

ARTICLE XX

GENERAL EXCEPTIONS

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I. TEXT OF ARTICLE XX AND INTERPRETATIVE NOTE AD ARTICLE XX**Article XX*****General Exceptions***

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

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

Interpretative Note *Ad* Article XX from Annex I

Sub-paragraph (h)

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

II. INTERPRETATION AND APPLICATION OF ARTICLE XX

A. SCOPE AND APPLICATION OF ARTICLE XX

1. General

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes, with regard to the argument that certain measures fell within Article XX(d):

“Since Article XX(d) is an exception to the General Agreement it is up to Canada, as the party invoking the exception, to demonstrate that the purchase undertakings are necessary to secure compliance with the Foreign Investment Review Act”.¹

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” found that “... it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are ‘necessary’ within the meaning of that provision”².

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, includes the following finding regarding the presentation of arguments to a panel concerning both the positive prescriptions of the General Agreement and the exceptions in Article XX:

“The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. The Panel recalled that previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.³ Therefore, the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation,⁴ and not to examine Article XX exceptions unless invoked.⁵ Nevertheless, the Panel considered that a party to a dispute could argue in the alternative that Article XX might apply, without this argument constituting *ipso facto* an admission that the measures in question would otherwise be inconsistent with the General Agreement. Indeed, the efficient operation of the dispute settlement process required that such arguments in the alternative be possible”.⁶

2. Preamble of Article XX

The preamble was inserted into the exceptions article of the commercial policy chapter of the draft ITO Charter during the London session of the Preparatory Committee. At that time one delegation stated that “Indirect protection is an undesirable and dangerous phenomenon. ... Many times the stipulations ‘to protect animal or plant life or health’ are misused for indirect protection. It is recommended to insert a clause which prohibits expressly [the use of] such measures [to] constitute an indirect protection ...”.⁷ In discussions in the Technical Sub-committee of Committee II at London, the following proposal was made.

¹L/5504, adopted on 7 February 1984, 30S/140, 64, para. 5.20.

²L/6439, adopted on 7 November 1989, 36S/345, 393, para. 5.27.

³The note to this sentence refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, adopted on 7 November 1989, BISD 36S/345, 385, para. 5.9.

⁴The note to this sentence refers to the Panel Reports on “Canada - Administration of the Foreign Investment Review Act”, adopted on 7 February 1984, 30S/140, 164, para. 5.20 and “United States - Section 337 of the Tariff Act of 1930”, adopted on 7 November 1989, 36S/345, 393 para. 5.27.

⁵The note to this sentence refers to, e.g., the panel report on “EEC - Regulation of Parts and Components”, adopted on 16 May 1990, L/6657, 37S/132, para. 5.11.

⁶DS21/R (unadopted), dated 3 September 1991, 39S/155, 197, para. 5.22.

⁷EPCT/C.II/32 (Note of the Netherlands and the Belgo-Luxembourg Economic Union, 30 October 1946).

“... it had been the practice in international agreements to include such exceptions as those laid down in Article 32 [XX], but only exceptions to provisions on import prohibitions and restrictions. The exceptions of Article 32 [XX] covered a far wider field.

“In order to prevent abuse of the exceptions of Article 32 ... the following sentence should be inserted as an introduction: ‘The undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any Member of the following measures, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.”⁸

This suggestion was generally accepted subject to later review of its wording, particularly as to whether the scope of the Article should be limited to import and export restrictions.⁹ See also Article XX(b) below.

(1) “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”

In the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada”, the Panel examined a US prohibition on imports of tuna and tuna products from Canada, imposed 31 August 1979 following the seizure by Canadian authorities of US fishing vessels and fishermen in disputed waters.

“The Panel noted the preamble to Article XX. The United States’ action of 31 August 1979 had been taken exclusively against imports of tuna and tuna products from Canada, but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and then for similar reasons. The Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable. ...”¹⁰

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined a ban on imports, under an “exclusion order” of the U.S. International Trade Commission, of certain automotive spring assemblies which the Commission had found under Section 337 of the Tariff Act of 1930 infringed United States patents. The Panel decided to first examine the applicability of Article XX(d).

“Looking first at the Preamble, the Panel interpreted the word ‘measure’ to mean the exclusion order issued by the United States International Trade Commission (ITC) under the provisions and procedures of Section 337 since, in the view of the Panel, it was the exclusion order which operated as the measure preventing the importation of the infringing product.

“The Panel noted that the exclusion order was directed against imports of certain automotive spring assemblies produced in violation of a valid United States patent from all foreign sources, and not just from Canada. It found, therefore, that the exclusion order was ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevail’.”¹¹

The Panel Report was adopted “on the understanding that this shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.¹² Such examination took place during the panel proceedings on “United States - Section 337 of the Tariff Act of 1930”.

⁸EPCT/C.II/50, p. 7.

⁹*Ibid.*, p. 9; EPCT/C.II/54/Rev.1, p. 36.

¹⁰L/5198, adopted on 22 February 1982, 29S/91, 108, para. 4.8.

¹¹L/5333, adopted on 26 May 1983, 30S/107, 125, paras. 54-55.

¹²C/M/168, p. 10.

(2) “disguised restriction on international trade”

The 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” notes that the Panel “felt that the United States’ action should not be considered to be a disguised restriction on international trade, noting that the United States’ prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such”.¹³ In discussions on this report at the 22 February 1982 Council meeting, the representative of Canada noted that “Canada did not consider it sufficient for a trade measure to be publicly announced as such for it to be considered not to be a disguised restriction on international trade within the meaning of Article XX of the General Agreement”.¹⁴

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” also notes that

“The Panel ... considered whether or not the exclusion order was ‘applied in a manner which would constitute ... a disguised restriction on international trade’. The Panel noted that the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined. Notice of the exclusion order was published in the Federal Register and the order was enforced by the United States Customs at the border. The Panel also noted that the ITC proceedings in this particular case were directed against the importation of automotive spring assemblies produced in violation of a valid United States patent and that, before an exclusion order could be issued under Section 337, both the validity of a patent and its infringement by a foreign manufacturer had to be clearly established. Furthermore, the exclusion order would not prohibit the importation of automotive spring assemblies produced by any producer outside the United States who had a licence from Kuhlman Corporation (Kuhlman) to produce these goods. Consequently, the Panel found that the exclusion order had not been applied in a manner which constituted a disguised restriction on international trade”.¹⁵

3. Paragraph (b)

(1) “necessary to protect human, animal or plant life or health”

During the Geneva session of the Preparatory Committee, in discussions concerning paragraph (b) and its relationship to the preamble of this article, it was agreed to delete the phrase (which had appeared in the New York draft of paragraph (b)) “if corresponding domestic safeguards under similar conditions exist in the importing country”. The reasons for the proposed deletion were that this would be difficult to implement, and “as for the protection needed for exporting countries, to see that this is not abused ... that is afforded one by the headnote to the Article ...”.¹⁶ It was stated at that time that “in view of the misuses which have been made in the past of sanitary regulations, and of damages caused in this way to exporting countries, it would be regrettable if we were to renounce any clarification of the provisions of sub-paragraph (b). However, the discussion which was raised here shows clearly that this Committee is against any possibility of this provision being used as a measure of protection in disguise”.¹⁷

The record of the discussions at the Havana Conference in the Third Committee on the corresponding provision in the Charter notes:

“The Committee agreed that quarantine and other sanitary regulations are a subject to which the Organization should give careful attention with a view to preventing measures ‘necessary to protect human, animal or plant life or health’ from being applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade and to advising Members how they can maintain such measures without causing such prejudice. In view of this, the Committee assumes that the Organization will establish a regular procedure with a view to investigating (in consultation, when it considers this advisable, with other intergovernmental specialized agencies of recognized scientific and

¹³L/5198, adopted on 22 February 1982, 29S/91, 108, para. 4.8.

¹⁴C/M/155.

¹⁵L/5333, adopted on 26 May 1983, 30S/107, 125, para. 56.

¹⁶EPCT/A/PV/30, p. 11; see also *ibid.* p. 14-15.

¹⁷EPCT/A/PV/30, p. 13.

technical competence, such as the FAO) any complaints that might be brought by a Member as to the use of the exception in sub-paragraph 1(a)(iii) of Article 45 [(b) of XX] in a manner inconsistent with the provisions of the preamble to that paragraph”.¹⁸

In the 1987 Panel Report on “Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages”, in discussing the claim of Japan that discriminatory or protective taxes on various alcoholic beverages could be justified as designed to meet the objective of taxation according to ability to pay, the Panel noted the scope provided to domestic tax systems under Article III; it also noted that “... The ‘general exceptions’ provided for in GATT Article XX might also justify internal tax differentiations among like or directly competitive products, for instance if ‘necessary to protect human ... or plant life or health’ (Article XX(b)). The Panel found, therefore, that the General Agreement reserved each contracting party a large degree of freedom to decide autonomously on the objectives, level, principles and methods of its internal taxation of goods”.¹⁹

The 1990 Panel Report on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”²⁰ examined measures by Thailand prohibiting imports of cigarettes. The Panel found that these measures were inconsistent with Article XI. Thailand claimed that the restrictions were justified under Article XX(b) because measures which could only be effective if cigarette imports were prohibited had been adopted by the government to control smoking and because additives in United States cigarettes might make them more harmful than Thai cigarettes. The Panel heard from an expert of the World Health Organization (WHO).

“The Panel ... defined the issues which arose under [Article XX(b)]. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be ‘necessary’.

“The Panel noted that a previous panel had discussed the meaning of the term ‘necessary’ in the context of Article XX(d), which provides an exemption for measures which are ‘necessary to secure compliance with laws or regulations which are not inconsistent’ with the provisions of the General Agreement. The panel had stated that

‘a contracting party cannot justify a measure inconsistent with other GATT provisions as “necessary” in terms of Article XX(d) *if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it*. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions’.²¹

“The Panel could see no reason why under Article XX the meaning of the term ‘necessary’ under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term ‘necessary’.

¹⁸E/CONF.2/C.3/SR.35.

¹⁹L/6216, adopted on 10 November 1987, 34S/83, 124, para. 5.13.

²⁰DS10/R, adopted on 7 November 1990, 37S/200.

²¹The note to this paragraph refers to the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, L/6439, adopted on 7 November 1989, paragraph 5.26.

“The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be ‘necessary’ in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. The Panel noted that contracting parties may, in accordance with Article III:4 of the General Agreement, impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to ‘like’ products of national origin. The United States argued that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be ‘necessary’ within the meaning of Article XX(b). The Panel proceeded to examine this issue in detail.

“The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

“The Panel then examined whether the Thai concerns about the *quality* of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

“The Panel then considered whether Thai concerns about the *quantity* of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the *demand* for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

‘Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco’.²²

“The resolution goes on to urge all member states of the WHO

‘to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for: ...

- (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco’

“A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.²³ Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of

²²The note to this paragraph refers to the Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

²³The note to this sentence provides: “On the requirement of equal competitive opportunities, see the Report of the panel on ‘United States - Section 337 of the Tariff Act of 1930’ (L/6439, paragraph 5.26, adopted on 7 November 1989)”.

Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

“The Panel then examined how Thailand might restrict the *supply* of cigarettes in a manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.²⁴ The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.²⁵ As to the pricing of cigarettes, the Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

‘Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco.’

“It accordingly urged all member states

‘to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco’.²⁶

“For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

“The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

‘Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking’.²⁷

“In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand’s practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not ‘necessary’ within the meaning of Article XX(b)”.²⁸

²⁴The note to this sentence provides: “Cf. Articles III:4, XVII and XX(d)”.

²⁵The note to this sentence provides: “Cf. Articles III:2 and 4 and II:4”.

²⁶The note to this sentence refers to Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

²⁷The note to this sentence refers to 1982 Expert Committee on ‘Smoking Control Strategies in Developing Countries’, page 69; cited at page 16 in the WHO Submission to the Panel of 19 July 1990.

²⁸DS10/R, adopted on 7 November 1990, 37S/200, 222-226, paras. 73-81.

In the November 1990 Council discussion preceding the adoption of this Panel Report, the representative of Thailand stated that “it was clear from the present Panel report that Thailand’s cigarette régime was based on public health policy considerations. His Government intended to take all measures necessary to prevent an increase in tobacco consumption, and to reduce it if possible. Thailand took heart from the report that a set of GATT-consistent measures could be taken to control both the supply of and demand for cigarettes, as long as they were applied to both domestic and imported cigarettes on a national-treatment basis. He concluded by saying that as a contracting party, Thailand intended to abide by its GATT obligations. It had lifted its import ban, and its present laws and regulations were in accordance with the national-treatment principle. On the other hand, Thailand needed to ensure that it would not be forced to accept conditions imposed above and beyond its GATT obligations”.²⁹

In the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, the Panel examined the provisions of the Marine Mammal Protection Act (MMPA) providing for a prohibition of imports of certain yellowfin tuna and yellowfin tuna products, and the import ban imposed under these provisions.

“The Panel noted that the United States considered the prohibition of imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico, and the provisions of the MMPA on which this prohibition is based, to be justified by Article XX(b) because they served solely the purpose of protecting dolphin life and health and were ‘necessary’ within the meaning of that provision because, in respect of the protection of dolphin life and health outside its jurisdiction, there was no alternative measure reasonably available to the United States to achieve this objective. Mexico considered that Article XX(b) was not applicable to a measure imposed to protect the life or health of animals outside the jurisdiction of the contracting party taking it and that the import prohibition imposed by the United States was not necessary because alternative means consistent with the General Agreement were available to it to protect dolphin lives or health, namely international co-operation between the countries concerned.

“The Panel noted that the basic question raised by these arguments, namely whether Article XX(b) covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure, is not clearly answered by the text of that provision. It refers to life and health protection generally without expressly limiting that protection to the jurisdiction of the contracting party concerned. The Panel therefore decided to analyze this issue in the light of the drafting history of Article XX(b), the purpose of this provision, and the consequences that the interpretations proposed by the parties would have for the operation of the General Agreement as a whole.

“The Panel noted that the proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, ‘Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures: ... (b) necessary to protect human, animal or plant life or health’. In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: ‘For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country’. This added proviso reflected concerns regarding the abuse of sanitary regulations by importing countries. Later, Commission A of the Second Session of the Preparatory Committee in Geneva agreed to drop this proviso as unnecessary.³⁰ Thus, the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country.

“The Panel further noted that Article XX(b) allows each contracting party to set its human, animal or plant life or health standards. The conditions set out in Article XX(b) which limit resort to this exception, namely that the measure taken must be ‘necessary’ and not ‘constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’, refer to the trade measure requiring justification under Article XX(b), not however to the life or health standard chosen by the

²⁹C/M/246, 23 November 1990.

³⁰The note to this sentence refers to EPCT/A/PV/30/7-15.

contracting party. The Panel recalled the finding of a previous panel that this paragraph of Article XX was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable.³¹ The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.

“The Panel considered that the United States’ measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel - as required of the party invoking an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel’s view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States’ dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.

“On the basis of the above considerations, the Panel found that the United States’ direct import prohibition imposed on certain yellowfin tuna and certain yellowfin tuna products of Mexico and the provisions of the MMPA under which it is imposed could not be justified under the exception in Article XX(b).”³²

In this connection see also the unadopted 1994 Panel Report on “United States - Restrictions on Imports of Tuna”.³³

See also the “Streamlined Mechanism for Reconciling the Interests of Contracting Parties in the Event of Trade-Damaging Acts”, discussed below, which provides, *inter alia*, that “A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b)”.³⁴

(2) Publication, notification and consultations concerning measures taken under paragraph (b)

The provisions of Article XXII in the 30 October 1947 text of the General Agreement (and the corresponding provisions in Article 41 of the Havana Charter) provided for consultations concerning “such representations as may be made by any other contracting party with respect to [various enumerated matters and] sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this Agreement”. The listing of specific matters in Article XXII was deleted as unnecessary during the 1954-55 Review Session; see Section III under Article XXII.

³¹The footnote to this sentence refers to the Panel Report on ‘Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes’, adopted on 7 November 1990, 37S/200, 222-223, DS10/R, paras. 73-74.

³²DS21/R (unadopted), dated 3 September 1991, 39S/155, 198-200, paras. 5.24-5.29.

³³DS29/R, dated 16 June 1994, paras. 5.28-5.39.

³⁴C/M/236, pp. 6-7; 36S/67.

During discussions in the Third Committee at the Havana Conference,

“The Committee agreed that quarantine and other sanitary regulations as well as other types of regulations must be published under Article 37 [X] and that the provisions for consultation in Article 41 [XXII] required Members to supply full information as to the reason for and operation of such regulations”.³⁵

According to the Interpretative Note *Ad* Article 41 of the Havana Charter

“The provisions for consultation require Members, subject to the exceptions specifically set forth in this Charter, to supply to other Members, upon request, such information as will enable a full and fair appraisal of the matters which are the subject of such consultation, including the operation of sanitary laws and regulations for the protection of human, animal or plant life or health, and other matters affecting the application of Chapter IV”.

In 1969, the United Kingdom notified new measures imposed in the wake of the 1967/68 outbreak of foot-and-mouth disease in the United Kingdom, including a ban on certain meat imports and imposition of requirements regarding compliance with animal health requirements, hygiene and public health inspection with respect to imports of boneless beef from countries where foot-and-mouth disease is endemic. The measures were accompanied by a reduction of the duty on beef imports. The notification stated “It must be emphasized the new measures are being taken solely as a result of the need to maintain high standards of animal and public health in the United Kingdom. There is no question of attempting to provide protection for our domestic industry and we consider the new measures to be fully compatible with the GATT and with Article XX in particular”.³⁶

Following the nuclear accident at Chernobyl in the Soviet Union, the EEC in May 1986 suspended imports of live animals, fresh meat and certain other fresh foods from certain East European countries. In the May 1986 meeting of the Council, the representative of Hungary stated that the selection of countries within a 1000 kilometer radius of the accident was unjustified and arbitrary; the radiation level had risen throughout most of Europe since the accident, and certain countries outside that radius had experienced a greater level of radiation than some within it. Hungary also recalled the recommendation of the World Health Organization according to which there was no public health justification to ban imports from East European countries. He expressed Hungary’s willingness to have its food products checked for radiation at the border by importing countries, and/or to certify freedom from radioactive contamination for each shipment. The representative of the EEC stressed that the measures were temporary and conservative, and stated that necessary data on radiation levels had not yet been received.³⁷ Austria notified the contracting parties of a temporary prohibition on imports of certain dairy, vegetable and fruit products originating in certain countries of Eastern and Southern Europe, following the Chernobyl accident; the prohibition was stated to be “in accordance with Article XX(b)”.³⁸

At the May 1989 Council meeting, Chile drew attention to the problem it had faced regarding the United States’ suspension of imports of Chilean fruit on the basis of suspected food contamination. Chile suggested that the Chairman hold consultations with interested contracting parties to study ways of setting up machinery which, while protecting the rights of contracting parties, would minimize the damage caused by similar measures. The delegate of Chile stated that “The measures taken had ... involved hundreds of millions of dollars of fruit and vegetables which had had to be destroyed or re-exported, confiscated or prohibited from entry because two grapes had been found to contain toxic chemicals. This situation had led Chile to believe that contracting parties should have a permanent expeditious system to hold consultations speedily, to exchange information and to arrive jointly at decisions – in short, a crisis management body ... to ensure that measures adopted would be in keeping with the dimension of the threat”.³⁹ A number of contracting parties supported this proposal, underlining the importance of the issues raised by Chile for food exporting countries. Others

³⁵E/CONF.2/C.3/SR.35, pp. 6-7.

³⁶L/3251.

³⁷C/M/198, p. 28-31.

³⁸L/5998, 27 May 1986; removal of measures, Add.1, 11 June 1986.

³⁹C/M/232, p. 24.

stated that governments had to be free to act expeditiously when human health was endangered, and could not be expected to consult extensively on the trade impact of their actions before responding to an urgent threat to human health.⁴⁰

At its meeting on 11 October 1989, the Chairman read out an agreed text, which noted that “During the course of the consultations and in the light of comments made by delegations, there seems to have emerged a consensus amongst the participating delegations that the matter under discussion is of interest to all contracting parties. Another element which emerged during the informal consultations was that some delegations, despite their recognition that a genuine problem exists, are doubtful whether it will be possible for their respective authorities in capitals to agree on a formalized GATT structure to deal with the problem”. The Council agreed to the Chairman’s proposal that the Council take note of his recommendation, entitled “Streamlined Mechanism for Reconciling the Interests of Contracting Parties in the Event of Trade-Damaging Acts”, that the following guidelines be used in the event of a trade-damaging act:

- “1. A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b).
- “2. The importing contracting party should notify the Director-General as quickly as possible. A notification by telephone should be followed immediately by a written communication from the importing contracting party, which would be circulated to contracting parties.
- “3. The importing contracting party would be expected to agree to expeditious informal consultations with the principally concerned contracting party as soon as a trade-damaging act has occurred, with a view to reaching a common view about the dimension of the problem and the best way to deal with it effectively.”⁴¹

In December 1989, at the Forty-fifth Session, Austria informed the CONTRACTING PARTIES that with effect from 1 December 1989, Austria had limited traffic of certain heavy trucks during night hours on certain Austrian transit roads; the representative of Austria stated that “This measure has become unavoidable due to the intolerable increase in heavy traffic on certain transit routes causing extreme noise and pollution seriously endangering the health of the adjacent Austrian population. This measure has been taken in accordance with Article XX(b) of the General Agreement”. The measure applied to trucks of all nationalities, including Austrian trucks. Austria also noted that in retaliation Germany had decided to ban as of 1 January 1990 the circulation of 212,000 Austrian lorries during night hours in the entire territory of Germany. Consultations were held under Article XXII:1 regarding the German measure in spring 1990.⁴²

In 1991, Peru drew the Council’s attention to restrictions imposed on exports of Peru following the cholera epidemic in Peru, and sought application of these 1989 guidelines, referring to a World Health Assembly resolution calling on member States not to apply to countries affected by the cholera epidemic import restrictions not justifiable on public health grounds. Pursuant to the 1989 guidelines, the EEC notified a prohibition on imports from Peru of certain food products unless accompanied by a certificate of freedom from cholera, and Austria notified with reference to Article XX(b) a prohibition on imports of fishery products from Peru.⁴³ In October 1993, Austria notified two prohibitions on importation of certain live animals and animal products from specific countries or districts, imposed in line with Article XX(b) and in order to prevent the introduction of classical swine fever and of foot-and-mouth disease into Austria; the notification was without reference to the 1989 guidelines. In July and October 1994 Austria again notified such restrictions.⁴⁴

⁴⁰C/M/232, p. 23-29; see further C/M/231, C/M/234, C/M/235.

⁴¹C/M/236, pp. 6-7; 36S/67.

⁴²SR.45/ST/22, DS14/1, C/M/241.

⁴³C/M/248, 249, 250, 251; statement of Peru with relevant WHO press releases, Spec(91)12; communication from Peru, L/7038; EEC notification, L/6845 (notification of modification of measures in L/6845/Add.1); notification by Austria, L/6917.

⁴⁴L/7302, L/7303 (1993); L/7503, L/7544 (1994).

A Secretariat Note of 1991 on “Trade and Environment” includes a list of quantitative restrictions for which Article XX(b) has been cited as a justification. The list was drawn from the Inventory of Quantitative Restrictions maintained by the Secretariat.⁴⁵

4. Paragraph (c): “relating to the importation or exportation of gold and silver”

The Panel Report on “Canada - Measures Affecting the Sale of Gold Coins”, which has not been adopted, examined a tax measure of the province of Ontario imposing a retail sales tax on gold coins and exempting from this tax Maple Leaf gold coins struck by the Canadian Mint. The Panel noted that while both the Maple Leaf and the Krugerrand were legal tender in their respective countries of origin, both were normally purchased as investment goods, and therefore considered that the Maple Leaf and Krugerrand gold coins were not only means of payment but also “products” within the meaning of Article III:2.⁴⁶

5. Paragraph (d)

(1) *General*

The Working Party on “The Haitian Tobacco Monopoly” in 1955 examined whether the licensing of tobacco imports by the Tobacco Régie required a release under the provisions of Article XVIII:12: “... the representative of Haiti stated that the measure was necessary to secure compliance with the Law of 16 February 1948, which established the Tobacco Régie ... and that it was ‘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 the light of this statement the Working Party considered that Article [XX(d)] would be applicable to the measure if the basic regulations were not in conflict with any provision of the Agreement”.⁴⁷

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” dealt with the claim by the European Economic Community that the special “Section 337” procedure for enforcing patent claims against imported products treated such products less favourably than the procedures applicable to patent claims involving products of domestic origin, contrary to Article III:4, and that this special procedure was not justified under Article XX(d) as “necessary” to enforce U.S. patent laws against imports.

“The Panel noted that the parties to the dispute agreed that, for the purposes of Article XX(d), Section 337 can be considered as ‘measures ... to secure compliance with’ United States patent law ... and ... examined whether, in respect of the elements of Section 337 found to be inconsistent with Article III:4 of the General Agreement, the conditions specified in Article XX(d) to justify measures otherwise inconsistent with the GATT are met. These are:

- that the ‘laws or regulations’ with which compliance is being secured are themselves ‘not inconsistent’ with the General Agreement;
- that the measures are ‘necessary to secure compliance’ with those laws or regulations;
- that the 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’.

“The Panel noted that each of these conditions must be met if an inconsistency with another GATT provision is to be justifiable under Article XX(d). A measure which does not meet any one of these

⁴⁵L/6896, p. 93. Concerning the Inventory of Quantitative Restrictions, see under Article XI in this Index.

⁴⁶L/5863 (unadopted), dated 17 September 1985, para. 51.

⁴⁷L/454, adopted on 22 November 1955, 4S/38, 39, para. 6. Before the revision of Article XVIII in the Review Session, Article XVIII:12 provided for notification and concurrence with regard to certain measures affecting imports which were not otherwise permitted by the General Agreement. See also references to this report under Article III.

conditions, for example the condition that it must be ‘necessary to secure compliance’ with a law consistent with the GATT, cannot be justified under Article XX(d).⁴⁸

(2) “*necessary*”

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined claims by Canada regarding an exclusion order issued by the U.S. International Trade Commission (ITC) under Section 337 of the Tariff Act of 1930, including arguments that “The exception under Article XX(d) did not justify trade restrictive measures taken pursuant to Section 337 on two grounds: (1) differential treatment of foreign products involving a separate adjudicating process was not ‘necessary’ to secure compliance with United States patent laws, and (2) the law with which compliance was sought (Section 337) was ‘inconsistent with the provisions of this agreement’, i.e. Article III of the GATT”.⁴⁹ In its findings,

“The Panel considered whether the ITC action, in making the exclusion order, was ‘necessary’ in the sense of paragraph (d) of Article XX to secure compliance with United States patent law. In this connection the Panel examined whether a satisfactory and effective alternative existed under civil court procedures which would have provided the patent holder Kuhlman with a sufficiently effective remedy against the violation of its patent by foreign producers including the Canadian producer Wallbank Manufacturing Co. Ltd. ...

“... it was the view of the Panel that the only way in which, under existing United States law, Kuhlman’s right to the exclusive use of its patent in the United States domestic market could be effectively protected against the importation of the infringing product would be to resort to the exclusion order procedure. For the above reasons, therefore, the Panel found that the exclusion order issued by the ITC under Section 337 of the United States Tariff Act of 1930 was ‘necessary’ in the sense of Article XX(d) to prevent the importation and sale of automotive spring assemblies infringing the patent, thus protecting the patent holder’s rights and securing compliance with United States patent law.”⁵⁰

“The Panel did not ... exclude the strong possibility that there might be cases ... where a procedure before a United States court might provide the patent holder with an equally satisfactory and effective remedy against infringement of his patent rights. In such cases the use of an exclusion order under Section 337 might not be necessary in terms of Article XX(d) to secure compliance with laws and regulations (i.e. United States patent law) which were not inconsistent with the General Agreement.”⁵¹

“... The Panel pointed out that its finding ... that the exclusion order issued by the ITC was ‘necessary’ within the meaning of Article XX(d) had been made on the basis of existing United States law. It carried no implication that the use of Section 337 was an entirely satisfactory means of dealing with patent based cases”.⁵²

In the Council discussion of the Panel Report, the representative of Canada stated “that the Panel qualified its conclusions by emphasizing that it was under existing United States law that Section 337 orders would often be necessary. This would seem to suggest that if a contracting party elects not to equip itself with effective enforcement procedures with respect to imports for its law of general application, then it is free to deny national treatment, even to the extent of having a discriminatory adjudicative process”.⁵³ Some other contracting parties also expressed concern at the Panel conclusions.⁵⁴ The Panel Report was adopted “on the understanding that this shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.⁵⁵

⁴⁸L/6439, adopted on 7 November 1989, 36S/345, 392, paras. 5.22-5.23.

⁴⁹L/5333, adopted on 26 May 1983, 30S/107, 120, para. 37.

⁵⁰*Ibid.*, 30S/126, paras. 58, 60.

⁵¹*Ibid.*, 30S/127, para. 66.

⁵²*Ibid.*, 30S/128, para. 68.

⁵³C/M/161, p. 11; C/W/396, para. 4.

⁵⁴C/M/161, pp. 12-16.

⁵⁵C/M/168, p. 10.

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” examined the argument by Canada that, if the Panel were to find purchase undertakings entered into between foreign investors and the government of Canada to be inconsistent with Article III:4, these would fall under Article XX(d) because the purchase undertakings were “necessary to secure compliance” with the Foreign Investment Review Act.

“... On the basis of the explanations given by Canada the Panel could not ... conclude that the purchase undertakings that were found to be inconsistent with Article III:4 are necessary for the effective administration of the Act. The Panel is in particular not convinced that, in order to achieve the aims of the Act, investors submitting applications under the Act had to be bound to purchasing practices having the effect of giving preference to domestic products. It was not clear to the Panel why a detailed review of investment proposals without purchasing requirements would not be sufficient to enable the Canadian government to determine whether the proposed investments were or were likely to be of significant benefit to Canada within the meaning of Section 2 of the Foreign Investment Review Act.”⁵⁶

The 1989 Panel Report on “United States - Section 337 of the Tariff Act of 1930” contains the following passage:

“The Panel noted that the United States and the Community interpret the term ‘necessary’ differently. They differ as to whether it requires the use of the least trade-restrictive measure available. They also differ as to whether ‘necessity’ to use measures that accord less favourable treatment to imported products can be created by a contracting party’s choice, in its national legislation, of enforcement measures against domestic products that would not be effective against imports ...

“It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so.

“Bearing in mind the foregoing and that it is up to the contracting party seeking to justify measures under Article XX(d) to demonstrate that those measures are ‘necessary’ within the meaning of that provision, the Panel considered whether the inconsistencies that it had found with Article III:4 can be justified as ‘necessary’ in terms of Article XX(d). The Panel first examined the argument of the United States that the Panel should consider not whether the individual elements of Section 337 are ‘necessary’ but rather whether Section 337 as a system is ‘necessary’ for the enforcement of United States patent laws. ... The Panel did not accept this contention since it would permit contracting parties to introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary. In the view of the Panel, what has to be justified as ‘necessary’ under Article XX(d) is each of the inconsistencies with another GATT Article found to exist, i.e. in this case, whether the differences between Section 337 and federal district court procedures that result in less favourable treatment of imported products within the meaning of Article III:4, as outlined above ... are necessary.”⁵⁷

The Panel went on to discuss the necessity of certain aspects of Section 337 which it had found were inconsistent with Article III:4:

⁵⁶L/5504, adopted on 7 February 1984, 30S/140, 164-165, para. 5.20.

⁵⁷L/6439, adopted on 7 November 1989, 36S/345, 392-393, paras. 5.25-5.27.

“The United States suggested that Section 337 can be justified because, under United States law, it provides the only means of enforcement of United States patent rights against imports of products manufactured abroad by means of a process patented in the United States. ... The Panel considered that, even if it were accepted that a different scheme for imports alleged to infringe process patents is necessary, this could not in itself justify as ‘necessary’ in terms of Article XX(d) any of the specific inconsistencies with Article III:4 summarised in paragraph 5.20 above. In any event, the Panel did not consider that a different scheme for imports alleged to infringe process patents is necessary, since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country. The Panel noted that, in the 1988 Omnibus Trade and Competitiveness Act, the United States has in fact amended its law to this effect (see Annex II).

“The United States also suggested that certain features of Section 337 are necessary in order to permit Presidential review, which is in the interests of respondents ... The Panel did not believe that this provided an argument for necessity in terms of Article XX(d), since Presidential review is not necessary in order to secure compliance with United States patent legislation; it is not, of course, available in United States patent litigation involving challenged products of domestic origin.

“The United States suggested that Section 337 is needed because of difficulties with service of process on and enforcement of judgments against foreign manufacturers As regards service of process, the difference in procedures between Section 337 and federal district courts was not itself alleged to be inconsistent with any GATT provision; and the Panel did not see why any of the inconsistencies with Article III:4 are a necessary accompaniment of arrangements for effective service of process where imported products are concerned. However, as noted in paragraph 5.19 above, the Panel found the differences in procedures for the enforcement of judgments to be inconsistent with Article III:4 in that they provide for the possibility of *in rem* general exclusion orders against imported products when no equivalent remedy is available against products of United States origin; and that they provide for automatic customs enforcement of exclusion orders while the enforcement of a court injunction requires the initiation of proceedings by the successful party.

“The United States stressed the importance to its system of enforcement of *in rem* orders, and the Panel considered this question at some length. The Panel agreed with the United States that taking action against infringing products at the source, that is at the point of their production, would generally be more difficult in respect of imported products than in respect of products of national origin: imported products are produced outside the jurisdiction of national enforcement bodies and it is seldom feasible to secure enforcement of the rulings of a court of the country of importation by local courts in the country of production. *In personam* action against importers would not in all cases be an adequate substitute for action against the manufacturer, not only because importers might be very numerous and not easily brought into a single judicial proceeding, but also, and more importantly, because as soon as activities of known importers were stopped it would often be possible for a foreign manufacturer to find another importer. For these reasons the Panel believed that there could be an objective need in terms of Article XX(d) to apply limited *in rem* exclusion orders to imported products, although no equivalent remedy is applied against domestically-produced products.

“A limited *in rem* order applying to imported products can thus be justified, for the reasons presented in the previous paragraph, as the functional equivalent of an injunction enjoining named domestic manufacturers. However, these reasons do not justify as ‘necessary’ in terms of Article XX(d) the inconsistency with Article III:4 found in respect of general exclusion orders; this is that such orders apply to products produced by persons who have not been named as respondents in the litigation, while no equivalent measure applicable to non-parties is available where products of United States origin are concerned. The United States informed the Panel that the situations which under Section 337 could justify a general exclusion order against imported products are a widespread pattern of unauthorised use of the patented invention or process and a reason to infer that manufacturers other than respondents to the investigation might enter the United States market with infringing products. However, the Panel saw no reason why these situations could not also occur in respect of products produced in the United States. Nevertheless, the Panel did not rule out entirely that there could sometimes be objective reasons why general *in rem* exclusion orders might be ‘necessary’ in terms of Article XX(d) against imported products

even though no equivalent measure was needed against products of United States origin. For example, in the case of imported products it might be considerably more difficult to identify the source of infringing products or to prevent circumvention of orders limited to the products of named persons, than in the case of products of United States origin. Of course, the United States could bring the provision of general exclusion orders into consistency with Article III:4 by providing for the application in like situations of equivalent measures against products of United States origin.

“As noted above, the Panel found an inconsistency with Article III:4 in the fact that Section 337 exclusion orders are automatically enforced by the Customs Service, whereas the enforcement of injunctions against products of United States origin requires the successful plaintiff to bring individual proceedings. However, in this case the Panel accepted the argument of necessity in terms of Article XX(d). A United States manufacturer which has been enjoined by a federal district court order can normally be expected to comply with that injunction, because it would know that failure to do so would incur the risk of serious penalties resulting from a contempt proceeding brought by the successful plaintiff. An injunction should therefore normally suffice to stop enjoined activity without the need for subsequent action to enforce it. As far as imported products are concerned, enforcement at the border by the customs administration of exclusion orders can be considered as a means necessary to render such orders effective.

“The Panel considered the argument of the United States that many of the procedural aspects of Section 337 reflect the need to provide expeditious prospective relief against infringing imports. ... The Panel understood this argument to be based on the notion that, in respect of infringing imports, there would be greater difficulty than in respect of infringing products of domestic origin in collecting awards of damages for past infringement, because foreign manufacturers are outside the jurisdiction of national courts and importers might have little by way of assets. In the Panel’s view, given the issues at stake in typical patent suits, this argument could only provide a justification for rapid *preliminary* or conservatory action against imported products, combined with the necessary safeguards to protect the legitimate interests of importers in the event that the products prove not to be infringing. The tight time-limits for the *conclusion* of Section 337 proceedings, when no comparable time-limits apply in federal district court, and the other features of Section 337 inconsistent with Article III:4 that serve to facilitate the expeditious completion of Section 337 proceedings, such as the inadmissibility of counterclaims, cannot be justified as ‘necessary’ on this basis.

“The United States did not advance, nor was the Panel aware of, any other arguments that might justify as necessary any of the elements of Section 337 that had been found to be inconsistent with Article III:4 of the General Agreement. On the basis of the preceding review and analysis, the Panel *found* that the system of determining allegations of violation of United States patent rights under Section 337 of the United States Tariff Act cannot be justified as necessary within the meaning of Article XX(d) so as to permit an exception to the basic obligation contained in Article III:4 of the General Agreement. The Panel, however, repeats that, as indicated in paragraphs 5.32 and 5.33 above, some of the inconsistencies with Article III:4 of individual aspects of procedures under Section 337 could be justified under Article XX(d) in certain circumstances”.⁵⁸

The 1992 Panel Report on “United States - Measures Affecting Alcoholic and Malt Beverages” examined, *inter alia*, the invocation of Article XX(d) with respect to a discriminatory requirement that imported beer be distributed through in-state wholesalers:

“The Panel then recalled the United States alternative argument that the requirement that imported beer be distributed through in-state wholesalers, which requirement was not imposed in the case of beer from in-state breweries, was justified under Article XX(d) as a measure necessary to secure compliance with laws or regulations which were not inconsistent with the provisions of the General Agreement. ...

⁵⁸*Ibid.*, 36S/393-396, paras. 5.28-5.35.

“... The Panel also noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use.

“The Panel recalled the position of the United States that there was no reasonable alternative to the existing regulatory scheme in the various states which required out-of-state and imported beer to be distributed to retailers via in-state wholesalers while allowing in-state beer to be shipped directly from producers to retailers. The United States considered that the wholesaler was the only reasonable place for beer excise taxes to be collected for out-of-state and foreign products, but that there was no such necessity with respect to products from in-state producers that were, by definition, under the jurisdiction of the state. The Panel further recalled the position of Canada that the burden was on the United States to specify and demonstrate the consistency with the General Agreement of the laws for which it was trying to secure compliance and to show that there were no less trade restrictive measures available to secure compliance with them.

“The Panel was of the view that even if, as argued by the United States, the requirement to use wholesalers is considered as a ‘measure to secure compliance’ in terms of Article XX(d) and the respective state liquor laws are considered as ‘laws ... not inconsistent with the provisions of this Agreement’ notwithstanding the above-mentioned Panel findings on inconsistency with Article III, the United States has not demonstrated that discriminatory requirements to use wholesalers are ‘necessary’ in terms of Article XX(d) to enforce the liquor tax laws. The Panel recalled a finding of an earlier panel ‘that a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it’.⁵⁹ The Panel considered that the United States has not met its burden of showing that the specific inconsistency with Article III:4 of the discriminatory wholesaler requirements in the various states is the only reasonable measure available to secure enforcement of state excise tax laws. The fact that not all fifty states maintain discriminatory systems indicates to the Panel that alternative measures for enforcement of state excise tax laws do indeed exist”.⁶⁰

The same Panel also examined the United States’ invocation of Article XX(d) with respect to a requirement in some states that alcoholic beverages transported into the state be transported by state-licensed common carriers while in-state producers could deliver their product in their own vehicles.

“The Panel was of the view that its considerations with respect to Article XX(d) in relation to the wholesaler requirement apply equally here. It was incumbent upon the United States to demonstrate that particular laws for which compliance is being sought are consistent with the General Agreement and that the inconsistency with Article III:4 of the discriminatory common carrier requirement for imported beer and wine is necessary to secure compliance with those laws. In the view of the Panel, the United States has not demonstrated that the common carrier requirement is the least trade restrictive enforcement measure available to the various states and that less restrictive measures, e.g. record-keeping requirements of retailers and importers, are not sufficient for tax administration purposes. In this regard, the Panel noted that not all fifty states of the United States maintain common carrier requirements. It thus appeared to the Panel that some states have found alternative, and possibly less trade restrictive, and GATT-consistent, ways of enforcing their tax laws. The Panel accordingly found that the United States has not met its burden of proof in respect of its claimed Article XX(d) justification for the common carrier requirement of the various states”.⁶¹

(3) “to secure compliance”

In the Panel Report on “EEC - Regulation on Imports of Parts and Components” the Panel examined the consistency with the General Agreement of Article 13:10 of Council Regulation No. 2176/84 on anti-dumping.

⁵⁹The footnote to this sentence in the panel report refers to the Report of the Panel on “United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, 36S/345, 392.

⁶⁰DS23/R, adopted on 19 June 1992, 39S/206, 282-283, paras. 5.40-5.43.

⁶¹*Ibid.*, 39S/287-288, para. 5.52.

This provision was intended to prevent circumvention of anti-dumping duties on finished products through the importation of parts or materials for use in the assembly or production of like finished products within the EEC. Japan considered this provision to be inconsistent with the EEC's obligations under Articles I and II or III, and not justified by Article VI of the General Agreement. The EEC considered both the application of Article 13:10 and the Article itself to be justified by Article XX(d). "The Panel considered that the 'measure' referred to in Article XX is the measure requiring justification under Article XX and that, therefore, the imposition of anti-circumvention duties inconsistent with Article III:2 is the 'measure' in the present case. It further considered that the 'laws or regulations' to be examined under sub-paragraph (d) are the laws or regulations the contracting party invoking Article XX(d) claims to secure compliance with, in the present case the Council Regulations Nos. 2176/84 and 2423/88 (except for the anti-circumvention provision) and the individual Council regulations imposing definitive anti-dumping duties on finished products from Japan."⁶²

"The Panel noted that, in order for a measure to be covered by Article XX(d), it must 'secure compliance with' laws or regulations that are not inconsistent with the General Agreement. The Panel therefore proceeded to examine the question of whether the imposition of anti-circumvention duties inconsistent with Article III:2 is a measure 'to secure compliance with' the EEC's general anti-dumping regulations and the individual regulations imposing definitive anti-dumping duties. The essential argument of Japan on this point was that Article XX(d) permits contracting parties to take only measures to enforce the obligations provided for in the laws or regulations consistent with the General Agreement. The only part of the EEC's anti-dumping regulations that requires enforcement is the part establishing the obligation to pay anti-dumping duties. The anti-circumvention duties do not serve to secure the payment of these duties and can therefore in the view of Japan not be considered to be securing compliance with the EEC's anti-dumping regulations. The essential argument of the EEC was that the terms 'to secure compliance with' should be interpreted more broadly to cover not only the enforcement of laws and regulations *per se* but also the prevention of actions which have the effect of undermining the objectives of laws and regulations. In the view of the EEC, the anti-circumvention duties, being levied only in narrowly defined circumstances in which the objectives of the EEC's anti-dumping regulations are clearly being undermined, therefore secure compliance with these regulations within the meaning of Article XX(d).

"The Panel concluded from the above that the interpretative issue before it was: Does the qualification 'to secure compliance with laws or regulations' mean that the measure must prevent actions inconsistent with the obligations set out in laws or regulations, or does it support a more expansive interpretation according to which it would also cover a measure which prevents actions that are consistent with laws or regulations but undermine their objectives?

"The Panel first examined this interpretative issue in the light of the *text of Article XX(d)*. The Panel noted that this provision does not refer to objectives of laws or regulations but only to laws or regulations. This suggests that Article XX(d) merely covers measures to secure compliance with laws and regulations as such and not with their objectives. The examples of the laws and regulations indicated in Article XX(d), namely 'those relating to customs *enforcement*, the *enforcement* of monopolies ..., the *protection* of patents ... and the *prevention* of deceptive practices' (emphasis added) also suggest that Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws or regulations. This conclusion is further supported by the fact that the provision corresponding to Article XX(d) in the 1946 Suggested Charter for an International Trade Organization used the terms 'to *induce* compliance with' while Article XX(d) of the General Agreement uses the stricter language 'to *secure* compliance with' (emphasis added).

"The Panel then examined the alternative interpretations in the light of the *purpose of Article XX(d)* and found the following. If the qualification 'to secure compliance with laws and regulations' is interpreted to mean 'to enforce obligations under laws and regulations', the main function of Article XX(d) would be to permit contracting parties to act inconsistently with the General Agreement whenever such inconsistency is necessary to ensure that the obligations which the contracting parties may impose consistently with the General Agreement under their laws or regulations are effectively enforced.

⁶²L/6657, adopted on 16 May 1990, 37S/132, 194-195, para. 5.12.

If the qualification ‘to secure compliance with laws and regulations’ is interpreted to mean ‘to ensure the attainment of the objectives of the laws and regulations’, the function of Article XX(d) would be substantially broader. Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d): each of the exceptions in the General Agreement - such as Articles VI, XII or XIX - recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on the grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.

“For the reasons indicated in the preceding paragraphs, the Panel found that Article XX(d) covers only measures related to the enforcement of obligations under laws or regulations consistent with the General Agreement. The Panel noted that the general anti-dumping Regulation of the EEC does not establish obligations that require enforcement; it merely establishes a legal framework for the authorities of the EEC. Only the individual regulations imposing definitive anti-dumping duties give rise to obligations that require enforcement, namely the obligation to pay a specified amount of anti-dumping duties. The Panel noted that the anti-circumvention duties do not serve to enforce the payment of anti-dumping duties. The Panel could, therefore, not establish that the anti-circumvention duties ‘secure compliance with’ obligations under the EEC’s anti-dumping regulations. The Panel concluded for these reasons that the duties could not be justified under Article XX(d).”⁶³

(4) “laws or regulations which are not inconsistent with the provisions of this Agreement”

In discussing a proposed amendment to the Havana Charter provision corresponding to Article XX(d), “designed to exempt measures against so-called ‘social dumping’ from the provisions of Chapter IV, the Subcommittee expressed the view that this objective was covered for short-term purposes by paragraph 1 of Article 40 [XIX] and for long-term purposes by Article 7 in combination with Articles 93, 94 [XXIII] and 95”.⁶⁴

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” notes that the Panel “concluded that the laws and regulations which were not inconsistent with the General Agreement and with which compliance was to be secured were the patent laws of the United States, since the case in question was based on the allegation of an infringement of patent rights under United States patent law.”⁶⁵

The 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined certain import quotas maintained by Japan. In response to the invocation of Article XX(d) by Japan in relation to import restrictions administered by an import monopoly, the Panel found that “Article XX(d) only exempts from the obligations under the General Agreement measures necessary to secure compliance with those laws and regulations ‘which are not inconsistent with the provisions of [the General] Agreement’. Article XX(d) therefore does not permit contracting parties to operate monopolies inconsistently with the other provisions of the General Agreement. ... The Panel therefore found that the enforcement of laws and regulations providing for an import restriction made effective through an import monopoly inconsistent with Article XI:1 was not covered by Article XX(d).”⁶⁶

⁶³*Ibid.*, 37S/195-197, paras. 5.14-5.18.

⁶⁴Havana Reports, p. 84, para. 19.

⁶⁵L/5333, adopted on 26 May 1983, 30S/102, 125, para. 57.

⁶⁶L/6253, adopted on 2 February 1988, 35S/163, 230, para. 5.2.2.3.

The 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, examined the “intermediary nations” embargo on imports of tuna under the US Marine Mammal Protection Act (MMPA), which required that the United States authorities implement a prohibition on imports of yellowfin tuna and yellowfin tuna products from “intermediary nations”; at the time of this panel proceeding the United States customs authorities refused entry to shipments of yellowfin tuna unless the importer declared that no yellowfin tuna or yellowfin tuna product in the shipment were harvested with purse-seine nets in the Eastern Tropical Pacific Ocean by vessels of Mexico. The Panel found that these measures and the provisions of the MMPA mandating them were inconsistent with Article XI:1.

“The Panel then proceeded to examine the consistency of the ‘intermediary nations’ embargo with Article XX(d), which the United States had invoked. ...

“The Panel noted that Article XX(d) requires that the ‘laws or regulations’ with which compliance is being secured be themselves ‘not inconsistent’ with the General Agreement. The Panel noted that the United States had argued that the ‘intermediary nations’ embargo was necessary to support the direct embargo because countries whose exports were subject to such an embargo should not be able to nullify the embargo’s effect by exporting to the United States indirectly through third countries. The Panel found that, given its finding that the direct embargo was inconsistent with the General Agreement, the ‘intermediary nations’ embargo and the provisions of the MMPA under which it is imposed could not be justified under Article XX(d) as a measure to secure compliance with ‘laws or regulations not inconsistent with the provisions of this Agreement’.”⁶⁷

In this connection, see also the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.⁶⁸

(5) “the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII”

The London Report on discussions in the Preparatory Committee notes that “There was general agreement that restrictions or prohibitions on private trade might be imposed in order to protect the position of state-trading enterprises operated under other articles ...”.⁶⁹ Accordingly, the London and New York Charters included in Article 25:2 [XI:2] an exception to the general prohibition on quantitative restrictions, for import and export prohibitions or restrictions on private trade for the purpose of establishing a new, or maintaining an existing, monopoly of trade for a state-trading enterprise operating consistent with the Charter articles on state trading. During discussions at the Geneva session of the Preparatory Committee, it was agreed to delete this provision from the article on quantitative restrictions, and to add language clarifying that such measures would be covered by the commercial policy exceptions clause corresponding to the present GATT Article XX(d).⁷⁰ The proposal to make this change was explained as follows:

“... these examples given under sub-paragraph (g) [XX(d)] are, in fact, only examples ... if any law or regulation is consistent with Chapter V, then any measure which is necessary for the enforcement of that law is taken care of here. ... the sole reason for mentioning state trading monopolies specifically here was that, in the case of a monopoly, the enforcement of that monopoly depends upon a prohibition against private trade, and in order to make it perfectly clear to certain Delegates that that was permitted, state trading monopolies were inserted as one of the examples”.⁷¹

It was also noted that “It is only if and when you have a monopoly that you need it protected by a restriction on imports. If by any chance you have a State-trading enterprise which is not a monopoly, it would no doubt simply go into the market and buy and sell alongside private traders, and there would be no occasion to have any restriction in that case at all”.⁷²

⁶⁷DS21/R (unadopted), dated 3 September 1991, 39S/155, 202, paras. 5.39-5.40.

⁶⁸DS31/R, dated 11 October 1994, para. 5.67.

⁶⁹London Report, p. 12, para. III.C.1(i).

⁷⁰See EPCT/W/208 (US proposal), EPCT/W/223 p. 8-9, discussion at EPCT/A/PV/21 p. 4-8,

⁷¹EPCT/A/PV/33 p. 12-13.

⁷²EPCT/A/PV/33, p. 15.

In the 1988 Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products”, in response to an argument by Japan concerning certain import restrictions administered through import monopolies:

“The Panel further examined whether Article XX(d) of the General Agreement justified import restrictions made effective through import monopolies. The Panel noted that Article XX(d) permits measures necessary to the enforcement of monopolies. Article XX(d) therefore permits measures necessary to enforce the exclusive possession of the trade by the monopoly, such as measures limiting private imports that would undermine the control of the trade by the monopoly. However, Article XX(d) only exempts from the obligations under the General Agreement measures necessary to secure compliance with those laws and regulations ‘which are not inconsistent with the provisions of [the General] Agreement’. Article XX(d) therefore does not permit contracting parties to operate monopolies inconsistently with the other provisions of the General Agreement. The General Agreement contains detailed rules designed to preclude protective and discriminatory practices by import monopolies (cf. in particular Article II:4, the note to Articles XI, XII, XIII, XIV and XVIII, and Article XVII). These rules would become meaningless if Article XX(d) were interpreted to exempt from the obligations under the General Agreement protective or discriminatory trading practices by such monopolies. The Panel therefore found that the enforcement of laws and regulations providing for an import restriction made effective through an import monopoly inconsistent with Article XI:1 was not covered by Article XX(d).”⁷³

(6) “protection of patents, trade marks and copyrights”

Drafts for an “Agreement on Measures to Discourage the Importation of Counterfeit Goods” were circulated in 1979 and 1982.⁷⁴ The preamble of the revised draft noted, *inter alia*, “that the contracting parties are exercising their rights under Article XX of the General Agreement, *inter alia*, to adopt or enforce laws and regulations relating to the protection of trademarks”. Following the Decision on Trade in Counterfeit Goods contained in the Ministerial Declaration of 29 November 1982,⁷⁵ the Director-General held consultations with the Director-General of the World Intellectual Property Organization (WIPO) on legal and institutional aspects involved in trade in counterfeit goods.⁷⁶ See also the 1985 Report of the Group of Experts on Trade in Counterfeit Goods.⁷⁷

In the 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies”, “The Panel noted that, as far as it had been able to ascertain, this was the first time a specific case of patent infringement involving Article XX(d) had been brought before the CONTRACTING PARTIES”.⁷⁸ “The Panel noted that the GATT recognized, by the very existence of Article XX(d), the need to provide that certain measures taken by a contracting party to secure compliance with its national laws or regulations which otherwise would not be in conformity with the GATT obligations of that contracting party would, through the application of this provision under the conditions stipulated therein, be in conformity with the GATT provided that the national laws or regulations concerned were not inconsistent with the General Agreement. In this connection the Panel noted in particular that the protection of patents was one of the few areas of national laws and regulations expressly mentioned in Article XX(d).”⁷⁹

In the Panel Report on “United States - Section 337 of the Tariff Act of 1930”, “The Panel noted that in the dispute before it the ‘laws or regulations’ with which Section 337 secures compliance are the substantive patent laws of the United States and that the conformity of these laws with the General Agreement is not being challenged”.⁸⁰ In relation to the criterion of “necessary” in terms of Article XX(d), “The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent

⁷³L/6253, adopted on 2 February 1988, 35S/163, 229-230, para. 5.2.2.3.

⁷⁴L/4817, L/5382.

⁷⁵L/5424, 29S/19.

⁷⁶See the Report by the Director-General on these consultations in C/W/418.

⁷⁷L/5878, dated 9 October 1985; see also background note by the Secretariat on “Trade in Counterfeit Goods”, MDF/W/19, dated 10 January 1985.

⁷⁸L/5333, adopted on 26 May 1983, 30S/107, 124, para. 51.

⁷⁹*Ibid.*, 30S/124-125, para. 53.

⁸⁰L/6439, adopted on 7 November 1989, 36S/345, 392, para. 5.24.

law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so”.⁸¹

(7) “the prevention of deceptive practices”

It was agreed during discussions at the London sessions of the Preparatory Committee that the words “deceptive practices” were broad enough to cover cases of false marking of geographical origin.⁸²

In 1987, during the Working Party on the Accession of Portugal and Spain to the EEC, in response to a question regarding an EEC regulation on the use of the term “sherry”, the EEC stated that the regulation in question “constitutes a measure designed to prevent deceptive practices. It is therefore justified under Article XX(d) of the General Agreement”.⁸³

(8) Preshipment inspection

A 1989 Background Note by the Secretariat on “Preshipment Inspection”⁸⁴ discusses the application of Article XX(d) in this connection.

6. Paragraph (g): “relating to the conservation of exhaustible natural resources”

(1) “relating to ... conservation”

In the 1988 Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”, the Panel examined the issue of whether export prohibitions of certain unprocessed salmon and unprocessed herring, conceded to be contrary to Article XI:1 of the General Agreement, were or were not justified by, *inter alia*, Article XX(g).

“... The Panel noted that both parties agreed that Canada maintains a variety of measures for the conservation of salmon and herring stocks and imposes limitations on the harvesting of salmon and herring. The Panel agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources’ and the harvest limitations are ‘restrictions on domestic production’ within the meaning of Article XX(g). Having reached this conclusion the Panel examined whether the export prohibitions on certain unprocessed salmon and unprocessed herring are ‘relating to’ the conservation of salmon and herring stocks ...

“Article XX(g) does not state how the trade measures are to be related to the conservation and how they have to be conjoined with the production restrictions. This raises the question of whether *any* relationship with conservation and *any* conjunction with production restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a *particular* relationship and conjunction are required. The Panel noted that the only previous case in which the CONTRACTING PARTIES took a decision on Article XX(g) was the case examined by the Panel on ‘United States - Prohibition of Imports of Tuna and Tuna Products from Canada’ but that that Panel had found that the party invoking Article XX(g) did not maintain restrictions on the production or consumption of tuna and thus had not been required to interpret the terms ‘relating to’ and ‘in conjunction with’.⁸⁵ The Panel therefore decided to analyze the meaning of these terms in the light of the context in which Article XX(g) appears in the General Agreement and in the light of the purpose of that provision.

⁸¹*Ibid.*, 36S/393, para. 5.26.

⁸²EPCT/C.II/50, p. 5, 9; EPCT/C.II/54/Rev.1, p. 37.

⁸³L/5984/Add.2, p. 2.

⁸⁴MTN.GNG/NG2/W/II/Add.1, 19 October 1989.

⁸⁵The footnote to this sentence refers to 29S/91.

“The Panel noted that some of the subparagraphs of Article XX state that the measure must be ‘necessary’ or ‘essential’ to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures ‘relating to’ the conservation of exhaustible natural resources. This suggests that Article XX(g) does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures. However, as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as ‘relating to’ conservation within the meaning of Article XX(g). The Panel, similarly, considered that the terms ‘in conjunction with’ in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective ‘in conjunction with’ production restrictions if it was primarily aimed at rendering effective these restrictions.

“Having reached these conclusions the Panel examined whether the export prohibitions on unprocessed salmon and unprocessed herring maintained by Canada were primarily aimed at the conservation of salmon and herring stocks and rendering effective the restrictions on the harvesting of salmon and herring. The Panel noted Canada’s contention that the export prohibitions were not conservation measures *per se* but had an effect on conservation because they helped provide the statistical foundation for the harvesting restrictions and increase the benefits to the Canadian economy arising from the Salmonid Enhancement Program. The Panel carefully examined this contention and noted the following: Canada collects statistical data on many different species of fish, including certain salmon species, without imposing export prohibitions on them. Canada maintains statistics on all fish exports. If certain unprocessed salmon and unprocessed herring were exported, statistics on these exports would therefore be collected. The Salmonid Enhancement Program covers salmon species for which export prohibitions apply and other species not subject to export prohibitions. The export prohibitions do not limit access to salmon and herring supplies in general but only to certain salmon and herring supplies in unprocessed form. Canada limits purchases of these unprocessed fish only by foreign processors and consumers and not by domestic processors and consumers. In light of all these factors taken together, the Panel found that these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish. The Panel therefore concluded that the export prohibitions were not justified by Article XX(g).”⁸⁶

In the 1991 Panel Report on “United States - Restrictions on Imports of Tuna”, which has not been adopted, the Panel also examined whether the prohibition on imports of certain yellowfin tuna and certain yellowfin tuna products from Mexico and the provisions of the Marine Mammal Protection Act (MMPA) under which it was imposed could be justified under the exception in Article XX(g).

“... The Panel noted that the United States, in invoking Article XX(g) with respect to its direct import prohibition under the MMPA, had argued that the measures taken under the MMPA are measures primarily aimed at the conservation of dolphin, and that the import restrictions on certain tuna and tuna products under the MMPA are ‘primarily aimed at rendering effective restrictions on domestic production or consumption’ of dolphin. The Panel also noted that Mexico had argued that the United States measures were not justified under the exception in Article XX(g) because, *inter alia*, this provision could not be applied extrajurisdictionally.

“The Panel noted that Article XX(g) required that the measures relating to the conservation of exhaustible natural resources be taken ‘in conjunction with restrictions on domestic production or consumption’. A previous panel had found that a measure could only be considered to have been taken ‘in conjunction with’ production restrictions ‘if it was primarily aimed at rendering effective these

⁸⁶L/6268, adopted on 22 March 1988, 35S/98, 113-115, paras. 4.4-4.7.

restrictions'.⁸⁷ A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX(g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.

"The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they not 'constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade' refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The considerations that led the Panel to reject an extrajurisdictional application of Article XX(b) therefore apply also to Article XX(g).

"The Panel did not consider that the United States measures, even if Article XX(g) could be applied extrajurisdictionally, would meet the conditions set out in that provision. A previous panel found that a measure could be considered as 'relating to the conservation of exhaustible natural resources' within the meaning of Article XX(g) only if it was primarily aimed at such conservation.⁸⁸ The Panel recalled that the United States linked the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their conservation policies conformed to the United States conservation standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as being primarily aimed at the conservation of dolphins.

"On the basis of the above considerations, the Panel found that the United States direct import prohibition on certain yellowfin tuna and certain yellowfin tuna products of Mexico directly imported from Mexico, and the provisions of the MMPA under which it is imposed, could not be justified under Article XX(g)."⁸⁹

In this connection, see also the unadopted Panel Report of 1994 on "United States - Restrictions on Imports of Tuna"⁹⁰ and the unadopted Panel Report of 1994 on "United States - Taxes on Automobiles".⁹¹

(2) "*exhaustible natural resources*"

The New York (Drafting Committee) Report notes in this context that "As it seemed to be generally agreed that electric power should not be classified as a commodity, two delegates did not find it necessary to reserve the right for their countries to prohibit the export of electric power".⁹²

In the 1982 Panel Report on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", "The Panel ... noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management"⁹³: see the material from this report directly below. In the 1988 Panel Report on "Canada - Measures Affecting Exports of Unprocessed Herring and

⁸⁷The footnote to this sentence refers to the Panel Report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", L/6268, adopted on 22 March 1988, 35S/98, 114, para. 4.6.

⁸⁸The footnote to this sentence refers to the same Panel Report, same paragraph: 35S/98, 114, para. 4.6.

⁸⁹DS21/R (unadopted), dated 3 September 1991, 39S/155, 200-201, paras. 5.30-5.34.

⁹⁰DS29/R, dated 16 June 1994, paras. 5.11-5.17, 5.21-5.27.

⁹¹DS31/R, dated 11 October 1994, paras. 5.56, 5.59-5.66.

⁹²New York Report, p. 31, general comments on Article 37; see also source at EPCT/C.6/89, p. 4.

⁹³L/5198, adopted on 22 February 1982, 29S/91, 108, para. 4.9.

Salmon”, the Panel “agreed with the parties that salmon and herring stocks are ‘exhaustible natural resources’.”⁹⁴

In this connection, see also the unadopted Panel Report of 1994 on “United States - Restrictions on Imports of Tuna”,⁹⁵ and the unadopted Panel Report of 1994 on “United States - Taxes on Automobiles”.⁹⁶

(3) “made effective in conjunction with restrictions on domestic production or consumption”

The US Draft Charter included an exception to the commercial policy chapter for “measures ... relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production and consumption” and a corresponding exception in the chapter on commodity agreements for “intergovernmental commodity agreements which appropriately relate to ... the conservation of reserves of exhaustible natural resources ... Provided that such agreements are not used to accomplish results inconsistent with the objectives of [the chapters on commodity agreements or restrictive business practices]”.⁹⁷ During the London session of the Preparatory Committee, the proposal was made to drop the proviso regarding restrictions on domestic consumption citing the case of a country with deposits of manganese, “which is very ample for our present and prospective domestic consumption but which is not very ample if we allow free exports of it”.⁹⁸ It was stated in response that “One of the ways in which export prohibitions could be used ... is for protective purposes. ... It is possible for a raw material producing country, which wishes to industrialize, to do so behind a protective arrangement which is extremely effective, and that is preventing anybody else getting the raw material to use in his already existing industries”.⁹⁹ The proposal was not accepted.¹⁰⁰

In the 1982 Panel Report on “United States - Prohibition of Imports of Tuna and Tuna Products from Canada” the Panel found that the import ban in question was inconsistent with Article XI:1 and not justified by Article XI:2(c), and examined the US argument that its measures were justified by Article XX(g).

“The Panel noted that the decision of the United States Government was based on Section 205 of the United States Fishery Conservation and Management Act of 1976. The Panel was informed that the purpose of the Fishery Conservation and Management Act of 1976 was to ensure that certain stocks of fish were properly conserved and managed, to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of such additional agreements as necessary. It furthermore noted that Section 205 of the Fishery Conservation and Management Act of 1976 contained provisions designed to discourage other countries from seeking to manage tuna unilaterally and from seizing United States fishing vessels which were fishing more than 12 miles off their coasts.

“The Panel also noted that the United States had applied limitations on the catch of some species of tuna (e.g. Pacific and Atlantic Yellowfin and Atlantic bluefin and bigeye), during the time the import prohibitions on tuna and tuna products from Canada had been in force. The Panel found, however, that even if an import restriction could, at least partly, have been necessary to the enforcement of measures taken to restrict the catches of certain tuna species, an import prohibition on all tuna and tuna products from Canada as applied by the United States from 31 August 1979 to 4 September 1980 would not sufficiently meet the requirements of Article XI:2, firstly because the measure applied to species for which the catch had not so far been restricted in the United States (such as albacore and skipjack) and secondly because it was maintained when restrictions on the catch were no longer maintained (e.g. Pacific yellowfin tuna in 1980). ...

⁹⁴L/6268, adopted on 22 March 1988, 35S/98, 113, para. 4.4.

⁹⁵DS29/R, dated 16 June 1994, paras. 5.13-5.20.

⁹⁶DS31/R, dated 11 October 1994, para. 5.57.

⁹⁷US Draft Charter, Articles 32 and 49; see London Report pp. 60, 63.

⁹⁸EPCT/C.II/QR/PV/1, p. 15 (proposal of Brazil).

⁹⁹EPCT/C.II/QR/PV/1, p. 20-21.

¹⁰⁰See discussion at EPCT/C.II/QR/PV/5, p. 77-82, report at EPCT/C.II/59, p. 5, para. 11.

“The Panel ... noted that both parties considered tuna stocks, including albacore tuna, to be an exhaustible natural resource in need of conservation management and that both parties were participating in international conventions aimed, *inter alia*, at a better conservation of such stocks. However, attention was drawn to the fact that Article XX(g) contained a qualification on measures relating to the conservation if they were to be justified under that Article, namely that such measures were made effective in conjunction with restrictions on domestic production or consumption.

“The Panel noted that the action taken by the United States applied to imports from Canada of all tuna and tuna products, and that the United States could at various times apply restrictions to species of tuna covered by the IATTC [Inter-American Tropical Tuna Commission] and the ICCAT [International Convention for the Conservation of Atlantic Tunas]. However, restrictions on domestic production (catch) had so far been applied only to Pacific yellowfin tuna, from July to December 1979 under the Tuna Convention Act (related to the IATTC) and to Atlantic yellowfin tuna, bluefin tuna and bigeye tuna under the Atlantic Tunas Convention Act (related to the ICCAT), and no restrictions had been applied to the catch or landings of any other species of tuna, such as for instance albacore.

“The Panel also noted that the United States representative had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States.

“The Panel could therefore not accept it to be justified that the United States prohibition of imports of all tuna and tuna products from Canada as applied from 31 August 1979 to 4 September 1980, had been made effective in conjunction with restrictions on United States domestic production or consumption on all tuna and tuna products”.¹⁰¹

In the 1988 Panel Report on “Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”,

“... The Panel noted that both parties agreed that Canada maintains a variety of measures for the conservation of salmon and herring stocks and imposes limitations on the harvesting of salmon and herring. The Panel agreed with the parties that ... the harvest limitations [are] ‘restrictions on domestic production’ within the meaning of Article XX(g)”.¹⁰²

A Secretariat Note of 1991 on “Trade and Environment” includes a list of quantitative restrictions for which Article XX(g) has been cited as a justification. The list was drawn from the Inventory of Quantitative Restrictions maintained by the Secretariat.¹⁰³

7. Paragraph (h): “undertaken in pursuance of obligations under [a] commodity agreement”

In order for a measure to be covered by Article XX(h) and the Interpretative Note *Ad* Article XX(h), the intergovernmental agreement in question must: (a) conform to criteria submitted to the CONTRACTING PARTIES and not disapproved by them; (b) be itself submitted and not disapproved; or (c) conform to the principles approved by the Economic and Social Council in its Resolution 30(IV) of 28 March 1947.

The US Draft Charter provided for a chapter on commodity policy, and therefore its article on elimination of quantitative restrictions provided for an exception for “export or import quotas imposed under inter-governmental commodity agreements concluded in accordance with the provisions of Chapter VI.” The London Report notes that “There was general agreement that ... import or export quotas imposed under inter-governmental commodity agreements concluded under the Charter might be used”¹⁰⁴ and accordingly the London and New York Draft Charters provided for such an exception in Article 25:2 (corresponding to GATT Article XI:2). The London Report also notes that it was agreed that an exception from the general rule of non-discrimination in quantitative restrictions was necessary where “Some element of discrimination in import and

¹⁰¹L/5198, adopted on 22 February 1982, 29S/91, 107-109, paras. 4.5-4.6, 4.9-4.12.

¹⁰²L/6268, adopted on 22 March 1988, 35S/98, 113, para. 4.4.

¹⁰³L/6896, p. 94. Concerning the Inventory of Quantitative Restrictions, see material at the end of the chapter on Article XI.

¹⁰⁴London Report, p. 12, para. III.C.1(i).

export restrictions may be needed in order to carry out inter-governmental commodity agreements under the commodity policy provisions of the Charter ...”¹⁰⁵

The Preparatory Committee at its London session adopted a resolution noting that governments were already taking action on the lines proposed in the Charter chapter on commodity agreements, and requesting the United Nations to appoint an Interim Co-ordinating Committee for International Commodity Arrangements.¹⁰⁶ In response, the Economic and Social Council of the United Nations on 28 March 1947 adopted ECOSOC Resolution 30(IV), as follows:

“The Economic and Social Council,

“Noting that inter-governmental consultations are going forward actively with respect to certain internationally traded commodities, and

“Considering the significant measure of agreement regarding commodity problems and the co-ordination of commodity consultations already reached both in the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, and in the Preparatory Commission on World Food Proposals of the Food and Agriculture Organisation of the United Nations:

“*Recommends* that, pending the establishment of the International Trade Organization, Members of the United Nations adopt as a general guide in inter-governmental consultation or action with respect to commodity problems the principles laid down in Chapter VII as a whole - i.e., the chapter on inter-governmental commodity arrangements of the draft Charter appended to the Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - although recognizing that discussion in future sessions of the Preparatory Committee of the United Nations Conference, as well as in the Conference itself, may result in modifications of the provisions relating to commodity arrangements, and

“*Requests* the Secretary-General to appoint an interim co-ordinating committee for international commodity arrangements to keep informed of and to facilitate by appropriate means such inter-governmental consultation or action with respect to commodity problems, the committee to consist of a chairman to represent the Preparatory Committee of the United Nations Conference on Trade and Employment, a person nominated by the Food and Agriculture Organization of the United Nations to be concerned in particular with agricultural primary commodities, and a person to be concerned in particular with non-agricultural primary commodities.”¹⁰⁷

During discussions at the Geneva session of the Preparatory Committee, it was agreed that the exception for measures under commodity agreements should be applicable to all provisions of the commercial policy chapter of the Charter. Accordingly, the article on general exceptions to the commercial policy chapter was amended to insert an exception for measures undertaken in pursuance of obligations under intergovernmental commodity agreements concluded in accordance with the Charter chapter on such agreements.¹⁰⁸ The rationale behind this change was stated as follows:

“... the implication is that the only exceptions to Chapter V which would be necessitated by the provisions of any possible commodity arrangement would be the use of quotas. We venture to doubt that and think that it would be wrong for the Charter to express the thought that the only way of dealing with the commodity problem is by a quota scheme. ... There is also the point that one can easily think of exceptions which might be needed under other Articles. I might mention one, and that is Article 31

¹⁰⁵London Report, p. 14, para. III.C.3(d)(iv).

¹⁰⁶London Report Annexure 9, p. 48.

¹⁰⁷Text reprinted in *Review of International Commodity Arrangements*, ICCICA, Geneva, November 1947, p. 8-9. Subsequent ECOSOC Resolutions (110(VI), 296(XI), 373(XIII) and 462 (XV)) substituted first ICITO and later the CONTRACTING PARTIES to the General Agreement as the body to nominate the Chairman of ICCICA; the last of these provided for an additional member familiar with the problems of developing countries. See also G/17 and G/17/Add.1 on ICCICA activities 1947-1952.

¹⁰⁸See EPCT/W/137 (proposal by U.K.), EPCT/W/208 (proposal by U.S.), EPCT/103 p. 47, EPCT/W/223 p. 4-5, EPCT/B/PV/5 p. 44-46, EPCT/A/PV/25 p. 32-34, EPCT/A/SR/30 p. 2, EPCT/A/PV/30 p. 4-6.

[XVII] which is headed ‘Non-discriminatory administration of state-trading enterprises’. Clearly, if the State were a party to a commodity arrangement and it were also a trader in that commodity, it would be bound to give precedence in its state-trading operations to the provisions of the commodity arrangement into which it had entered, and not so much to the considerations to which its attention is directed by Paragraph 1 of Article 31.¹⁰⁹

Thus, in the General Agreement as concluded 30 October 1947, paragraph (h) (Article XX:I(h)) provided an exception for measures “undertaken in pursuance of obligations under intergovernmental commodity agreements, conforming to the principles approved by the Economic and Social Council of the United Nations in its Resolution of March 28, 1947, establishing an Interim Co-ordinating Committee for International Commodity Arrangements”. The “principles” referred to in the ECOSOC Resolution are, as noted above, those of the Charter chapter on commodity agreements, which became in due course Chapter VI of the Havana Charter. Chapter VI of the Charter provided for intergovernmental commodity agreements with respect to “primary commodities”, defined as “any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade”.¹¹⁰ Chapter VI also provided certain general principles and procedural requirements for agreements concluded thereunder.

Article XXIX:1 of the General Agreement provides that the contracting parties “undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive ... of the Havana Charter”. A proposal to give provisional effect to Chapter VI of the Havana Charter pending entry into force of the Charter was submitted to the Executive Committee of ICITO when it met at Annecy on 22 July 1949. A Working Party prepared a proposal which was not acted upon.¹¹¹

During the Review Session of 1954-55, paragraph (h) was examined in the Review Working Party on Organizational and Functional Arrangements in the context of the question of the GATT’s involvement in the area of commodity trade generally, and in the context of an ECOSOC Resolution of 5 August 1954 establishing the Advisory Commission on International Trade with some of the responsibilities formerly assigned to ICCICA.¹¹² Certain delegations sought insertion into the General Agreement of provisions on the lines of Chapter VI of the Charter.

In response, a separate Working Party on Commodity Problems was established and met during the Review Session to consider “specific proposals for principles and objectives to govern international action designed to overcome problems arising in the field of international trade in primary commodities and the form of an international agreement necessary to administer and apply those principles; ... the relationship between the parties to such an agreement with, on the one hand, the CONTRACTING PARTIES and, on the other hand, with any other international organizations exercising responsibilities in the field of international trade in primary commodities ...”.¹¹³ The Working Party drafted a Special Agreement on Commodity Arrangements containing “general principles governing provisions of all commodity arrangements” and setting out procedural and institutional provisions for dealing with commodity agreements. The draft Agreement contemplated the negotiation of agreements among governments, the implementing measures for which would possibly conflict with GATT obligations unless provision were made. It was envisaged that the GATT and the proposed Special Agreement would be linked by an amendment to Article XX:I(h).¹¹⁴ Discussions concerning this draft during the Review Session did not result in consensus, and the Working Party was held over to the Tenth Session.¹¹⁵

¹⁰⁹EPCT/B/PV/5, p. 44-45. See also EPCT/A/PV/19 p. 13.

¹¹⁰This same definition was used for the (linked) Charter obligations with regard to export subsidies on primary commodities, and is utilized in the definition of “primary products” in paragraph 2 of the note *ad* Section B of Article XVI of the General Agreement (also referred to in the interpretative note to Article XXXVI:4). See the material in this Index on Article XVI and its drafting history.

¹¹¹GATT/CP.3/72; see also ICITO/19, ICITO/20, ICITO/21, ICITO/22.

¹¹²L/189/Add.2.

¹¹³L/301; see 3S/238.

¹¹⁴See L/320, Interim Report of the Working Party, February 1955, including the annexed draft Special Agreement on Commodity Arrangements.

¹¹⁵See discussion at SR.9/18, 19, 23, 27, 34, 38.

Meanwhile, in the context of the Review it had been agreed to amend Article XX. The Report of the Review Working Party on “Organizational and Functional Arrangements” notes as follows:

“The Working Party felt that, in view of the steps being taken to develop new principles relating to the conclusion of commodity agreements, Article XX:I(h) required amendment. Accordingly, the Working Party recommends the substitution for the existing sub-paragraph of the Article of a new text. The Working Party considered that Article XX:I(h) does not itself establish principles for the conclusion of commodity agreements, but stipulates conditions under which measures taken pursuant to commodity agreements may be excepted from the provisions of the General Agreement ...

“In order that the exception provided for in the present Article XX:I(h) might continue to apply to commodity agreements concluded or which may be concluded, in accordance with the principles approved by the Economic and Social Council in its Resolution of 28 March 1947, the Working Party recommends that an Interpretative Note be added to the amended Article.”¹¹⁶

The interpretative note to Article XX(h) states: “The exception provided by this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its Resolution 30(IV) of 28 March 1947.”

At the Tenth Session in the fall of 1955, discussions on commodity issues continued. The Working Party on Commodity Problems submitted a final report which included the draft Special Agreement “with the recommendation of the Working Party that subject as far as possible to resolution of outstanding differences, it be accepted by them as embodying the criteria to which intergovernmental commodity arrangements should conform in order to benefit from the exception provided in the first part of paragraph (h) of Article XX of the General Agreement as revised at the Ninth Session. The Working Party assumes, that, if the CONTRACTING PARTIES find this Agreement satisfactory for that purpose, they will record their intention of recognizing formally when the revised GATT comes into effect that the Agreement has been considered under Article XX(h) and not disapproved.”¹¹⁷ However, due to differences of view concerning various issues, the Working Party report and its draft Agreement were not adopted, and the issue was deferred to the Eleventh Session.¹¹⁸ At the Eleventh Session in the fall of 1956, it was recognized that it was unlikely that agreement could be reached on the lines of the draft Special Agreement. Instead, an alternative approach was adopted, embodied in the Resolution of the CONTRACTING PARTIES on “Particular Difficulties connected with Trade in Primary Commodities”¹¹⁹ which focused on general multilateral review, problem-specific consultations and the possible convening of an intergovernmental meeting on a case-by-case basis. The Working Party Report on “Particular Difficulties connected with Trade in Primary Commodities” notes that

“The Working Party gave consideration to the question whether the Resolution should include a statement of objectives to be sought and principles to be applied in inter-governmental commodity arrangements. The view was widely held in the Working Party that such objectives and principles would need to take into account the circumstances of the particular commodity agreement under negotiation and should, therefore, be left to each negotiating conference subject, so far as the contracting parties are concerned, to any review by the CONTRACTING PARTIES in accordance with the relevant provisions of the General Agreement”.¹²⁰

¹¹⁶L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 239, paras. 20, 22.

¹¹⁷L/416, Final Report of the Working Party, October 1955, p. 2, para. 5. See also Tenth Session discussions, SR.10/13, 14, 19.

¹¹⁸See Chairman’s statement on points of difference, SR.10/14 p. 158; decision to defer at SR.10/19, p. 219-220.

¹¹⁹5S/26; see L/592/Rev.1, Report of the Working Party on “Particular Difficulties Connected with Trade in Primary Commodities, adopted on 17 November 1956, 5S/87, para. 1. See Eleventh Session discussions at SR.11/2 and adoption of the Resolution at SR.11/18, as well as later reports on commodity problems at L/1103, adopted on 20 November 1959, 8S/76; and L/1656, adopted on 4 December 1961, 10S/83.

¹²⁰L/592/Rev.1, adopted on 17 November 1956, 5S/87, 89, para. 7.

See also the material on consultations on commodity issues under Articles XVIII:5, XXII:2 and XXV:1. See also the unadopted Panel Report of 1994 on “EEC - Import Régime for Bananas”.¹²¹

In response to arguments that commodity matters lay outside the competence of GATT, the CONTRACTING PARTIES ruled at the Tenth Session in 1955 that they were competent, pursuant to Article XXV:1, to deal with commodity problems.¹²² This view was confirmed in subsequent reports on commodity trade problems.

Article XXXVIII:2(a), which was added to the General Agreement by the 1965 Part IV Protocol, provides that the CONTRACTING PARTIES “shall ... where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products”. See also the corresponding provisions in Article XXXVI:4.

A Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement is attached to the Geneva (1967) Protocol to the General Agreement on Tariffs and Trade.¹²³ The International Grains Arrangement, consisting of a Wheat Trade Convention and a Food Aid Convention, was negotiated under the auspices of the International Wheat Council in cooperation between the FAO and UNCTAD in 1967, and has expired. The Arrangement Regarding Bovine Meat¹²⁴ and the International Dairy Arrangement¹²⁵ were negotiated during the Tokyo Round of multilateral trade negotiations.

A Secretariat Note of 1991 on “Trade and Environment” includes a list of quantitative restrictions for which Article XX(h) has been cited as a justification. The list was drawn from the Inventory of Quantitative Restrictions maintained by the Secretariat.¹²⁶

No contracting party has ever submitted a complaint under Articles XXII or XXIII that a measure taken in pursuance of a commodity agreement was inconsistent with the General Agreement, and no commodity agreement has ever been formally submitted to the CONTRACTING PARTIES under Article XX(h).

8. Paragraph (i)

This paragraph was proposed by New Zealand at the Geneva session of the Preparatory Committee in 1947. New Zealand explained it as follows:

“The purpose of this amendment is to provide for the case of countries like New Zealand which maintain as a matter of permanent policy price stabilization schemes covering, generally, the whole range of their economy. Any country which, like New Zealand, stabilizes its general price levels is faced with the problem that the world price for certain commodities, particularly raw materials which it exports, will be substantially higher than the stabilized domestic price for the like commodity.

“The best way of explaining that is, I think, to give a practical example. In New Zealand the price of leather to domestic users such as, for instance, the footwear industry is sold at a price very much below the world level. Now, in the circumstances it becomes necessary to ensure, by means of export controls, that the local requirements of leather are satisfied - otherwise, if that is not done, there would be no leather for the local market or, alternatively, it would be necessary to let the local price of leather rise to the world level. We do not assume that it would be contemplated that the effect of the Charter would be to compel the abandonment of the price stabilization schemes, and therefore we have brought

¹²¹DS38/R, dated 11 February 1994, para. 166.

¹²²SR.10/19, p. 218.

¹²³15S/18.

¹²⁴26S/84.

¹²⁵26S/91.

¹²⁶L/6896, p. 95. Concerning the Inventory of Quantitative Restrictions, see under Article XI in this Index.

forward this amendment. It is true that it has been suggested that the same result can be achieved by the method of export taxes, but we, and I think other countries who have tried that method, have found it unsatisfactory and, indeed, impracticable, because the world price of primary commodities is subject to such wide variations that the rate of tax has to be varied too frequently”.¹²⁷

During the discussion of this proposal, it was “pointed out that the provision only applied in cases where a general scheme of internal price stabilization was in operation, and it could not be used to afford protection to national industry by a country which had no such plan”.¹²⁸ The various concerns expressed at the danger of abuse in the utilization of this exception clause led to the addition of the proviso contained in the second part of paragraph (i).

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Other Commercial Purposes”¹²⁹ examined, *inter alia*, the use of export restrictions on raw materials to promote a domestic fabricating industry.

“... The Working Party took note of the fact that since the exemption provided for in [Article XX(i)] referred to export restrictions associated with a governmental stabilization plan, and not to the plan itself, the various provisos listed in [Article XX(i)] were meant to apply only to the export restrictions and not to other aspects of such a plan.

“The Working Party concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case.

“There was some discussion of certain cases in which, on the one hand, a country would be maintaining export restrictions on a raw material which had the effect of assisting a domestic industry processing that material, and on the other hand would be maintaining a prohibition or a severe restriction on imports of the finished product. There was general agreement that in such a case a contracting party, in considering whether the export restrictions were justified by [Article XX(i)], would have to give close examination to the question whether these export restrictions in fact operated to increase the protection afforded to the domestic industry”.¹³⁰

9. Paragraph (j)

(1) “*local short supply*”

The report on discussions in the London session of the Preparatory Committee notes that “The Preparatory Committee agreed that during a post-war transitional period it should be permissible to use [quantitative] restrictions to achieve the equitable distribution of products in short supply, the orderly maintenance of war-time price control by countries undergoing shortages as a result of the war, and the orderly liquidation of temporary surpluses of government-owned stocks and of industries, which were set up owing to the exigencies of war, but which it would be uneconomic to maintain in normal times. ... all these exceptions would be limited to a specified post-war transitional period, which might, however, be subject to some extension in particular cases”.¹³¹ These three situations were provided for in Article 25:2 of the London and New York Drafts of the Charter (corresponding to GATT Article XI:2).

¹²⁷EPCT/A/PV.36, p. 22.

¹²⁸EPCT/A/SR.40(2), p. 13.

¹²⁹GATT/CP.4/33 (Sales No. GATT/1950-3).

¹³⁰*Ibid.*, paras. 11-13.

¹³¹London Report, p. 11, para. III.C.1(b).

During the Geneva session of the Preparatory Committee, it was decided to move these three postwar temporary exceptions to Article 43 (general exceptions to the commercial policy chapter) as a new second part of Article 43. Measures of these three types were to be removed in principle not later than 1 January 1951; it was stated that “The effect of this would be to permit during the transitional period the use of differential internal taxes and mixing regulations as well as quantitative restrictions in order to distribute goods in short supply, to give effect to price controls based on shortages and to liquidate surplus stocks or uneconomic industries carried over from the war period”.¹³² Accordingly, Article XX in the 30 October 1947 text of the General Agreement included a Part II consisting of three paragraphs corresponding to the three situations noted above. Paragraph XX:II(a) provided for measures

“essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all contracting parties are entitled to an equitable share of the international supply of such products”.

It was stated during the course of the discussion at Geneva in 1947 that the phrase “general or local short supply” was “understood to include cases where a product, although in international short supply, was not necessarily in short supply in all markets throughout the world. It was not used in the sense that every country importing a commodity was in short supply otherwise it would not be importing it”.¹³³

Part II of Article XX further provided that “Measures instituted or maintained under part II of this Article which are inconsistent with the other provisions of this Agreement shall be removed as soon as the conditions giving rise to them have ceased, and in any event not later than January 1, 1951; *Provided* that this period may, with the concurrence of the CONTRACTING PARTIES, be extended in respect of the application of any particular measure to any particular product by any particular contracting party for such further periods as the CONTRACTING PARTIES may specify”.

At the Fifth Session in 1950, it was decided to prolong the validity of all three paragraphs of Article XX:II until 1 January 1952, by a decision under Article XXV:5 waiving until that date the obligation of contracting parties instituting or maintaining measures under part II of Article XX to discontinue them or seek permission for their continuance.¹³⁴ Further such decisions extended this waiver until 1 January 1954¹³⁵ and 1 July 1955¹³⁶. In the Review Session of 1954-55, it was agreed that the substance of paragraph (a) of Section II should be retained for the time being, subject to review not later than 30 June 1960, but that the remainder of paragraph XX:II should be deleted.¹³⁷ A Resolution on “Liquidation of Strategic Stocks” was also adopted.¹³⁸ The Report of the Review Working Party on “Other Barriers to Trade” notes in this connection:

“In connexion with the proposed suppression of Section II of Article XX, one member of the Working Party made the point that the need for the exception in Section II(b) was not limited to shortages subsequent to the war, but might be needed in the event of a natural catastrophe. The Working Party considered, however, that other provisions of the Agreement were adequate to cover the application of restrictions when required by any natural catastrophe, and therefore did not consider it necessary to retain or amend the exception in Section II(b)”.¹³⁹

Section II(a) then became paragraph (j) of Article XX. This change was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement and entered into effect on 7 October 1957.

¹³²Passage cited from EPCT/A/PV/30 p. 22; report at EPCT/W/245; discussion at EPCT/A/SR/30 p. 3-5, EPCT/A/PV/30 p. 21-27, EPCT/A/SR/33 p. 1-2, EPCT/A/PV/33 p. 2-7.

¹³³EPCT/A/SR.40(2), p. 15.

¹³⁴Decision of 30 November 1950 on Extension of Time-Limit in Article XX Part II, GATT/CP/94; see Report on “Amendment to the Last Paragraph of Part II of Article XX”, GATT/CP.5/32, II/46, 48, paragraph 7.

¹³⁵II/28.

¹³⁶2S/27.

¹³⁷L/334, and Addendum, adopted on 3 March 1955, 3S/222, 230, para. 41.

¹³⁸Resolution of 4 March 1955, 3S/51. See also references to this Resolution under Articles X, XVII and XXII in this Index.

¹³⁹L/334, and Addendum, adopted on 3 March 1955, 3S/222, 230-231, para. 42.

In 1949, Czechoslovakia complained that export restrictions applied by the United States discriminated against Czechoslovakia because the export licensing system favoured countries in the European Recovery Program (the OEEC area). The United States stated that these measures were consistent with Article XXI, and also stated that they were consistent with the short-supply exception in Article XX which required “that any controls exercised to promote the distribution of commodities in short supply shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products”.¹⁴⁰

The 1950 Report of the Working Party on “The Use of Quantitative Restrictions for Protective and Other Commercial Purposes”¹⁴¹ also examined the use of export restrictions for short-supply items under then-Article XX:II(a).

“... The Working Party discussed the proviso ... requiring the observation of the principle of equitable shares for all contracting parties in the distribution of the international supply of a product in local or general short supply, and noted that the word ‘equitable’ is used in Article XX:II(a) and not the word ‘non-discriminatory’ which is used in Article XIII.

“In respect of this type of restriction, general agreement existed on the following statements:

“(a) Apart from situations to which the provisions of Article XX:II(a) are applicable, the practice referred to is inconsistent with the provisions of the Agreement.

“(b) Although the requirement of Article XX:II(a) relates to the total international supply and not the supply of an individual contracting party, nevertheless if a contracting party divert an excessive share of its own supply to individual countries (which may or may not be contracting parties) this may well defeat the principle that all contracting parties are entitled to an equitable share of the international supply of such a product.

“(c) What would not be regarded as an equitable share if it were the result of a unilateral allotment by a contracting party could not appropriately be defended as equitable within the meaning of Article XX:II(a) simply because it had been the consequence of an agreement between two contracting parties.

“(d) The determination of what is ‘equitable’ to all the contracting parties in any given set of circumstances will depend upon the facts in those circumstances.”¹⁴²

(2) “The CONTRACTING PARTIES shall review the need for this sub-paragraph”

When the need for paragraph (j) was reviewed at the Sixteenth Session in 1960, the CONTRACTING PARTIES noted “that the contracting parties have resorted to the provisions of this sub-paragraph in a relatively limited number of cases and that it is generally recognized that it would be appropriate to retain such provisions to enable contracting parties to meet emergency situations which may arise in the future”. It was decided to retain the paragraph and to review the matter again in 1965.¹⁴³ At the Twenty-second Session in 1965, the CONTRACTING PARTIES decided that paragraph (j) “should be retained for the time being” and to review the need for it again in 1970.¹⁴⁴ At the Twenty-sixth Session in 1970, the CONTRACTING PARTIES adopted a recommendation of the Council that paragraph (j) be retained with no provision for further review.¹⁴⁵

¹⁴⁰CP.3/38.

¹⁴¹GATT/CP.4/33 (Sales No. GATT/1950-3).

¹⁴²*Ibid.*, paras. 8-9.

¹⁴³9S/17.

¹⁴⁴Decision of 15 March 1965, 13S/18.

¹⁴⁵Decision of 20 February 1970, L/3361, 17S/18; see L/3350.

10. Trade and environment

See the discussion at the Council meetings of 6 February, 12 March and 8 October 1991, and in the minutes and working papers of the Group on Environmental Measures and International Trade and the Subcommittee on Trade and Environment of the Preparatory Committee for the WTO.¹⁴⁶

B. RELATIONSHIP BETWEEN ARTICLE XX AND OTHER ARTICLES OF THE GENERAL AGREEMENT

1. Article III

The 1983 Panel Report on “United States - Imports of Certain Automotive Spring Assemblies” examined the consistency of Section 337 of the Tariff Act of 1930 and its application to the imports of certain spring assemblies from Canada with Articles III and XX(d). The Panel found Article XX(d) to apply and “considered that an examination of the United States action in the light of the other GATT provisions referred to ... was not required”.¹⁴⁷ This Panel Report was adopted subject to an understanding that its adoption “shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement”.¹⁴⁸

The 1989 Panel on “United States - Section 337 of the Tariff Act of 1930” found, concerning the relation between Article III and Article XX(d):

“The Panel noted that Article XX is entitled ‘General Exceptions’ and that the central phrase in the introductory clause reads: ‘nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures ...’. Article XX(d) thus provides for a limited and conditional exception from obligations under other provisions. The Panel therefore concluded that Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified under Article XX(d)”.¹⁴⁹

The 1990 Panel on “Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes” referred to the use of non-discriminatory measures consistent with Article III in interpreting the scope of “necessary” measures under Article XX(b); see page 566 above.

2. Articles XXII and XXIII

In discussions of the article on exceptions to the commercial policy chapter of the Charter in the London Session of the Preparatory Committee, it was stated in relation to Article 30 of the draft Charter [XXII and XXIII] that “one of the main objectives of Article 30 was to prevent evasion of the provisions of Chapter IV. If a Member country used the exceptions of sub-paragraph (b) [XX(b)] as a means of protection, Article 30 provided that another Member might make representations to the ITO and so obtain satisfaction. It was almost impossible to draft exceptions which could not be abused, if good faith was lacking. The League of Nations had adopted an Article on the lines of Article 30, precisely because they had been unable to formulate exceptions which would exclude all possibility of abuse”.¹⁵⁰

¹⁴⁶C/M/247, C/M/248, C/M/250, SR.49/2; TRE/1-14, TRE/W/1-21, and documents in PC/SCTE series. See also Decision of the CONTRACTING PARTIES on follow-up to the recommendations in the area of trade of the United Nations Conference on Environment and Development, SR.48/1, p. 12-16, 39S/330; debate on environmental labelling at C/M/260, p. 40-56; Secretariat Note on the UN Conference on Environment and Development held in Rio de Janeiro, Brazil, from 3 to 14 June 1992, L/6892/Add.3, 39S/303, and earlier notes on the UNCED Preparatory Committee at L/6892 and Add.1-2; Minutes of Council meeting on UNCED followup, C/M/269; and Report of the EMIT group at L/7402. The Secretariat has also issued to the public summaries of meetings of the EMIT and SCTE groups, in the TE document series.

¹⁴⁷L/5333, adopted on 26 May 1983, 30S/107, 126, para. 61.

¹⁴⁸C/M/168.

¹⁴⁹L/6439, adopted on 7 November 1989, 36S/345, 385, para. 5.9.

¹⁵⁰EPCT/C.II/50, p. 6.

3. Article XXIV

In 1987, during the Working Party on the Accession of Portugal and Spain to the EEC, in response to a question regarding an EEC regulation permitting the use of the term “sherry” to describe certain liqueur wines of the United Kingdom, Ireland and Cyprus but not liqueur wines of South Africa, the EEC stated that the regulation in question “constitutes a measure designed to prevent deceptive practices. It is therefore justified under Article XX(d) of the General Agreement” and that the preferential treatment of certain products was “consistent with the GATT by virtue of Article XXIV, which permits customs unions to be formed in accordance with the needs of the integration process they plan to carry out”.¹⁵¹

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Provisions corresponding to those in Article XX appear in the US Proposals in Chapter III-G; in the US Draft Charter in Article 32; in the London and New York Drafts, in Article 37; in the Geneva Draft in Article 43; and in the Havana Charter in Article 45. In each of these drafts these provisions were exceptions to the commercial policy provisions of the Charter. Separate policy-based exceptions were provided for the Charter chapters on commodity agreements and restrictive business practices.

The article on commercial policy exceptions originally included four national security provisions which were separated during the Geneva session of the preparatory committee and became exceptions to all obligations in the Charter; see Section III under Article XXI.

At Havana, an exception was added for measures “necessary to the enforcement of laws and regulations relating to public safety”, which term, in the view of the drafters, included the legal concept of “public order” (“ordre public”).¹⁵² In addition, an exception was added for measures “taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals”, as a corollary to a similar provision added to Article 70, the exceptions provision in the chapter on commodity agreements.¹⁵³ The Working Party on “Modifications to the General Agreement”, which met during the Second Session in September 1948 and considered which of the changes made at Havana should be brought into the text of the General Agreement, did not decide to take either of these changes into the General Agreement.

See above at pages 589 and 593 concerning the amendments to sub-paragraph (h) and Section II of Article XX agreed during the Review Session of 1954-55. These changes were effected through the Protocol Amending the Preamble and Parts II and III, which entered into force on 7 October 1957.

¹⁵¹L/5984/Add.2, p. 2.

¹⁵²Havana Reports, p. 84, para. 18, referring to Charter Article 45:1(a)(ii); see also French text of same document (para. 18, p. 92).

¹⁵³Havana Reports, p. 84-85, para. 21, referring to paragraph 1(a)(x) of Article 45 of the Charter.

IV. RELEVANT DOCUMENTS*London*

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