if such measures are made effective in conjunction with restrictions on domestic production or consumption." This clause has been interpreted in two landmark Appellate Body decisions, including the following decision, which was the first issued by the Appellate Body.

UNITED STATES—STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE

WT/DS2/AB/R, pp. 13–20.
Appellate Body Report adopted May 20, 1996.

[This case involved a dispute between the United States and Venezuela, later joined by Brazil. The dispute related to the implementation by the US Environmental Protection Agency (EPA) through its so-called Gasoline Rule of provisions of the US Clean Air Act of 1990 (CAA), which were designed to ensure (i) that pollutants in major population centres were reduced and (ii) that pollution from gasoline combustion did not exceed 1990 levels. To achieve the first goal, the Rule provided that only so-called reformulated gasoline could be sold in certain large metropolitan (and some other) areas that had experienced significant summertime ozone pollution in the past. Conventional gasoline could only be sold outside of these areas. To achieve the second goal, the Gasoline Rule relied on the use of 1990 baselines as described below.

The CAA required reformulated gasoline to meet certain specifications. In addition, it imposed "non-degradation" rules, which required that certain quality aspects of reformulated gasoline not fall below 1990 baseline levels for gasoline generally. In order to prevent the dumping of pollutants extracted from reformulated gasoline into conventional gasoline, the CAA required that conventional gasoline remain as clean as 1990 baseline levels. Consequently, in respect of both reformulated and conventional gasoline, the 1990 baselines were an integral element of the Gasoline Rule, and it contained detailed baseline establishment rules. Baselines could be either individual (established on the basis of the records of the individual) or statutory (established by the EPA and intended to reflect average 1990 US gasoline quality). Any domestic refiner which was in operation for at least six months in 1990 was required to establish an individual baseline representing the quality of gasoline produced by that refiner in 1990. In contrast, the Gasoline Rule did not provide for individual baselines for foreign refiners. Although the EPA at one time proposed allowing limited use by importers of such baselines, Congress enacted legislation specifically denying the funding necessary to implement the proposal.

The Panel Report concluded that the above described rules violated Article III:4, essentially because imported gasoline was required to meet the statutory baseline (with effectively no option to benefit from an individual baseline) while domestic gasoline needed only to meet the applicable individual baseline. In fact, the vast majority of domestic gasoline did not meet the statutory baseline. It should be noted that after January 1, 1998, all reformulated gasoline had to meet the same

specified standard, so the Gasoline Rule in respect of individual baselines for reformulated gasoline was essentially a transitional provision for the benefit of US refiners.

The US did not appeal the Panel's finding that Article III:4 had been violated, nor did it appeal the Panel's finding that the Gasoline Rule could not be justified as a health measure under Article XX(b). It did, however, appeal the Panel's rejection of its Article XX(g) defense. While the Panel found that clean air was an exhaustible natural resource for purposes of Article XX(g), it concluded that the less favourable baseline establishment methods at issue were not "primarily aimed" at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g).]

The Panel, addressing the task of interpreting the words "relating to", quoted with approval the following passage from the panel report in the 1987 *Herring and Salmon* case:[1]

> 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 exhaustive 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). (emphasis added by the Panel)

The Panel Report then went on to apply the 1987 *Herring and Salmon* reasoning and conclusion to the baseline establishment rules of the Gasoline Rule in the following manner:

> The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III—the less favourable baseline establishment methods that adversely affected the conditions of competition for imported gasoline—were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of

1. [original note 30] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, para. 4.6; adopted on 22 March 1988.

imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources.

It is not easy to follow the reasoning in the above paragraph of the Panel Report. In our view, there is a certain amount of opaqueness in that reasoning. The Panel starts with positing that there was "no direct connection" between the baseline establishment rules which it characterized as "less favourable treatment" of imported gasoline that was chemically identical to the domestic gasoline and "the US objective of improving air quality in the United States." Shortly thereafter, the Panel went on to conclude that "*accordingly, it could not be said that* the baseline establishment rules that afforded less favourable treatment to imported gasoline *were primarily aimed at* the conservation of natural resources" (emphasis added). The Panel did not try to clarify whether the phrase "direct connection" was being used as a synonym for "primarily aimed at" or whether a new and additional element (on top of "primarily aimed at") was being demanded.

One problem with the reasoning in that paragraph is that the Panel asked itself whether the "less favourable treatment" of imported gasoline was "primarily aimed at" the conservation of natural resources, rather than whether the "measure", i.e. the baseline establishment rules, were "primarily aimed at" conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided "less favourable treatment" under Article III:4 before the Panel examined the "General Exceptions" contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the "measures" which are to be examined under Article XX(g), and not the legal finding of "less favourable treatment."

* * *

A principal difficulty, in the view of the Appellate Body, with the Panel Report's application of Article XX(g) to the baseline establishment rules is that the Panel there overlooked a fundamental rule of treaty interpretation [i.e., Article 31 of the Vienna Convention on the Law of Treaties].

* * * That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That

direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.

Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

"necessary"—in paragraphs (a), (b) and (d);

"relating to"—in paragraphs (c), (e) and (g);

"for the protection of"—in paragraph (f);

"in pursuance of"—in paragraph (h);

"involving"—in paragraph (i); and

"essential"—in paragraph (j).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.

At the same time, Article XX(g) and its phrase, "relating to the conservation of exhaustible natural resources," need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.

The 1987 *Herring and Salmon* report, and the Panel Report itself, gave some recognition to the foregoing considerations of principle. As earlier noted, the Panel Report quoted the following excerpt from the *Herring and Salmon* report:

> 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. (emphasis added)

All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).

Against this background, we turn to the specific question of whether the baseline establishment rules are appropriately regarded as "primarily aimed at" the conservation of natural resources for the purposes of Article XX(g). We consider that this question must be answered in the affirmative.

The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline), need to be related to the "non-degradation" requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. The relationship between the baseline establishment rules and the "non-degradation" requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).

[The Appellate Body then considered the third clause of Article XX(g), i.e., whether the baseline establishment rules were "made effective in conjunction with restrictions on domestic production or consumption", an issue that the Panel had not considered. In that connection, the Appellate Body noted that it viewed that clause] as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause

is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.

There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment—constituting real, not merely formal, equality of treatment—it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.

In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for—generally speaking—individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of "dirty" gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded "less favourable treatment" than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). * * *

We do not believe, finally, that the clause * * * was intended to establish an empirical "effects test" for the availability of the Article XX(g) exception. * * *

[The Appellate Body then considered whether the requirements of the chapeau to Article XX had been met and concluded that they had not been. Its reasoning on that issue is considered in the notes following the principal case in Section 13.5, where we examine the meaning of the chapeau to Article XX.]

Notes and Questions

(1) Although the United States ultimately lost its appeal, it expressed great satisfaction with the Appellate Body's analysis of Article XX(g). Past GATT panels had focused, as had the *Gasoline* panel, on whether the GATT-inconsistent aspect of a measure was "primarily aimed at" conservation. The Appellate Body's decision that it was necessary to look at the broader measure—the baseline establishment rules generally—and examine whether they were aimed at conservation significantly expanded the scope of Article XX(g). Do you agree with the Appellate Body's approach?

(2) The Appellate Body had the occasion to consider again the scope of Article XX(g) in the *Shrimp* case, which we examine in detail in the next section of this chapter dealing with the chapeau to Article XX. In respect of Article XX(g), one of the issues in the *Shrimp* case was a claim that the phrase "exhaustible natural resources" referred only to minerals and not to living things. Not surprisingly, the Appellate Body rejected that argument;