TRADE PRINCIPLES AND CONCEPTS

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris 1995

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I. INTRODUCTION

There was widespread recognition at the 1992 U.N. Conference on Environment and Development of the challenge to ensure the consistency of trade and environment policies and of the principles and rules relevant to making those policies mutually supportive in favour of sustainable development¹.

The most significant and widespread system of rules governing international trade is the multilateral trading system, which includes the General Agreement on Tariffs and Trade and the interpretative notes that are attached to it, over 200 ancillary treaties, as well as a number of other related arrangements and decisions. This body of rules has recently been modified and amplified with the completion of the Uruguay Round negotiations, notably through the creation of a new institutional framework, the World Trade Organisation (WTO). By virtue of the Agreement establishing the World Trade Organisation the multilateral trading system espouses the objective of sustainable development, recognising the need to allow "for the optimal use of the world’s resources in accordance with the objectives of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with the countries’ respective needs and concerns at different levels of economic development".

The 38 Articles of the General Agreement represent a general framework which sometimes calls for interpretation in order to be implemented. Interpretation by decision of the contracting parties includes the adoption of dispute settlement panel reports, as well as of various reports by working parties and committees. Adopted by consensus, such decisions represent the views of the contracting parties on a particular issue at a given point of time, often relying on the drafting history of the General Agreement and the Havana Charter². Although dispute settlement decisions do not represent legally binding precedents, they have an important persuasive impact and significantly influence future interpretations.

A number of other treaties and arrangements, namely regional ones like the North American Free Trade Agreement (NAFTA), are relevant to this discussion of the trade-environment policy interface, but most of the essential principles can be discussed in the context of the multilateral trading system. Multilateral trading rules and policies can thus be reviewed as generic examples of issues that also occur in other contexts.

This document presents the trade principles and concepts relevant to the trade and environment debate as they are prescribed in the General Agreement on Tariffs and Trade, the Agreement on Technical Barriers to Trade³ and the Agreement on the Application of Sanitary and Phytosanitary Measures⁴, and as they have been further defined through the adoption of relevant preparatory Committee and Working Party documents and panel reports.

Exceptions to these principles and concepts will also be presented, inasmuch as they apply to environmental regulations. Furthermore, the document presents a number of additional concepts which have been incorporated in the multilateral trading system, although they cannot be considered as genuine trade concepts. It should be noted that if some of the notions presented in this document, such as the principle of non-discrimination, are well crystallised and largely agreed principles, others, such as necessity or complementarity, can only be considered as concepts which are in the process of formulation and thus likely to evolve. Nothing in this document should be construed as offering a definitive interpretation of the international agreements described.
II. THE PHILOSOPHY OF LIBERAL TRADE

A. Liberal trade and the concept of comparative advantage

The multilateral trading system is based on the philosophy of liberal trade, aiming to promote mutually beneficial specialisation and to enhance the potential for economic growth, thereby contributing to higher standards of living. The concept underlying the philosophy of liberal trade is known as *comparative advantage*, referring to the special ability of a country to provide one product or service at a relatively lower cost than other products or services. The theory of comparative advantage was developed by David Ricardo in 1817 as the fundamental analytical explanation for the source of gains from trade. According to the theory, each country has a benefit in specialising in and trading the commodity for which it has a relative cost advantage relative to commodities produced in other countries.

B. The equilibrium of rights and obligations

The rule-oriented structure of the General Agreement is felt to enhance the predictability necessary for a smooth operation of economic activities; to contribute to protecting economically weaker countries from economic pressures of more powerful countries; and more generally, to prevent the escalation of international tensions. However, this rule-oriented structure is only one aspect of the system, which has to be viewed at the same time as a binding contract among 109 countries, introducing an equilibrium of rights and obligations that the contracting parties have voluntarily accepted as being in their mutual interest. This contract, which incorporates negotiated tariff commitments contained for each country in a *schedule of tariff concessions*, provides a stable basis for trade by affording a certain degree of predictability for market access. Concessions are *bound* in the sense that contracting parties cannot set tariff levels which exceed them and have to grant compensation to affected parties if they withdraw them.

C. The concept of nullification or impairment

*Benefits* accruing to contracting parties under the General Agreement (or other covered agreements in the framework of the WTO) have to be preserved in order to maintain the negotiated equilibrium. Nullification or impairment of such benefits, or, more generally, *impediment* of the objectives of the Agreements, gives the affected party the right to seek adjustment by virtue of GATT Article XXIII. The multilateral trading rules have to be understood as aimed at ensuring this equilibrium by limiting the scope for countries to undermine benefits through resort to other, often less transparent, trade measures. Consequently, measures taken by Members may nullify or impair benefits accruing to other Members, or otherwise impede objectives of the Agreements, whether or not such measures violate the Agreements. Nullification, impairment or impediment resulting from "non-violating” measures can be introduced to the WTO dispute settlement mechanism.

D. The concept of transparency

The concept of *transparency* is an essential concept in democratic legal systems. In its general sense, it implies guaranteeing that certain types of information which are deemed of particular importance to society at large are made generally available. From an economic point of view, it aims at providing essential economic information to consumers, as well as ensuring the equality of competitive conditions among producers. In this specific sense, it was taken up in the framework of the multilateral trading
system with a view to creating confidence among Members, facilitating investment and production decisions by the private sector and, in general, enhancing the security and predictability of market access and helping to avoid trade disputes. It refers more particularly to the transparency of both national trade and trade-related measures and the way such measures are administered. Transparency takes the form of a number of notification requirements contained in the GATT and in many WTO Agreements.

GATT Article X calls for the prompt publication of domestic and international trade regulations made effective by any contracting party, in order to enable governments and traders to become acquainted with them. The 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance requires the notification of the adoption of trade measures affecting the operation of the GATT, where possible in advance of implementation. The TBT Agreement calls for the publication and notification of proposed standards and technical regulations likely to have significant effects on the trade of other parties, and which are not substantially based on relevant international standards, while the SPS Agreement requires the prompt publication of all adopted sanitary and phytosanitary regulations.

E. Additional concepts incorporated into the trading system

Despite the importance of the objective of liberal trade for the multilateral trading system, this objective is complemented by provisions whose aim is to accommodate other policy objectives, such as environmental protection, although the level of accommodation of such other objectives remains a matter of discussion. Consequently, a number of additional concepts, relevant to those other objectives, have been incorporated into the framework of trade provisions which aim at ensuring that the fulfilment of those objectives does not create unnecessary obstacles to trade. The GATT Agreement and the new WTO Agreement also recognise the existence of other policy objectives, and the preamble to the latter refers explicitly to the objective of sustainable development.

The concept of harmonisation is incorporated into the TBT Agreement, which stresses “the important contribution that international standards and conformity assessment systems can make (to further the objectives of GATT 1994) by improving efficiency of production and facilitating the conduct of international trade”, while recognising that countries should not be prevented from adopting the measures which are the most appropriate for fulfilling their legitimate objectives. Similarly, the SPS Agreement calls for national sanitary and phytosanitary measures which are based on international standards, although Members may introduce measures which result in higher levels of protection if there is a scientific justification. A closely related concept is the concept of equivalence, which involves accepting the technical regulations or sanitary and phytosanitary measures of other Members as equivalent, if it is demonstrated that they adequately fulfil the objectives of the importing country’s regulations, or that they achieve the importing country’s appropriate level of protection.

The concept of risk assessment is an environmental concept which is used in risk management and is relevant to the precautionary approach. It has been incorporated into the SPS Agreement as a means for determining the level of sanitary or phytosanitary protection which is appropriate for each country. SPS Article 5 invites Members to ensure that their measures “are based on an assessment ... of the risks to human, animal or plant life or health ..”, taking into account, on the one hand, “available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease- free areas; relevant ecological and environmental conditions; and quarantine or other treatment”; and on the other hand relevant economic factors, such as “the potential damage in terms of loss of production or sales in the event of the entry,
establishment or spread of pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

III. FUNDAMENTAL TRADE PRINCIPLES

A. The principle of non-discrimination

The principle of non-discrimination can be considered as the central trade principle which underpins the philosophy of liberal trade. This principle is embodied in most-favoured-nation (MFN) treatment, which prohibits discrimination among foreign countries in certain trade matters, and in national treatment, which prohibits discrimination between national and foreign products in certain trade matters.

a. Most Favoured Nation treatment

According to GATT Article I.1,

... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

This provision is modelled on the MFN clause incorporated in the Charter of the League of Nations and reflects a long standing principle of international law.

The GATT MFN clause bans discrimination based on the origin of goods with respect to customs matters, internal taxes and internal sales regulations. It does so by requiring contracting parties to extend the favourable treatment of a foreign product to like products from all other contracting parties (the concept of like product will be discussed below in section c). It follows that no country is to be singled out for special trading advantages or restrictions. Exceptions to this basic principle are allowed in certain defined circumstances, such as regional trading arrangements or preferential arrangements for developing countries.

Several arguments can be used to explain the rationale of the MFN clause. It is often stated that MFN treatment has a "multiplier" effect, by generalising the liberalisation of trade policies. It has no doubt helped ensure that developing countries and, more generally, countries with limited economic leverage were able to benefit freely from improved trading conditions negotiated by other countries. However, the most important argument is the equality of opportunity for all foreign trading partners, members of the Agreement, afforded through the MFN clause. This enhances the operation of market-driven forces for the selection of the most efficient producer, irrespective of origin.

The concept of conditionality

GATT Article I provides that MFN treatment is open to all unconditionally. Conditional MFN treatment had been quite usual in international practice almost until World War I, and implied that the above-mentioned advantages would only be accorded if the benefiting state accorded reciprocal advantages in return. However, given that the negotiation of reciprocal advantages from third countries is difficult
and that such conditionality restricts the generalisation of trade liberalisation, the insertion of a conditionality clause was considered inconsistent with GATT Article I\textsuperscript{18}.

The question of conditionality arose however with respect to the MTN Codes adopted after the Kennedy and Tokyo Rounds. Although the issue remained controversial, most Code signatories accorded the benefits of the Codes only to other signatories (or to countries accepting equivalent disciplines). "Code conditionality" was considered to create an incentive for third countries to join the Codes. However, with the conclusion of the Uruguay Round negotiations, the General Agreement and all but four\textsuperscript{19} of the attached agreements are accepted as a single undertaking by all WTO Members; thus, they fall under the unconditional obligations of WTO Members.

b. National Treatment

According to GATT Article III.1 and 4, national measures

\[\ldots \text{should not be applied to imported or domestic products so as to afford protection to domestic production.} \ldots \text{The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin...}\]

Here also, the provision crystallises a concept that had been incorporated in commercial treaties as early as the twelfth and thirteenth centuries\textsuperscript{20}.

The **national treatment** clause aims to ensure that the conditions of trade (or, from another perspective, the conditions of competition) do not afford protection to domestic production. It does so by calling for an effective equality of treatment for imported products as compared with like domestically produced goods with respect to the application of internal regulations\textsuperscript{21}. The clause has been interpreted as applying only to measures directed at products as such, and not at processes, policies or practices in the exporting country which have no impact on the product as such\textsuperscript{22}. Furthermore, the national treatment obligation concerns internal measures, and not border measures. It thus covers imported products once cleared through customs\textsuperscript{23}. In that sense it is a corollary to MFN treatment and to the progressive elimination of tariff barriers, since it ensures that the conditions of fair competition achieved by these means will not be annulled through internal measures.

The rationale of the principle is to assure countries that their products will be able to compete on foreign markets once they have crossed the border. Competition opportunities for foreign products are to be preserved irrespectively of whether the country has a negotiated claim for market access or not\textsuperscript{24}. The purpose is not only to provide an equitable basis for current trade but also to create the predictability needed to plan future trade. A number of practical consequences can be inferred from this rationale, which will be presented in the following paragraphs.

First of all, in order to assess whether imported products are afforded equality of competitive opportunity, one has to look at the distinctions made by domestic laws, regulations or requirements themselves and at their potential impact on domestic and imported products. Domestic legal provisions which introduce de jure or de facto discriminatory treatment between domestic and imported products are inconsistent with national treatment even if there are no actual trade consequences for specific imported products\textsuperscript{25}.  

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It also follows that "no less favourable" treatment does not always mean "identical" treatment. The mere fact that imported products are subject to legal provisions different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with national treatment. The question is whether such differences effectively accord less favourable treatment to imported products. Likewise, there may be cases where the application of identical provisions would in practice accord less favourable treatment to imported products. In such a case, a country would have to apply different provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable.

Furthermore, national treatment obligations cover measures affecting specific products as such and not the overall trade flows between two countries. Thus, the less favourable treatment of some imported products cannot be counterbalanced by according more favourable treatment to other imported products. This notion of balancing has been expressly rejected because it would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.

The national treatment obligation is not only incumbent upon national governments, but also upon regional or local governments. Moreover, contracting parties should accord to imported products treatment no less favourable than that accorded to the most-favoured domestic products. Thus it is inconsistent with national treatment for regional or local governments to accord to foreign products less-favourable treatment than that accorded to locally produced goods, even if they provide the same less-favourable treatment to products from other domestic origins.

The national treatment obligation calls for a distinction between protectionist measures and measures designed for other purposes. In fact, it has been considered that GATT Article III refers both to the effect and the aim of the measures in question; in that sense the effect is judged on the eventual change in competitive opportunities in favour of domestic products, while the aim is assessed on that change constituting "the desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal". Domestic policies are generally not designed for protectionist purposes but to serve other legitimate goals, including environmental protection. Its purpose being to avoid indirect protection, national treatment does not prevent contracting parties from differentiating between product categories for policy purposes unrelated to the protection of domestic production, for instance on the basis of their environmental characteristics. GATT Article III does not seek to "harmonise the (...) regulations of contracting parties, which differ from country to country".

National treatment does not prevent the payment of subsidies exclusively to domestic producers, including payments derived from the proceeds of internal taxes or charges and subsidies effective through governmental purchases of domestic products. Such subsidisation should not have the effect of directly affecting the purchaser's choice. Nevertheless, even if there is no inconsistency with national treatment, products which benefit from such subsidisation may be countervailable according to GATT Article VI.

c. The concept of "like product"

The General Agreement gives no definition of the concept. In fact, during the preparatory work on the Agreement, it was stated that "the expression had different meanings in different contexts of the Draft Charter". An interpretation of the concept of "like product" is given in the Anti-dumping code, as well as in the Subsidies Code:
.. the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration

Criteria for determining “like products”

A number of criteria have been suggested for determining whether given products were alike or not. The use of these criteria varied depending on the provisions under consideration, as mentioned above, and evolved in pace with the evolution of those provisions. Thus, although based on such criteria, the determination of like products has generally been made on a case-by-case basis, allowing for "a fair assessment in each case of the different elements that constitute a "similar" product". In fact, the concept of "like" product (in the French text: "produit similaire") has been used in GATT practice not only in the sense of identical or equal products but also for products with similar qualities, although it is not meant to apply to different but directly competitive or substitutable products. Panels have recognised that two individual products can hardly be exactly the same in all aspects, but rather share common features, such as physical characteristics or end uses, and may differ in others. Since governments do use such differences in establishing regulatory distinctions, the main issue in interpreting this GATT concept is “which differences between products may form the basis of regulatory distinctions ..(and) which similarities between products prevent (such distinctions)?

One of the criteria proposed was the criterion of tariff classification, according to which two products would not be considered as "like products" if they are listed in the country's tariff schedule as separate items to which distinct tariff rates are applied. However, this criterion may have implications for the regulatory autonomy of contracting parties and interfere with the achievement of domestic policy objectives in areas other than trade. It has been suggested that, once products are designated as like products for tariff purposes, differentiation between them under domestic regulations (e.g. for standardisation or environmental purposes) might appear inconsistent with Article III, even if it is not applied "so as to afford protection to domestic production". This would run counter to the need to define product differentiation in a way which leaves room for the achievement of domestic policy options.

In any case, a contracting party which claims to be harmed by the tariff differentiation of another contracting party bears the burden of establishing that such classification has been diverted from its normal purpose so as to become a means of discrimination in international trade. In order to prove that differentiation was made so as to afford protection to domestic production two issues have to be considered: on the one hand, the extent to which a given tariff specification may serve internal protection interests, and on the other hand, its actual or potential influence on the pattern of imports from different foreign sources.

Other factors or criteria proposed for determining like products include:

- the product's properties, nature and quality,
- the varying nature of inputs of a product, e.g. whether it has a vegetable, animal or synthetic origin,
- the product's end-uses in a given market and consumers' tastes and habits, which vary from country to country.
Although some of the above criteria are clearly based on the final product and its physical characteristics, others incorporate factors of origin or destination that may go beyond strict physical characteristics. Conversely, differences related to geographical factors (such as the zone of production), cultivation methods, processing methods, or genetic factors have not been considered a sufficient reason for justifying differentiation, even if the taste and aroma of the end products differ

Generally speaking, since GATT Article III covers only measures affecting products as such, it has been considered that products may be alike irrespective of the method of their production

Recent panel argumentation stressed the importance of the policy purpose of the measure affecting the product for the determination of the concept of like products; it indicated that "in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made ‘so as to afford protection to domestic production’". As noted above (para. 28), the purpose of GATT Article III is not to prevent differentiation of products categories for policy purposes which are not protectionist. In the absence of protectionist purposes, the imported product could be determined to be "unlike" the domestic product and could therefore be treated differently under GATT Article III.

To date, panels have not examined whether the effects on product characteristics should be perceived as any detectable effects, or solely those effects related to the policy purpose (for instance environmental effects when the policy aims at protecting the environment). It is interesting to note that in the former case the notion of measures affecting products as such would heavily depend on the evolution of techniques available for detection.

B. The principle of protection through tariffs

A second basic trade principle is that where protection is accorded to domestic industry, it should be applied essentially through the customs tariff, and not through other commercial measures. According to GATT Article XI.1,

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

This provision expresses the initial idea of the drafters of the Havana Charter to prohibit the use of import restrictions other than tariffs and then to provide for negotiations in order to reduce tariff levels. It was thus recognised that the reduction of tariff levels would not be successful in liberalising trade as long as other types of trade restrictions could be used.

The multilateral trading system therefore contains a general prohibition on quantitative restrictions, including quotas, embargoes, import or export licences, import or export prohibitions, or minimum price systems for import or exports. The main aim of this principle is to make trade protection visible and to allow price competition. As for non-tariff barriers in general, quantitative restrictions can be much more difficult to identify than tariffs. Transparency of protection is therefore the starting-point for the GATT approach to liberalisation through successive negotiations and the enforcement of balanced rights and obligations.
However, a series of exceptions allows the use of quantitative restrictions under certain conditions. The main exception concerns the case of balance-of-payments difficulties, by virtue of GATT Article XII. Furthermore, according to GATT Article XI.2, quantitative restrictions may be applied for other than balance-of-payments reasons. For instance, "export prohibitions or restrictions may be temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party". Contracting parties are able to take remedial action before a critical shortage has actually arisen, while the importance of any product should be judged in relation to the particular country concerned. Temporary export restrictions can in that sense be also envisaged to meet a considerable rise in domestic prices of foodstuffs due to a rise in prices in other countries. According to the Uruguay Round Agreement on Agriculture (Article 12), Members instituting quantitative restrictions in terms of Article XI.2(a) shall give due consideration to their effects on the food security of importing Members, provide information and consult, as appropriate, with other concerned Members.

Contracting parties may also establish "import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade". It seems to be accepted that prohibitions of products not meeting specific quality standards can be established in order to maintain those quality standards; however, such prohibitions should not go beyond what would be necessary to the application of the standards (see also Section III, General Exceptions). With respect to marketing regulations, the intention of drafters was to cover restrictions designed to promote sales of the restricted product and not restrictions on one commodity designed to promote sales of another commodity.

Article XI.2(c) provides for an additional exception to the general prohibition of quantitative restrictions: the importation of agricultural or fisheries products, the domestic marketing or production of which is quantitatively restricted. The reason why only agriculture and fisheries and not industrial products were included in this exception was mainly to enable countries to compensate for irregular levels of production due to "the capricious bounty of nature". Contrary to the other exceptions mentioned above, the measures foreseen here were import restrictions and not prohibitions. However, this provision became inapplicable in practice, by virtue of Article 4.2 of the Uruguay Round Agreement on Agriculture, indicating that agriculture-specific quantitative import restrictions may not be maintained any longer, but have to be converted into ordinary customs duties.

It should be noted that the principle of non-discrimination applies even in the above-mentioned cases where the use of quantitative restrictions is admitted. This means that any quantitative restrictions should not be applied in a way which discriminates between like products of different origins. GATT Article XIII.1 specifies that:

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

In order to judge whether such restrictions are applied in a non-discriminatory way, several elements can be taken into account, including the transparency of the measures, the way the measures are administered, whether they are unilateral or negotiated, and whether they are mandatory or voluntary.
IV. GENERAL EXCEPTIONS

It follows from the above description that environmental laws or regulations are \textit{a priori} consistent with trade principles if they apply equally to imports and domestic products, do not discriminate among different trading partners and are not based on quantitative restrictions (unless covered by the exemptions in GATT Article XI.2 and XII). The General Agreement also recognises a number of circumstances where trade restrictive measures \textit{inconsistent} with its provisions may be justified. These circumstances give rise to a number of exemptions motivated by social and public order considerations, unlike exemptions of Articles XI.2 and XII, which are motivated by economic and financial considerations. Consequently, environmental measures which contravene the basic trade principles mentioned in Section III above may be justified under a general exception, mainly to allow measures necessary for the effective implementation of environmental policies.

As with all exceptions to fundamental principles, such circumstances need to be narrowly defined. 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. By the same token, it is the party invoking the exception that must demonstrate that restrictive measures are "necessary". For example, a state seeking compliance to laws inconsistent with the principle of non-discrimination has to demonstrate that such inconsistency is necessary to achieve the objectives of those laws. In this case, it has also to demonstrate that it does not use more trade-restrictive enforcement measures than necessary, and that less restrictive measures are not available, or not sufficient for achieving its policy objectives.

A. Necessity

According to GATT Article XX:

\textit{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:}

\begin{itemize}
  \item[(b)] \textit{necessary to protect human, animal or plant life or health;} ...
  \item[(d)] \textit{necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement};
  \item[(g)] \textit{relating to the conservation of exhaustible natural resources} ...
\end{itemize}

According to the Preamble of the TBT Agreement:

\textit{.. no country should be prevented from taking measures necessary.. for the protection of human, animal or plant life or health, of the environment, .. subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade ..}

Those provisions are based on Article 43 of the ITO Draft Charter and largely inspired by an early Convention for the Abolition of Import and Export Prohibitions and Restrictions.

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According to Article 6 of the SPS Agreement:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence ...

The objective of these provisions is to allow departure from a strict application of the trade principles including the MFN and National Treatment clauses to the extent necessary to pursue the overriding policy goals listed in Article XX. Trade measures inconsistent with the General Agreement may be considered necessary and justifiable in order to achieve certain policy goals, when alternative measures consistent with the General Agreement are not available or not effective enough. Nevertheless, the provisions guard against the abuse of the exceptions for protectionist reasons. Thus, the measures in question are still subject to the general requirement of non-discrimination: for instance, they may introduce a differentiation between two products having different environmental impacts, but not an arbitrary discrimination which cannot be justified on the basis of the environmental characteristics of the products. Likewise, a competing policy measure which imposes conditions more difficult or costly to meet by imported products than by domestic products may, under certain circumstances, be dismissed as a "disguised restriction" on trade. In the more limited scope of the SPS Agreement, measures which are costly or difficult to meet may be considered perfectly acceptable, provided they are scientifically justifiable and based on appropriate risk assessment criteria.

Protection of human, animal or plant life or health

It has been indicated that a measure taken by an importing contracting party should be no more severe, and should be applied no longer, than necessary to protect the human, animal or plant life or health involved. The question was recently raised whether such a measure had to be directed to humans, animals or plants within the territorial jurisdiction of the country. Recent Panel argumentation considered that GATT Article XX [the reasoning applying both to paragraphs (b) and (g)] was not limited to policies related to living beings or resources located within the territory of the country introducing the policy, but was nevertheless limited by jurisdiction in general. It indicated that, under general international law, states are entitled to regulate the conduct of their nationals with respect to persons, animals, plants and natural resources outside their territory. The latter argument, however, applies only to policies over the countries’ own nationals.

In order to assess the necessity of specific trade measures for achieving human, animal or plant life or health protection objectives, it has to be considered whether those objectives could have been achieved through a non-discriminatory regulation implemented on a national treatment basis. Specific import restrictions would then be 'necessary' in terms of Article XX(b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which the concerned country could reasonably be expected to employ for achieving its policy objectives. This implies determining whether there are alternative measures that would be as effective in achieving those objectives and examining whether any such alternative is less inconsistent with the GATT. For public health objectives, such GATT-consistent alternative measures may include strict, non-discriminatory labelling and ingredient disclosure regulations, allowing governments to control, and the public to be informed of, the content of the products. They may also take the form of bans on advertising, as well as financial measures applied on both domestic and foreign origin products and destined to curb the demand for products considered as harmful.
Compliance with laws and regulations not inconsistent with the GATT

The notion of compliance has again been narrowly defined to mean enforcement of obligations set out in laws and regulations and not as also covering measures "to ensure the attainment of the objectives of the laws and regulations". Furthermore, for the Article XX(d) exception to be applicable, laws and regulations with which compliance is being secured must themselves be not inconsistent with the General Agreement.

In order to assess the necessity of specific trade measures for securing compliance with laws and regulations, it has to be considered whether "a satisfactory and effective alternative existed". However, this does not imply that any deliberate lack of effective enforcement procedures in a country would allow such a country to deny national treatment or otherwise relax compliance with GATT provisions.

Conservation of exhaustible natural resources

The notion of exhaustible natural resources has consistently been determined on the basis of the need for conservation of such resources, as reflected in international concern over their conservation management. It has further been noted that conservation objectives did not depend on whether stocks of the affected resource were presently depleted, as long as such stocks could potentially be exhausted.

Unlike the paragraphs of Article XX which refer to "necessary" measures, paragraph (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 designed for, and having an effect on, the conservation of exhaustible natural resources. The aim of this differing formulation was to ensure that the commitments under the General Agreement do not hinder the pursuit of those policies, provided they are primarily aimed at the conservation of exhaustible natural resources, and not at providing indirect protection to domestic production.

B. Determining necessity on the basis of correlated concepts

Generally speaking, in order to determine necessity, a series of correlated concepts have been used, namely whether the measure is not more trade restrictive than necessary, and whether it is proportional to the objective pursued.

a. Trade restrictiveness

According to Article 2 of the TBT Agreement:

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

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

According to Article 21 of the SPS Agreement

.. when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility.

The concept of least trade-restrictiveness does not appear explicitly in the main body of the General Agreement. It has nevertheless been used by the 1979 Declaration on Trade Measures Taken for Balance-of-Payment Purposes, which invites contracting parties to give preference to measures which have the "least disruptive effect on trade". The term arose for the first time in the context of determining necessity with respect to Article XX, which dispute settlement panels have viewed in terms of the measure's consistency with the GATT. While incorporated into many panel decisions, adopted and unadopted, the concept has only now been embodied in the WTO itself: the revised Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures link least-trade restrictiveness to the requirement of necessity.

It has been recognised that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" if an alternative measure is available which could reasonably be employed and which is not inconsistent with other GATT provisions. 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, the one which entails the least degree of inconsistency with other GATT provisions. For instance, with respect to the application of GATT Article III (national treatment), a contracting party cannot be asked to change its substantive laws or its desired level of enforcement if they are the same for imported and domestically-produced goods. If, however, a contracting party could reasonably secure its desired level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so.

In order to assess the degree of trade restrictiveness necessary to fulfil the policy objectives in question, policy makers have to take into account the risks that would arise if those objectives were not fulfilled. Elements for assessing the risks include, under the SPS Agreement, a number of technical factors, such as: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment. They also include economic factors, such as: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing country; and the relative cost effectiveness of alternative approaches to limiting risks.
b. Proportionality

The concept of proportionality implies weighing the trade costs of a measure against its benefits for other policy areas, and thus considering as necessary only measures with potential trade impacts proportional to the objectives pursued. In this sense it has been used by the European Court of Justice to require policy means which least restrict the free movement of goods\textsuperscript{77}. The term proportionality does not appear in the main body of the General Agreement. Reference to proportionality was made in the draft TBT Agreement, which noted that the provision of Article 2.2 on least-trade restrictiveness was "intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create". This reference was dropped in the final text of the TBT Agreement.

C. Complementarity

According to GATT Article XX

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

\begin{itemize}
  \item[(g)] relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
\end{itemize}

It should be noted that a similar provision ("if corresponding domestic safeguards under similar conditions exist in the importing country") completing GATT Art. XX (b) was deleted during the Geneva session of the Preparatory Committee. Drafters considered that complementarity would be difficult to implement with respect to human, animal or plant life or health protection. They furthermore believed that the protection of exporting countries against any abuse of paragraph (b) was sufficiently afforded by the headnote to the Article XX.

The concept of complementarity means that trade restrictive measures would be considered as necessary if they are adopted to complement corresponding restrictive measures on domestic production and consumption. Measures taken in conjunction with domestic restrictions refer to measures primarily aimed at rendering effective the domestic restrictions\textsuperscript{78}. Several panel reports\textsuperscript{79} have found that restrictions applied only to certain species, products or forms of the concerned natural resource, or to certain and not all interested consumers could not be deemed to be primarily aimed at the conservation of such resource and at rendering effective the relevant domestic restrictions\textsuperscript{80}.

The requirement that trade restrictive measures must be complementary to domestic measures implies that contracting parties are permitted to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction. It is considered that 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\textsuperscript{81}. As noted above, GATT Article XX does not prevent countries from taking measures covering resources outside their jurisdiction. However, such measures could not be considered as “primarily aimed” at the conservation of resources if they were not sufficient in themselves for furthering those conservation objectives. Measures that would be effective only through the changes in policies and practices of other countries, and taken so as to force these countries to change their policies, would not be justified under GATT Article XX(g)\textsuperscript{82}.
NOTES

1. Agenda 21, Chapter 2.20 and 2.21(a).

2. The Havana Charter, formally known as the Final Act of the United Nations Conference on Trade and Employment (March 24, 1948, UN Doc. E/Conf.2/78) is the outcome of the negotiations aimed at the establishment of an International Trade Organization (ITO). This Charter never entered into force. The General Agreement, which was intended to implement interrimarily the tariff reductions agreed upon during the negotiations, included most of the trade-related provisions of the Havana Charter, although not always in their final form.

3. The Agreement on Technical Barriers to Trade (TBT or Standards Code) was adopted at the conclusion of the Tokyo Round negotiations to make sure that the adoption and implementation by governments or other bodies of technical regulations or standards, for reasons of safety, health, consumer or environmental protection, or other purposes, do not create unnecessary obstacles to trade. The Agreement was revised in the framework of the Uruguay Round negotiations (TBT Agreement).

4. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) was elaborated in the Uruguay Round negotiations with a view to guiding the adoption, development and enforcement of sanitary and phytosanitary measures in order to minimise their negative effects on trade.

5. The objective of liberal trade implies the minimization of interference of governments in trade flows that cross national borders. Paul Samuelson notes "there is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe" (in Economics, New York, McGraw Hill, 11th ed., 1989).

6. More recently, the Leutwiler Report (in "Trade Policies for a Better Future: Proposals for Action", Geneva, GATT, 1985) notes that "Trade allows countries to concentrate on what they can do best. No two countries are exactly alike in natural resources, climate or work force. Those differences give each country a "comparative advantage" over the others in some products. Trade translates the individual advantages of many countries into maximum productivity for all. This is the classic theory of international trade. It is still valid today."

7. As of the 18th August 1995.

8. For a more detailed description see document COM/TD/ENV(93)115/REV4, Dispute Settlement in the WTO.

9. See also document COM/TD/ENV(93)115/REV4, Dispute Settlement in the WTO.

10. TBT Articles 2.9, 2.10 and 2.11. See also TBT Article 10 concerning information about technical regulations, standards and conformity assessment procedures, and the establishment of national enquiry points.

11. Article 7 of the SPS Agreement.

12. Article 3 of the SPS Agreement. See also SPS Annex A.
TBT Article 2.7 and SPS Article 4.

For a more detailed description of the concept of risk assessment see document OECD/GD(95)124, Environmental Principles and Concepts.

MFN clauses appeared in commercial treaties since the seventeenth century, although MFN-type obligations seem to have been contracted as early as the twelfth century. It is however generally argued that an economic non-discrimination obligation does not exist under customary international law, but only when a treaty clause creates it.

According to GATT Article I.1, foreign products are afforded non-discrimination treatment more specifically with respect to the following:

-- customs duties and charges of any kind imposed on or in connection with importation or exportation, as well as on the international transfer of payments for imports or exports,

-- the method of levying such duties and charges,

-- all rules and formalities in connection with importation and exportation,

-- internal taxes or other internal charges,

-- laws regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of foreign products,

-- internal quantitative regulations relating to the mixture, processing or use of products in specified amounts of proportions allocated among external sources of supply,

-- charges, regulations and formalities in connection with traffic of products in transit to or from the territory of any other contracting party,

-- marking requirements with regard to products,

-- prohibitions and restrictions on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party,

-- technical regulations, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations.

Territories enjoying historical preferences (referred to in Annexes A, B, C, D, E and F of Article I, were exempted from the MFN clause, although most of those preferences are terminated today. Furthermore, MFN treatment does not apply in the case of free trade areas and customs unions qualifying under GATT Article XXIV. Most importantly, exceptions to this clause were introduced in the framework of the Generalised System of Preferences (Decision of 25 June 1971, GATT BISD 18S/24) to implement a system of generalised non-reciprocal and non-discriminatory preferences accorded by developed countries to products originating in developing countries and territories, without according such treatment to like products of other contracting parties. Similar exceptions were introduced with respect to trade preferences among developing countries (Decision of 26 November 1971 on Trade negotiations among developing countries, GATT BISD 18S/26). The Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (known as the
"Enabling Clause", GATT BISD 26S/203) provided that "notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." Under the Enabling Clause, a number of preferential arrangements have been adopted.

See in particular the conclusions of the 1952 Working Party on the "International Convention to Facilitate the Importation of Commercial Samples and Advertising Material".

The Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement.

Such clauses applied not only to products, as is the case with the GATT national treatment clause, but to various other aspects of economic activities, such as the right of establishment of foreign businesses.

According to GATT Article III.1, Foreign products are afforded national treatment more specifically with respect to the following:

-- internal taxes and other internal charges, including those collected or enforced at the time or point of importation,

-- laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. An exception has been introduced with regard to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in production of goods for commercial sale,

-- internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, and in particular requiring, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources,

-- technical regulations, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations.

The two Panel Reports on "United States - Restrictions on Imports of Tuna" (DS21/R, dated 3 September 1991, BISD 39S/155 and DS29/R, dated 16 June 1994) (neither one adopted) relied on this limitation to products to exclude the application of Article III in these cases (see, in particular, Panel Report DS29/R, points 5.8 and 5.9, pages 48-49).

See, in particular, the Panel Report on "Italian Discrimination against Imported Agricultural Machinery" (L/833, adopted on 23 October 1958, 7S/60, 63-64, para.11). The distinction between import duties and internal charges was also stressed in the Panel Report on "EEC Regulation on Imports of Parts and Components" (L/6657, adopted on 16 May 1990, 37S/132, 191-192, para.5.4), which noted that while "the imposition of 'ordinary customs duties' for the purpose of protection is allowed unless they exceed tariff bindings", .. "internal taxes that discriminate against imported products are prohibited".

See in particular the Panel Report on "United States Taxes on Petroleum and Certain Imported Substances" (L/6175, adopted on 17 June 1987, 34S/136, 158, para. 5.1.9 and 5.2.2). The Report particularly stresses the importance of equality of competitive conditions in the domestic market, both for domestic and for imported products.
The Panel Report on "United States - Section 337 of the Tariff Act of 1930" (L/6439, adopted on 7 November 1989, BISD 36S/345-386, paragraphs 5.11 to 5.13) stated that the national treatment obligation required first of all to forestall less favourable treatment rather than rectifying it after the event.

See in particular the Panel Report on "United States - Section 337 of the Tariff Act of 1930" (L/6439, adopted on 7 November 1989, BISD 36S/345-386, para. 5.11).


The Panel Report on "United States - Measures Affecting Alcoholic and Malt Beverages" (DS23/R, adopted 19 June 1992, 39S/206, para. 5.25 and 5.71) noted that contracting parties were not prevented from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. It further noted that in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production." Similarly, the Panel Report on “United States - Taxes on Automobiles” (DS31/R, dated 11 October 1994, not yet adopted, para.5.8) indicated that "a primary purpose of the General Agreement was to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them .".

This clarification, contained in GATT Art.III.8.b was added during the Havana Conference "because it was felt that if subsidies were paid on domestic and not on imported products, it might be construed that Members were not applying the 'national treatment' rule" (E/CONF.2/C.3/A/W.49, p.2).

The Panel Report on "Italian Discrimination against Imported Agricultural Machinery" (L/833, adopted on 23 October 1958, 7S/60, para.5) considered a State assistance paid not to producers but to the purchasers of machinery as inconsistent with the National treatment obligation.

London Session of the Preparatory Committee, EPCT/C.II/65, p.2.

See the Agreement on Implementation of Article VI, Article 2.2 (Article 2.6 of the amended 1994 Agreement), and the Agreement on Subsidies and Countervailing measures, footnote 18 to Article 6 (footnote 44 to Article 15 of the amended 1994 Agreement).

See the Working Party Report on Border Tax Adjustments (L/3464, adopted on 2 December 1970, 18S/97, 102, para.18). The Panel Report on "United States - Measures Affecting Alcoholic and Malt Beverages" (DS23/R, adopted on 19 June 1992, 39S/206, para.5.24) states that the contracting parties have not developed a general definition of the term, either within the context of Art. III or of other GATT Articles, and that past decisions on this question have been made on a case-by-case basis.


First Session of the Preparatory Committee of the UN Conference on Trade and Employment (1946) (EPCT/C.II/PV/12; Havana Conference (1947-1948) E/CONF.2/C.3/SR.5, p.4. See also the Panel Report on "EEC - Measures on Animal Feed Proteins" (L/4599, adopted on 14 March 1978, 25S/49, 63, para. 4.2) which referred to the number of products and tariff items carrying different duty rates and tariff bindings.

See in particular the 1950 Report of the Working Party on "the Australian Subsidy on Ammonium Sulphate" (GATT/CP.4/39, adopted on 3 April 1950, II/188, 191, para.8). It should be noted that, although there is no obligation for contracting parties to follow any particular system for classifying goods, the Harmonised Commodity Description and Coding System has been accepted as a basis for classification since 1 January 1988. Contracting parties conserved their wide discretion with respect to tariff classification even after this adoption. In fact, although the Harmonised System has brought about a large measure of harmonisation in the field of customs classification of goods, since parties are committed to apply the first six-digit numbers of that system, the nomenclature has been structured so as to leave room for further specifications. Every contracting party has the right to introduce in its customs tariff the sub-positions which it deems appropriate [Panel Report on "Spain - Tariff Treatment of Unroasted Coffee" (L/5135, adopted 11 June 1981, 28S/102, 111-112, para.4.4)]. It is considered that "a tariff classification going beyond the Harmonised System's structure is a legitimate means of adapting the tariff scheme to each contracting party's trade policy interests, comprising both its protection needs and its requirements for the purposes of tariff and trade negotiations” [Panel Report on "Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber" (L/6470, adopted on 19 July 1989, 36S/167, 180, para. 5.7-5.10)].

The Panel Report on "United States - Measures Affecting Alcoholic and Malt Beverages" (DS23/R, adopted 19 June 1992, 39S/206, para.5.72) particularly stressed the need for the non-discrimination principle to be implemented in a way which does not impede the elaboration and implementation of other policies.


See in particular the Panel Report on "Spain - Tariff Treatment of Unroasted Coffee" (L/5135, adopted on 11 June 1981, 28S/102, 111-112, para. 4.5 and 4.8).

The Panel Report on "United States - Restrictions on Imports of Tuna" (DS21/R, dated 3 September 1991, BISD 39S/155, para. 5.11 and 5.14), which however has not been formally presented to the GATT Council with a view to adoption, considered that regulations with respect to harvesting, which could not possibly affect the product as such, do not differentiate otherwise like products.

See also the Panel Report on “United States - Taxes on Automobiles” (DS31/R, dated 11 October 1994, not yet adopted), which argued (para. 5.7 and 5.8) that "... Article III serves only to prohibit regulatory distinctions between products applied so as to afford protection to domestic production .. (and) could not be interpreted as prohibiting government policy options, based on products, that were not taken (with this aim).”.

The Panel Report on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" (L/4687, adopted on 18 October 1978, 25S/68, 99, para.4.9) noted that the import regulation allowing the import of products in principle but not below a minimum price level fell within the purview of Article XI. The Panel Report on "Japan - Trade in Semiconductors" (L/6309, adopted on 4 May 1988, 35S/116, 153, para.105) provided that the same applied to restrictions on exports.

The Panel Report on "EEC - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins" (L/6627, adopted on 25 January 1990, 37S/86, 130, para.150) observed that the basic provisions on restrictive trade measures have been consistently interpreted as provisions establishing conditions of competition and thus considered that import quotas are covered by Article XI.1 whether or not they actually impede imports.

Geneva Sub-Committee, EPCT/141, p.2.

See Reports of the Sub-Committee on Articles 20 and 22 of the Havana Charter (Havana Reports, p.88, para.14), as well as the Report of the Review Working Party on "Quantitative Restrictions" (L/332/Rev.1+Adds., adopted on 2, 4 and 5 March 1955, 3S/170, 191, para.73).

See the Panel Report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon" (L/6268, adopted on 22 March 1988, 35S/98, 112, para.4.2), where it is noted that the prohibition of certain exports "even if they could meet the standards generally applied .. could not be considered as 'necessary' to the application of standards within the meaning of Article XI:2(b)".


Geneva Session of the Preparatory Committee, EPCT/A/PV/19, p.42.

See the Panel Reports on "US - Prohibition of Tuna and Tuna Products from Canada" (L/5198, adopted on 22 February 1982, 29S/91, 107, para.4.6), or on "Japan - Restrictions on Imports of Certain Agricultural Products" (L/6253, adopted on 22 March 1988, 35S/163, 244, para.6.4). The conditions to be met in order to qualify for exemption under Article XI.2(c) have been summarised inter alia in the Panel Report on "Canada - Import Restrictions on Ice Cream and Yoghurt" (L/6568, adopted on 5 December 1989, 36S/68, 85-86, para.62).


It should be recalled however that the measures can be challenged in case of nullification or impairment of benefits (see above, para. 6 and document COM/TD/ENV(93)115/REV4, Dispute Settlement in the WTO).


The 1927 International Convention for the Abolition of Import and Export Prohibitions and Restrictions, which never entered into force, provided for a series of exceptions to the abolition of restrictions, all "exceptions which have been admitted through long-established international practice .. to be indispensable and compatible with the principle of the freedom of trade". Those exceptions were subject to the condition that ",.. they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade".

See in particular the Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes" (DS10/R, adopted 7 November 1990, BISD 37S/200, para.73 to 81). The panel addressed the availability of alternative measures, as well as their least degree of inconsistency. This latter point is developed under Section IV.B. in the body of the text above.


Panel Report on "United States - Restrictions on Imports of Tuna" (DS29/R of 16 June 1994, not yet adopted, paras. 5.15 to 5.20 and 5.31 to 5.32).


See the Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes" (DS10/R, adopted on 7 November 1990, BISD 37S/200, para.76), stating a WHO resolution (Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda item 10, 17 May 1990, A43/VR/14;WHA43.16) on the effectiveness of "tobacco control strategies .. providing for .. progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco".


Panel Report on "United States Imports of Certain Automotive Spring Assemblies" (L/5333, adopted on 26 May 1983, 30S/126, paras. 58, 60) estimated that, on the basis of law applicable at that time, the measures adopted were the only way in which patent rights could be effectively protected, and thus considered them as “necessary” in the sense of Article XX(d).

See the Council discussion of the above-mentioned Panel Report (C/M/161, pp.11 to 16).


Panel Report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon" (L/6268, adopted on 22 March 1988, 35S/98). See also Panel Report on "United States - Restrictions on Imports of Tuna" (DS29/R of 16 June 1994, not yet adopted, paras. 5.21-5.22) which underlines that "the words 'primarily aimed at' referred not only to the purpose of the measure, but also to its effect on the conservation of the natural resource".

Declaration adopted on 28 November 1979, BISD 26S/206, para. 1(a).

See the Panel Report on "United States - Section 337 of the Tariff Act of 1930" (L/6439, adopted on 7 November 1989, BISD 36S/345). The European Economic Community considered that "any difference between .. two enforcement mechanisms that might be required to adapt the domestic measures to deal with imports .. must be confined to what discriminated least against imported goods" (para.3.60), while the US did not believe this to require "an obligation to use the least trade-restrictive measure that could be envisaged" (para.3.59).


See for instance the ADBHU case where it was stated that the measures adopted must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection" (Case 240/83 "Procureur de la République v Association de défense des brûleurs d'huiles usagées", judgement of 7 February 1985, ECR 531). In the Danish bottles case the ECJ found that the Danish quantitative restrictions for re-usable containers marketed by importers were disproportionate to the objective of protection of the environment through a mandatory collection system for re-usable containers (Case 302/86 "Commission of the European Communities v Kingdom of Denmark - Containers for beer and soft drinks", judgement of 20 September 1988).


See also the Panel Report on "United States - Restrictions on Imports of Tuna" (DS21/R, dated 3 September 1991, 39S/155), which has not been formally presented to the GATT Council with a view to adoption.


Panel Report on "United States - Restrictions on Imports of Tuna" (DS29/R of 16 June 1994, not yet adopted, paras.5.25 to 5.27).