in finding that the AIDCP, to which new parties can accede only by invitation, is "open to the relevant body of every country and is therefore an international standardizing organization" for purposes of Article 2.4 of the Agreement.

**EXERCISES**

9. Why is it that in the Brazil – Retreaded Tyres case, Brazil's import ban on retreaded tyres was provisionally justified under GATT Article XX, but was subsequently considered inconsistent with the "chapeau" of the provision?

10. Why is it that in EC – Asbestos case, the Appellate Body concluded that the EC's import ban on asbestos-containing products did not contravene Article III:4 of the GATT 1994?

11. In the US – Gasoline case, what were the reasons that led the Appellate Body to the conclusion that the Gasoline Rule was inconsistent with the chapeau of Article XX?
III. SUMMARY

Under WTO rules, Members may adopt trade-related measure to protect the environment and human health and life, as long as such measures comply with GATT rules or fall under the exceptions to these rules, subject to certain specified conditions.

Certain measures taken to achieve environmental protection goals may, by their very nature, restrict trade and thereby impact on the WTO rights of other Members. They may violate basic trade rules, such as the non-discrimination obligation and the prohibition of quantitative restrictions.

Article XX of the GATT 1994 lays down a number of specific instances in which WTO Members may be exempted from GATT rules. The exceptions contained in paragraphs (b) and (g) of Article XX are of particular relevance to human health and environmental protection. Pursuant to these two paragraphs, WTO Members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating the conservation of exhaustible natural resources (paragraph (g)).

The Appellate Body has used a process of "weighing and balancing" of several factors to determine whether a measure is necessary to protect human, animal or plant life or health under Article XX(b). These factors include: (i) the contribution made by the measure at issue to the stated health policy objective; (ii) the importance of the common interests or values protected by the measure; and (iii) the impact of the measure on international trade. The measure is also compared with possible alternative measures capable of achieving the same objective, to determine if they are less trade-restrictive than the measure adopted.

For a measure to be "relating" to the conservation of natural resources under Article XX(g), it is necessary to establish a substantial relationship between the measure and the conservation objective. In other words, the measure must be "reasonably related" to the stated policy goal of preserving exhaustible natural resources.

Moreover, for a measure to be covered by Article XX, its application must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. This is required by the introductory paragraph ("chapeau") of Article XX. The design and flexibility of the measure, as well as the efforts made by the Member adopting the measure to enter into cooperative arrangements with the affected countries, are factors that may be evaluated to determine if a measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

The interface between trade and environment is also addressed in a number of WTO agreements. These provisions include Article XIV of GATS that, similar to GATT Article XX, contains general exceptions to the substantive disciplines of GATS. The TBT, SPS, TRIPS, SCM and Agriculture agreements also include provisions designed to accommodate environmental issues.

Since 1995, a number of panel and Appellate Body proceedings have examined environmental or human health-related measures under GATT Article XX. The most relevant disputes from an environmental perspective are Brazil – Retreaded Tyres, EC – Asbestos, US – Shrimp, US – Gasoline (US – Tuna II is also important but it concerned claims under the TBT Agreement, not the GATT). In light of the jurisprudence, it is fair to say that WTO rules provide ample space for environmental concerns to be accommodated. Even if a measure is found to be inconsistent with basic WTO disciplines, it may be justifiable under one of the exceptions, for example, if it pursues an environmental or human health objective, and if its application does not reveal protectionist intent.
PROPOSED ANSWERS:

1. WTO Members may adopt measures that are inconsistent with one or more disciplines of the GATT 1994 without infringing upon those disciplines, if the objective of the measures is the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. This is by virtue of Article XX of the GATT 1994, General Exceptions, that contains a list of specific instances in which WTO Members may be exempted from GATT rules. In particular, Articles XX(b) and (g) respectively allow WTO Members to justify GATT-inconsistent measures if these are either necessary to protect human, animal or plant life or health, or if the measures relate to the conservation of exhaustible natural resources.

2. In broad terms, the principle of non-discrimination requires that "like" domestic and foreign products are treated the same, or in other words, that imported products that are like domestic products are not treated less-favourably.

3. In WTO case law, four criteria have been used in determining whether products are "like":
   (i) the physical properties of the products;
   (ii) the extent to which the products are capable of serving the same or similar end-uses;
   (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and
   (iv) the international classification of the products for tariff purposes.

4. (i)-Article XX(b); (ii)-Both; (iii)-Article XX(g); and (iv)-Article XX(g) or both.

5. To determine whether a measure is "necessary" to protect human, animal or plant life or health under GATT Article XX(b), the Appellate Body has evaluated the weight or importance of several factors. These factors include: (i) the contribution made by the environmental measure to the policy objective; (ii) the importance of the common interests or values protected by the measure; and (iii) the impact of the measure on international trade. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternative measures. The objective of this comparison is to determine whether these alternatives are less trade-restrictive while providing an equivalent contribution to the achievement of the objective pursued. If the alternatives are not less trade-restrictive or if they fail to contribute in an equivalent manner, the challenged measure is considered necessary under Article XX(b) of the GATT 1994.

6. In EC – Asbestos case, the Appellate Body concluded that the term "relating", as used in GATT Article XX(g), implies that the measure at issue must be "reasonably related" to the stated policy goal of conservation of exhaustible natural resources. In other words, for a measure to be "relating" to the conservation of natural resources, a substantial relationship between the measure and the conservation objective needs to be established.

7. In the US – Shrimp case, the Appellate Body considered that the United States had not sufficiently explored the possibility of entering into cooperative arrangements with the countries affected by the import restrictions on shrimp and shrimp products, to mitigate the administrative burdens arising from the measure. The fact that the United States had "treated WTO Members differently" by adopting a cooperative approach regarding the protection of sea turtles with some Members but not with others also showed that the measure was applied in a manner that discriminated among WTO Members in an unjustifiable manner.
8. A technical regulation, which requires that certain electronic products to perform at certain energy efficiency levels, is allowed under the TBT Agreement even if it may have adverse impacts on trade, as long as it complies with the disciplines set out by that agreement, such as non-discrimination and avoidance of unnecessary obstacles to trade.

9. In Brazil – Retreaded Tyres, unjustifiable and arbitrary discrimination was found to arise from two situations: (i) the exemption from the import ban on retreaded tyres originating from MERCOSUR countries; and (ii) the importation of used tyres through domestic court injunctions (obtained to override the general ban on importing used and retreaded tyres). The Appellate Body considered that there was no acceptable rationale for the discrimination, because this difference in treatment bears no relationship to the legitimate objective pursued by the import ban, and even goes against it. The Appellate Body considered that this situation resulted in arbitrary or unjustifiable discrimination, thus contravening the chapeau of Article XX of the GATT 1994.

10. The Appellate Body concluded that the very serious health risks inherent in products containing asbestos must be taken into consideration when assessing whether the products at issue were "like products" under Article III:4. The Appellate Body considered that the carcinogenic nature of asbestos fibres meant that a product containing asbestos fibres has quite different physical properties to a product that does not. Moreover, the Appellate Body was persuaded that the health risks associated with products containing asbestos fibres would influence consumers' behaviour in relation to those products. Thus, the products compared were not "like" and the EC had consequently not breached Article III:4.

11. In US – Gasoline, the Appellate Body considered that the United States did not provide sufficient justification for the discriminatory effect of the Gasoline Rule. According to the Appellate Body, such rule could have been formulated in a non-discriminatory way. Thus, the Appellate Body concluded that the application of the Gasoline Rule resulted in discriminatory treatment of gasoline imports and that this difference in treatment was "unjustifiable" under the chapeau of Article XX.