

# Analysis of Environmental Exception under GATT, 1994

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## Introduction

The World Trade Organisation has dual promises 'o an open, non-discriminatory and equitable multilateral trading system on the one hand and the 'protection of the environment, and the promotion of sustainable development on the other', "this allows the member states to take certain measures in pursuit of specified purposes, even if those measures would normally be WTO-inconsistent. 1 This is possible due to Article XX of the General Agreement on Tariffs and Trade (GATT). One such exception is the Environmental Exception which is embedded in Article XX, para (b) and (d)".<sup>1</sup>

This paper is a descriptive one, and it seeks to analyse the environmental exception under GATT. It talks about the significance of ecological abnormalities; then, the report focuses on the provisions by starting with the basic overview, interpretation and analysis of the requirements.

## Significance

"Several declarations ensure commitment to ensuring that trade and sustainable development are mutually supportive."

"The Marrakesh Agreement Establishing the WTO recognises that along with trade, there must be an allowance of optimal use of resources in line with sustainable development's goal, while also attempting to maintain and preserve the environment and improve available tools in a way that takes into account each group's needs and concerns at different stages of economic growth."<sup>2</sup>

"Doha Ministerial Declaration also opined, reaffirming commitment to the goal of sustainable development as stated in the Marrakesh Agreement's Preamble and ensuring that it is mutually supportive of trade."<sup>3</sup>

UN Framework Convention for Climate Change opens the international economic system also.

"talk about promoting a supportive and open international economic system that would lead to sustainable economic growth and addressing the problem of climate change".<sup>4</sup>

Sustainable Development Goals (SDGs) also "talk about sustainable development. The Addis Ababa Action Agenda on Financing for Development, the companion agreement to the so-called post-2015 agenda, refers to trade as an "engine for development" and commits that it talks about incorporating sustainable development into trade policy at all levels."<sup>3</sup>

Thus, it can be observed that the environment has been an indispensable part of multilateral trade agreements and, more specifically, GATT, 1994 and WTO.

## Overview of the provisions:

"The two exceptions [XX(b) and XX(g)] afford space for shielding environmental measures from the censures of GATT law, provided certain conditions are met.

GATT Article XX(b) looks at measures "necessary to protect human, animal or plant life or health," without mentioning the environment explicitly".<sup>4</sup>

"Similarly, Article XX(g) covers measures "relating to the conservation of exhaustible natural resources," without defining exhaustible natural resources as including living resources (e.g., animals) or the atmosphere, though the WTO's Appellate Body has made it clear that both might be included."<sup>5,8</sup>

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

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

(...)

<sup>1</sup> *Id.*

<sup>2</sup> *A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda*, UN ENVIRONMENT, <https://www.iisd.org>.

<sup>34</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> General Agreement on Tariffs and Trade, Art. XX(b), XX(g), 33 I.L.M 1153(1994).

<sup>89</sup> *Id.*

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are effective in conjunction with restrictions on domestic production or consumption.<sup>9</sup>

### The objective of the Provisions:

“Article XX paras. (b) and (g) provide a compromise between trade obligations and environmental well-being implemented by environmental policies. Environmental interests embrace safeguarding human, animal and plant life or health and, additionally, the preservation of exhaustible natural resources. Such exceptions permit Member states, under specific conditions, to give priority to environmental goals over trade liberalisation and rules on market access”.<sup>6</sup> “Some of the 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. 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”.<sup>7</sup>

“The exceptions under Articles XX(b) and (g) are of particular relevance to environmental and human health protection.<sup>43</sup> Article XX(b) and (g) are grounds for justification for protecting ecological interests for measures that are otherwise inconsistent with GATT 1994. Such exceptions may be invoked to justify GATT-inconsistent measures actions”.<sup>12</sup>

### Interpretation of the Provisions

“The panels and the Appellate Body formulated a system to apply Article XX to address the defence of GATT-inconsistent measures. The security of the GATT-inconsistent action involves issues such as the burden of proof, the sequence of steps for application of Article

XX”, “the policy choice and fulfilment of the requirements of paragraphs in Article XX, and its introductory clause known as chapeau”.<sup>13</sup>

#### The burden of Proof:

“The rule is that the party who asserts the affirmative of a particular claim or defence has to prove it. In the context of the applicability of Article XX, the party invoking such exceptions

bears the burden of proving that the GATT-inconsistent measure – i.e. the challenged measure – meets the requirements contained in that [Article XX] provision.<sup>8</sup>

This has been confirmed in the *US – Wool Shirts and Blouses*, “The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.”<sup>9</sup>

In the *US – Gasoline* case, “the Appellate Body found that the burden of showing that a measure complies with the requirements of the introductory clause of Article XX falls on the defending party, even after that party has established that the measure qualifies under one of the subheadings of Article XX. Therefore a party invoking an exception under Article XX has to prove: first, that the inconsistent measure comes within the scope of one exception and, second, that the measure complies with the chapeau of Article XX.”<sup>10</sup> The sequence of Steps:

“The defending party must exhibit that the measure“:

- (i) Fits within at least one of the ten exceptions" (paragraphs (a) to (j) listed in Article XX, and
- (ii) Satisfies the requirements of the preamble, meaning it is not applied in a way that would be "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is not "a disguised restriction on" international trade the party invoking Article XX bears the burden of proving that the contested measure meets the requirements contained in that provision.<sup>11</sup>

### (a) Under Article XX(b):

The panel, in *US – Gasoline*, determined that this demonstration includes the following steps“:

“(1) That the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;

<sup>6</sup> Sonia Gabiatti, *Trade-Related Environmental Measures under Gatt Article Xx(B) and (G)*, SKEMMAN, <http://skemman.is/>.

<sup>7</sup> *WTO rules and environmental policies: Introduction*, WORLD TRADE ORGANISATION, <http://www.wto.org/>.

<sup>12</sup> *Id.*

<sup>8</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc. WT/DS/33/AB/R (adopted May 23, 1997).

<sup>9</sup> *Ibid.*

<sup>10</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996).

<sup>11</sup> *WTO rules and environmental policies: Introduction*, WORLD TRADE ORGANISATION, [HTTP://www.wto.org/](http://www.wto.org/). 6

(2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and

(3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX".<sup>12</sup>

**(b) Under Article XX(g):**

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

(1) The measure at hand is "a measure concerned with the conservation of 'exhaustible natural resources within the meaning of Article XX(g)";<sup>13,14</sup>

(2) "Article XX(g) requires that the measure sought to be justified be one which 'relates to the conservation of exhaustible natural resources';<sup>13</sup> and

(3) The measure at issue is "a measure made effective in conjunction with restrictions on domestic production or consumption".

This position is clear that it is the measure, not the policy goal, that had to meet the requirements under Article XX. In *US – Tuna (Mexico)* case, the panel noted that:

The requirements outlined in Article XX(g) that restrict the use of this exception, namely that the actions taken must be related to the conservation of exhaustible natural resources and that they do not "constitute a means of arbitrary or unjustifiable discrimination... or a disguised restriction on international trade," only apply to the trade measure that requires justification under Article XX(g), not the conservation policies adopted by the contracting party.<sup>21</sup>

Similar views were taken in *US – Gasoline* case<sup>15</sup> and *EC- Asbestos* Case<sup>16</sup>

**Application of Environmental Exceptions:**

There are two steps involved in the application of Exceptions under Article XX.<sup>16</sup>

1. Determine if the policy being pursued by the measure is one that is intended to safeguard human, animal, plant, or environmental health, to ensure compliance with laws or regulations that are not in conflict with the requirements of the GATT 1994, or to conserve exhaustible natural resources (Section A).

2. The next step is to check whether the requirements of Article XX(b), (d), and (g) are satisfied as well as whether the measure helps the condition of the opening paragraph (the "chapeau" of Article XX), i.e., that it is not applied in a way that would constitute a method of arbitrarily or unjustifiably discriminating between countries where the same conditions prevail, and is not "a disguised restriction on international trade."

**POLICY OBJECTIVES PURSUED THROUGH THE MEASURES.**

"It has been reaffirmed on several occasions that WTO members have the autonomy to determine their environmental objectives".

1) Article XX(b): "*Protecting human, animal or plant life or health*" The following panel reports can be looked into in this regard:

In the *Thailand – Cigarettes* case, The panel focused on "the serious risk of smoking and that consequently, measures designed to reduce the consumption of cigarettes fell

within the scope of Article XX(b)." The Panel noted that "this provision allowed contracting parties to give priority to human health over trade liberalisation"<sup>17</sup>

In the *US–Tuna (Mexico)*, explicitly in *USUS–TunaEEC* <sup>26</sup> panel said: "that the protection of dolphin life or health was a policy that could fall under Article XX(b)".

In the *US – Gasoline* case, the panel and the parties "agreed that "the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of Article XX(b)".<sup>18</sup>

**2) Conserving exhaustible natural resources under Article XX(g)**

<sup>12</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996).

<sup>13</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58 (adopted Nov. 06, 1998)

<sup>14</sup> *Ibid.* Panel Report, United Nations para. 135. - Restrictions on Imports of Tuna, WTO Doc.

DS 21/R (not adopted).

<sup>15</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996).

<sup>16</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135 (adopted April 5, 2001).

<sup>16</sup> Panel Report, United Nations *WTO rules and environmental policies: Introduction- Restrictions on Imports of Tuna*, WTO Doc. DS 21/R (not adopted). , WORLD TRADE ORGANISATION, [http:// www.wto.org/](http://www.wto.org/).

<sup>17</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135 (adopted April 5, 2001).

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<sup>18</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc.

WT/DS2/R (adopted May 20, 1996).

This phrase has been broadly interpreted to cover both "living" species like sea turtles as well as "mineral" or "non-living" resources that may be subject to depletion.

In *US Shrimp Case* (India v. USA), the appellate body highlighted that "modern international conventions and declarations made frequent references to natural resources as embracing both living and non-living resources. Additionally, the Appellate Body pointed out that sea turtles were listed have listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora's ("CITES") Appendix 1 on species threatened with extinction, demonstrating the exhaustible nature of sea turtles. The appellate board also acknowledged that the policy's extra-territorial applicability extended beyond US territorial seas to those who resided abroad.<sup>19</sup>

In *US – Automobiles*<sup>20</sup>, the panel "noting that gasoline was produced from petroleum, an exhaustible natural resource, found that a policy to conserve gasoline was within the range of policies mentioned in Article XX(g)."

In the *US – Gasoline* case, the Panel decided that "a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g)"<sup>2021</sup>

*Canada – Salmon and Herring* case, the panel "agreed with the parties that salmon and herring stocks are "exhaustible natural resources".<sup>31</sup> In *US – Tuna (Mexico)*, the parties and the panel seem to have implicitly agreed that dolphins are an exhaustible natural resource."<sup>32</sup>

#### DEGREE OF CONNECTION BETWEEN THE MEANS AND THE ENVIRONMENTAL POLICY OBJECTIVE:

"A member has to establish a connection between its stated environmental policy goal and the measure at issue for a trade-related ecological action to be eligible for an exception under Article XX, paragraphs (b) and (g) ".

The measure needs to be either:<sup>22</sup>

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

##### 1. Necessity Test under Article XX(b):

In *Brazil- Retreaded Tyres Case*, the Appellate Body "found that the import ban on retreaded tyres was "apt to produce a material contribution to the achievement of its objective," i.e. the reduction in waste tyre volumes. It also focused that results obtained from certain actions — for instance, measures adopted to address global warming and climate change — can only be evaluated with the benefit of time."<sup>23</sup>

In *EC- Asbestos* case, "The Appellate Body made the point that the more vital the common interests or values pursued, the easier it was to accept as necessary measures designed to achieve those ends. As a result of a process of weighing and balancing a series of factors, there was no reasonably available alternative to a trade prohibition. This was designed to achieve the level of health protection chosen by France, and the value pursued by the measure was found to be "both vital and important in the highest degree."<sup>24</sup>

In the *US – Gasoline* case, the panel also held, "in essence, that an alternative measure did not cease to be "reasonably" available simply because the alternative measure involved administrative difficulties for a member."<sup>25</sup>

##### 2. Relating to ..." and "... in conjunction with restrictions on domestic production or consumption" under Article XX(g)

A strong connection must be made between a policy and the protection of finite natural resources to be considered "related" to environmental protection. A participant must demonstrate how the means (i.e., selected measure) are "reasonably connected" to the goals (i.e. the stated policy goal of conservation of exhaustible natural resources).

A measure affecting imports must also be used "in combination with limits on domestic production or consumption" to be justified under Article XX(g) (the even-handedness requirement).<sup>26</sup>

<sup>19</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58 (adopted Nov. 06, 1998)

<sup>20</sup> Panel Report, United Nations Panel Report, *United States – Taxes on Automobiles Restrictions on Imports of Tuna*, WTO Doc. DS 21/R (not adopted)., WTO Doc. DS31/R (not adopted).

<sup>20</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996).

<sup>21</sup> *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (March 22, 1998). GATT BIDS <sup>358/98</sup> Panel Report, United Nations - Restrictions on Imports of Tuna, WTO Doc. DS 21/R (not adopted).

<sup>32</sup>

<sup>22</sup> General Agreement on Tariffs and Trade, Art. XX(b), XX(g), 33 I.L.M 1153(1994).

<sup>23</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. DS332 (July 29, 2008).

<sup>24</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135 (adopted April 5, 2001).

<sup>25</sup> *WTO rules and environmental policies: Introduction*, WORLD TRADE ORGANISATION, HTTP:// www.wto.org/.

<sup>26</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996).



In *US Gasoline* Case, the panel found that The Appellate Body ruled that the selected action was principally directed at the policy objective of clean air conservation in the United States and so fell within the ambit of paragraph (g) of Article XX. The panel noted that while the US policy harmed local and imported goods, it did not meet the "even-handedness" criteria."<sup>27</sup>

In the *US — Shrimp* case, the Appellate Body "looked at the general structure and design of the measure in question and marked it as "fairly narrowly focused" and not a blanket prohibition on the importation of shrimp. Thus, the appellate body found the measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) and in conjunction with the restrictions on domestic harvesting of shrimp."<sup>28</sup>

### Role of Chapeau in Interpretation

"The introductory clause of Article XX (its chapeau) stresses how the measure in hand is applied. The application of the measure must not constitute a "means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade". It necessitates the measure to be applied in lawfulness and not as an abuse of the exceptions provided in article

XX of GATT, 1994"<sup>29</sup>

In *Brazil — Retreaded Tyres*, The appellate body noted that "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."<sup>31</sup> There are some circumstances that the WTO jurisprudence has highlighted to determine that the chapeau applies the measure. These include the following:<sup>30</sup>

1. "The defendant undertakes relevant coordination and cooperation activities at the international level in the trade and environment area
2. the design of the measure,
3. its flexibility to take into account different situations in different countries and,
4. an analysis of the rationale put forward to explain the existence of discrimination."

These considerations have been highlighted in several cases:

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 to mitigate the administrative problems raised by the United States in their justification of the discriminatory treatment."<sup>31</sup>

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 unjustifiably discriminated among WTO members."<sup>32</sup>

### Conclusion:

It can be observed that WTO has shown much willingness towards strong environmental policies even when these are at the cost of the provisions of GATT and fall under the environment exceptions under Article XX. This has been further strengthened with the institution of the Committee on Trade and Environment. Whose aim is to make "international

trade and environment policies mutually supportive. WTO tries to balance the members' rights to take regulatory measures to achieve legitimate policy objectives and their rights under trade agreements. The constant efforts of WTO are appreciable in integrating the relationship between trade and environmental policies. This also needs to be looked into because WTO can't interpret the environmental exceptions comprehensively because it's not an environmental agency, and its primary task is to ensure trade policies.

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<sup>30</sup> *WTO rules and environmental policies: Introduction*, WORLD TRADE ORGANISATION, <http://www.wto.org/>.

<sup>31</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996).

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