

**United States -  
Standards for Reformulated  
and Conventional Gasoline**

Report of the Panel

## I. INTRODUCTION

1.1 On 23 January 1995, the United States received a request from Venezuela to hold consultations under Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("General Agreement"), Article 14.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), on the rule issued by the Environmental Protection Agency on 15 December 1993, entitled "Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline" (WT/DS2/1). The consultations between Venezuela and the United States took place on 24 February 1995. As they did not result in a satisfactory solution of the matter, Venezuela, in a communication dated 25 March 1995, requested the Dispute Settlement Body ("DSB") to establish a panel to examine the matter under Article XXIII:2 of the General Agreement and Article 6 of the DSU (WT/DS2/2). On 10 April 1995, the DSB established a panel in accordance with the request made by Venezuela. On 28 April 1995, the parties to the dispute agreed that the Panel should have standard terms of reference (DSU, Art. 7) and agreed on the composition of the Panel as follows:

Chairman: Mr. Joseph Wong  
Members: Mr. Crawford Falconer  
          Mr. Kim Luotonen

1.2 On 10 April 1995, Brazil requested the United States to hold consultations under Article XXII:1 of the General Agreement, Article 14.1 of the TBT Agreement and Article 4 of the DSU on the rule issued by the Environmental Protection Agency on 15 December 1993 entitled "Regulation on Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline" (WT/DS4/1). Consultations between Brazil and the United States were held on 1 May 1995 without resulting in a satisfactory solution of the matter. In a communication dated 19 May 1995, Brazil requested the DSB to establish a panel to examine the matter pursuant to Article XXIII of the General Agreement, Article 14 of the Agreement on Technical Barriers to Trade and Article 6 of the DSU. On 31 May 1995, the DSB established a Panel in accordance with the request made by Brazil.

1.3 On 31 May 1995, pursuant to Article 9 of the DSU in respect of multiple complainants, the DSB decided, with the agreement of all the parties, that for practical reasons this matter be examined by the Panel already established at the request of Venezuela on 10 April 1995. The date of the constitution of the Panel, namely 28 April 1995, remained unchanged.

1.4 Due to the additional task given to the Panel, the DSB agreed upon, at the same meeting, the following terms of reference:

"To examine, in the light of the relevant provisions of the covered agreements cited by Venezuela in document WT/DS2/2 and by Brazil in document WT/DS4/2, the matters referred to the DSB by Venezuela and Brazil in those documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.5 The Chairman of the DSB recalled Article 9.2 of the DSU which provides that "the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired".

1.6 Australia, Canada, the European Communities and Norway reserved their rights to participate in the Panel proceedings as third parties. Only the European Communities and Norway presented arguments to the Panel.

1.7 The Panel met with the parties to the dispute from 10 to 12 July 1995 and from 13 to

15 September 1995. It met with the interested third parties on 11 July 1995.

1.8 On 21 September 1995, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months. The reasons for that delay are stated in document WT/DS2/5.

1.9 The Panel issued its interim report to the parties on 11 December 1995. Following a request made by the United States pursuant to Article 15.2 of the DSU, the Panel held a further meeting with the parties on 3 January 1996.

1.10 The Panel issued its final report to the parties to the dispute on 17 January 1996.

## **II. FACTUAL ASPECTS**

### **A. The Clean Air Act**

2.1 The Clean Air Act ("CAA"), originally enacted in 1963, aims at preventing and controlling air pollution in the United States. In a 1990 amendment to the CAA<sup>1</sup>, Congress directed the Environmental Protection Agency ("EPA") to promulgate new regulations on the composition and emissions effects of gasoline in order to improve air quality in the most polluted areas of the country by reducing vehicle emissions of toxic air pollutants and ozone-forming volatile organic compounds. These new regulations apply to US refiners, blenders and importers.

2.2 Section 211(k) of the CAA divides the market for sale of gasoline in the United States into two parts. The first part, which covers approximately 30 percent of gasoline marketed in the United States, consists of the nine large metropolitan areas that experienced the worst summertime ozone pollution during the period 1987-1989, plus any areas that do not meet national ozone requirements and are added at the request of the governor of the state. These areas are referred to as ozone "nonattainment areas", and in this part of the United States only "reformulated gasoline" may be sold to consumers. In the rest of the United States, "conventional gasoline" may be sold to consumers.

2.3 Section 211(k)(2)-(3) of the CAA established certain compositional and performance specifications for reformulated gasoline. The oxygen content must not be less than 2.0 percent by weight, the benzene content must not exceed 1.0 percent by volume and the gasoline must be free of heavy metals, including lead or manganese. The performance specifications of the CAA require a 15 percent reduction in the emissions of both volatile organic compounds ("VOCs") and toxic air pollutants ("toxics") and no increase in emissions of nitrogen oxides ("NOx"). These requirements are measured by comparing the performance of reformulated gasoline in baseline vehicles (representative model year 1990 vehicles) against the performance of "baseline gasoline" in such vehicles. Section 211(k)(10) of the CAA defines the specifications of baseline gasoline sold in the summer, which is the high ozone season, and leaves the specifications of winter baseline gasoline to be determined by EPA. It provides, however, that the specifications for winter gasoline shall be those of the industry average gasoline sold in 1990. For the year 2000 and beyond, the CAA requires that new reformulated gasoline requirements be developed that require a 20-25 percent reduction in emissions of VOCs and toxics, depending on EPA's considerations of feasibility and cost.

2.4 The CAA also sets requirements for conventional gasoline, which ensure that each refiner's, blender's or importer's conventional gasoline sold in the rest of the country remains as clean as it was in 1990. This programme is known as "anti-dumping rules" because it is designed to prevent refiners,

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<sup>1</sup>42 U.S.C. §7545(k).

blenders or importers from dumping into conventional gasoline fuel components that are restricted in reformulated gasoline and that cause environmentally harmful emissions. To accomplish this, section 211(k)(8) of the CAA provides that no refiner, blender or importer of gasoline may sell conventional gasoline that emits VOCs, toxics, NO<sub>x</sub> or carbon monoxide ("pollutants") in greater amounts than the gasoline sold in the United States by that refiner, blender or importer in 1990. In order to implement this provision, separate individual baselines must be established for refiners, blenders or importers based on the gasoline they sold in 1990. That permits determination of whether the emissions from a refiner's, blender's and importer's conventional gasoline (post-1994 gasoline) are greater than the emissions from its 1990 gasoline. If, however, EPA determines that no adequate and reliable data exist regarding the composition of such 1990 gasoline sold by a refiner, blender or importer, the statutory baseline gasoline is applied. The statutory annual baseline values are calculated using a seasonal weighting of the statutory summer baseline, as defined in the CAA, and the statutory winter baseline, as determined by EPA.

## **B. EPA's Gasoline Rule**

### ***1. Establishment of Baselines***

2.5 The CAA directed EPA to determine the quality of 1990 gasoline, to which reformulated and conventional gasoline would be compared in the future: these determinations are known as "baselines". EPA set historic baselines for individual entities, and established a statutory baseline, intended to reflect average US 1990 gasoline quality, which would be used instead of the historic individual baselines for those entities who were determined to be lacking adequate and reliable data regarding the quality of the gasoline they produced in 1990.

2.6 EPA's final rule<sup>2</sup> ("Gasoline Rule") requires any domestic refiner, which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represents the quality of gasoline produced by that refiner in 1990. The rule establishes three methods for the purpose of determining a domestic refiner's individual historic baseline. Under Method 1, the refiner must use the quality data and volume records of its 1990 gasoline. However, as acknowledged by EPA at the time, it was not anticipated that many domestic refiners would have all the data necessary to establish an individual baseline based entirely on actual 1990 data. If Method 1 type data are not available, a domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that neither one of these two methods is available, a domestic refiner must turn to Method 3 type data which consist of its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show 1990 gasoline composition. Domestic refiners are not permitted to choose the statutory baseline.

2.7 An importer which is also a foreign refiner must determine its individual baseline using Methods 1, 2 and 3 if it imported at least 75 percent, by volume, of the gasoline produced at its foreign refinery in 1990 into the United States in 1990 (the so-called "75 % rule")<sup>3</sup>.

2.8 Certain entities are, however, automatically assigned to the statutory baseline. Firstly, refineries which began operation after 1990 or were in operation for less than 6 months in 1990 are required to use the statutory baseline. Secondly, importers and blenders are assigned the statutory baseline unless they can establish their individual baseline following Method 1. If actual 1990 data are not available, which is, as for domestic refiners, anticipated by EPA, importers and blenders are assigned to the statutory baseline. EPA considers that blenders which produce gasoline by combining gasoline blendstocks purchased from many sources cannot determine with accuracy the quality of

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<sup>2</sup>40 CFR 80, 59-Fed. Reg. 7716 (16 February 1994).

<sup>3</sup>40 CFR 80.91(b)(ii).

their 1990 gasoline using Methods 2 and 3. Similarly, EPA considers that importers cannot use Methods 2 and 3, because these methods inherently apply only to refineries and because of the extreme difficulty in establishing the consistency of their gasoline quality over time.

## **2. *Reformulated Gasoline***

2.9 Regarding the implementation of the regulations for reformulated gasoline, EPA proposes a two-step approach. From 1 January 1995 to 1 January 1998, EPA enforces an interim programme called the "Simple Model". Under this programme, reformulated gasoline sold in the United States by domestic refiners will be subject to requirements established with reference to the individual baseline for certain gasoline qualities and requirements specified in the Gasoline Rule for other gasoline qualities. More specifically, the parameters sulphur, olefins and T-90 are measured against each US refiner's individual 1990 baseline and must be maintained at or below these 1990 levels (these are called "non-degradation requirements"). The requirements regarding four other gasoline qualities (Reid Vapour Pressure, oxygen, benzene and toxics performance) are specified by EPA in the Gasoline Rule<sup>4</sup>. Importers of foreign gasoline also have to comply with the requirements set out in the final rule regarding Reid Vapour Pressure, oxygen, benzene and toxics performance. However, importers cannot use individual 1990 baseline for sulphur, olefins and T-90, but have to comply with levels specified in the statutory baseline for these parameters. Under the Simple Model, requirements for sulphur, olefins and T-90 must be met on an annual average basis. EPA adopted the individual baseline approach for these parameters in the Simple Model because at the time it was formulating its regulation, it considered that the available data regarding sulphur, olefins and T-90 did not permit an assessment of the precise effects of these components on the emissions level of gasoline. Given this uncertainty, EPA did not want to require refiners immediately to make refinery changes which might later prove to be unnecessary, given the greater flexibility provided by the Complex Model.

2.10 As of 1 January 1998, EPA will enforce the "Complex Model", which will apply the same emissions reduction requirements to all producers of reformulated gasoline. The individual baselines for sulphur, olefins and T-90 will no longer apply.

## **3. *Conventional Gasoline (or "Anti-Dumping Rules")***

2.11 The 1990 Amendment to the CAA requires that, as of 1 January 1995, each refiner's, blender's or importer's conventional gasoline sold in the United States be no more polluting than the gasoline sold by that refiner, blender or importer in 1990<sup>5</sup>. EPA requires domestic refiners to measure non-degradation requirements for conventional gasoline against their individual baselines while importers of foreign gasoline are assigned to the statutory baseline. However, in this programme, the non-degradation requirements apply to all conventional gasoline requirements, and not only to sulphur, olefins and T-90. Requirements must be met on an average annual basis. The Gasoline Rule limits ("caps") the volume of conventional gasoline that is subject to an individual baseline to the volume of gasoline produced in 1990 by that entity; all conventional gasoline produced in excess of the specific volume cap is measured against the statutory baseline.

2.12 Domestic refiners and importers of conventional gasoline, unlike those of reformulated gasoline, will still be subject to different baselines after the entry into force of the Complex Model in 1998.

## **C. The May 1994 Proposal**

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<sup>4</sup>40 CFR 80.41.

<sup>5</sup>42 U.S.C. § 7545 (CAA 211(k)(8)).

2.13 In view of the comments made by interested parties during the rulemaking process of the final Gasoline Rule, EPA proposed, in May 1994, to amend the reformulated gasoline regulation in order to define criteria and procedures by which foreign refiners could establish individual refinery baselines in a manner similar to that required for domestic refiners<sup>6</sup>. Pursuant to this proposal, foreign refiners would be allowed to establish an individual baseline using Methods 1, 2 or 3. If the individual baseline was approved by EPA, importers could use it for the purpose of certifying the portion of reformulated gasoline imported from that particular refinery into the United States. However, the use of individual foreign refinery baselines would be subject to various additional strict requirements, aiming at ensuring the accuracy and respect of the foreign refinery's individual baseline with respect to gasoline shipped to the United States and verifying the refinery of origin. Furthermore, it would not apply to conventional gasoline. After a public comment period, the US Congress enacted legislation in September 1994 denying funding to EPA for implementation of the May 1994 Proposal.

**[Parties' arguments in Sections III and IV deleted from this version]**

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<sup>6</sup>40 CFR 80 (59 Fed. Reg. 22800, 3 May 1994).

## **V. INTERIM REVIEW**

5.1 On 18 December 1995, the United States requested the Panel to review in accordance with Article 15.2 of the DSU precise aspects of the interim report that had been issued to the parties on 11 December 1995, and to hold a meeting for that purpose. The Panel met with the parties on 3 January 1996 in order to hear their arguments concerning the interim report. The Panel carefully reviewed the arguments presented by the United States and the responses offered by Venezuela and Brazil.

5.2 In respect of the interim report's discussion of Article III, the United States argued that in several respects the interim report dealt with issues that were not disputed by the parties or were unnecessary to the Panel's conclusion that aspects of the Gasoline Rule violated Article III:4. While the Panel did not agree with all the arguments made by the United States, it did revise the report to take into account those arguments with which it agreed and paragraphs 6.5 and 6.9 - 6.11 of the findings reflect the Panel's response.

5.3 In respect of the interim report's discussion of Article XX(b), the United States objected to the Panel's use of specific terms which did not appear in the text of the provision, the description of the US argument, and the Panel's analysis of alternative measures available to the United States. The Panel revised the report where it accepted the US arguments and paragraphs 6.20 - 6.25 and 6.27 - 6.28 of the findings reflect the Panel's response.

5.4 In respect of the interim report's discussion of Article XX(d), the United States objected to the Panel's use of specific terms which did not appear in the text of the provision. The Panel accepted the US arguments and paragraph 6.31 of the revised findings reflects the Panel's response.

5.5 In respect of the interim report's discussion of Article XX(g), the United States objected to the Panel's use of specific terms which did not appear in the text of the provision, and the analysis of alternative measures available to the United States. Venezuela requested a change to the description of its argument under this provision. The Panel revised the report where it accepted the arguments of the US and Venezuela and paragraphs 6.35 - 6.36 and 6.40 - 6.41 of the findings reflect the Panel's response.

5.6 In respect of the interim report's descriptive section, Venezuela and the United States suggested further changes which the Panel took into account in re-examining that part of the report. The Panel revised the descriptive section of the report where it accepted the need for these changes.

## **VI. FINDINGS**

### **A. Introduction**

6.1 The Panel noted that the dispute arose from the following facts. The Clean Air Act aims to control and reduce air pollution in the United States. The Act and certain of its regulations (the "Gasoline Rule") set standards for gasoline quality intended to reduce air pollution, including ozone, caused by motor vehicle emissions. From 1 January 1995, the Gasoline Rule permits only gasoline of a specified cleanliness ("reformulated gasoline") to be sold in areas of high air pollution. In other areas, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") can be sold.

6.2 The Gasoline Rule applies to refiners, blenders and importers of gasoline. It requires that certain chemical characteristics of the gasoline in which they deal respect, on an annual average basis,

defined levels. In the Gasoline Rule some of these levels are fixed; others are expressed as “non-degradation” requirements. Under the non-degradation requirements, each domestic refiner must maintain, on an annual average basis, the relevant gasoline characteristics at levels no worse than its “individual baseline” — that is, the annual average levels achieved by that refiner in 1990. To establish an individual baseline, a refiner must show evidence of the quality of gasoline produced or shipped in 1990 (“Method 1”). If that evidence is not complete, then it must use data on the quality of blendstock produced in 1990 (“Method 2”). If these two methods do not result in sufficient evidence, the refiner must also use data on the quality of post-1990 gasoline blendstock or gasoline (“Method 3”).

6.3 Importers are also required to use an individual baseline, but only in the case (unlikely, according to the parties to the dispute) that they are able to establish it using Method 1 data. Unlike domestic refiners, they are not allowed to establish an individual baseline by using the secondary or tertiary data specified in Methods 2 and 3. If an importer cannot produce Method 1 data, then it must use a “statutory baseline” which the United States claims is derived from the average characteristics of all gasoline consumed in the United States in 1990. Some other domestic entities (such as refiners with only partial or no 1990 operations, and blenders with insufficient Method 1 data) are also assigned the statutory baseline. Exceptionally, importers that imported in 1990 at least 75 percent of the production of an affiliated foreign refinery are treated as domestic refiners for the purpose of establishing baselines. Since this dispute concerns only the Gasoline Rule’s non-degradation requirements, and not reformulated and conventional gasoline as such, the Panel will refer generally to “gasoline” in the course of its findings.

6.4 Venezuela and Brazil claim that the Gasoline Rule violates the national treatment provisions of Article III:1 and 4 of the General Agreement and the most-favoured-nation provision of Article I. Venezuela claims in the alternative that the Gasoline Rule has nullified and impaired benefits under the non-violation provisions of Article XXIII:1(b). Venezuela and Brazil also claim that the Gasoline Rule violates Article 2 of the Agreement on Technical Barriers to Trade (the “TBT Agreement”). The United States rejects these claims and argues that the Gasoline Rule can be justified under the exceptions contained in Article XX, paragraphs (b), (d) and (g), which argument is rejected by Venezuela and Brazil. It also argues that the Gasoline Rule does not come within the scope of Article 2 of the TBT Agreement.

## **B. Article III**

### ***I. Article III:4***

6.5 The Panel proceeded to examine the claim that the Gasoline Rule violates Article III:4 of the General Agreement, which states:

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 in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The Panel noted that under this provision the complainants are required to show the existence of: (a) a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and (b) treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported product than to the like product of national origin. The Panel agreed with the parties that the Gasoline Rule was a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use

of an imported product. It proceeded therefore to consider whether the Gasoline Rule accorded less favourable treatment to imported products than to like products of national origin.

6.6 The Panel noted the arguments of Venezuela and Brazil that imported gasoline was “like” domestic gasoline, but received treatment less favourable because imported gasoline was subjected to more demanding quality requirements than gasoline of US origin. The United States replied that gasoline from similarly-situated parties was treated in the same manner under the Gasoline Rule. Gasoline from importers was treated no less favourably than that from other domestic non-refiners such as blenders, or refiners who had only limited or no operations in 1990.

6.7 The Panel observed that Article III:4 deals with treatment to be accorded to like products. However, the text does not specify exhaustively those aspects that determine whether the products are “like”. In resolving this interpretative issue the Panel referred, in conformity with Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, to the *Vienna Convention on the Law of Treaties*, which states in Article 31 that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>25</sup>

6.8 The Panel proceeded to examine this issue in the light of the ordinary meaning of the term “like”. It noted that the word can mean “similar”, or “identical”. The Panel then examined the practice of the CONTRACTING PARTIES under the General Agreement. This practice was relevant since Article 31 of the *Vienna Convention* directs that “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is also to be considered in the interpretation of a treaty. The Panel noted that various criteria for the determination of like products under Article III had previously been applied by panels. These were summarized in the 1970 *Working Party Report on Border Tax Adjustments*, which had observed:

With regard to the interpretation of the term ‘like or similar products’, which occurs some sixteen times throughout the General Agreement, it was recalled that considerable discussion had taken place . . . but that no further improvement of the term had been achieved. The Working Party concluded that problems arising from the interpretation of the terms should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is ‘similar’: the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.<sup>26</sup>

These criteria had been applied by the panel in the 1987 *Japan Alcohol* case in the examination under Article III:2 of internal taxation measures. That panel had proceeded on a case-by-case basis, determining whether various alcoholic beverages were “like” on the basis of “their similar properties, end-uses and usually uniform classification in tariff nomenclatures.”<sup>27</sup> The Panel considered that those criteria were also applicable to the examination of like products under Article III:4.

6.9 In light of the foregoing, the Panel proceeded to examine whether imported and domestic gasoline were like products under Article III:4. The Panel observed first that the United States did not argue that imported gasoline and domestic gasoline were not like *per se*. It had argued rather that

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<sup>25</sup>Vienna Convention on the Law of Treaties, Art. 31.

<sup>26</sup>L/3464, adopted on 2 December 1970, BISD 18S/97, 102, para. 18.

<sup>27</sup>“Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages”, BISD 34S/83, 115, para. 5.6 (adopted on 10 November 1987).

with respect to the treatment of the imported and domestic products, the situation of the parties dealing in the gasoline must be taken into consideration. The Panel, recalling its previous discussion of the factors to be taken into account in the determination of like product, noted that chemically-identical imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification, and are perfectly substitutable. The Panel found therefore that chemically-identical imported and domestic gasoline are like products under Article III:4.

6.10 The Panel next examined whether the treatment accorded under the Gasoline Rule to imported gasoline was less favourable than that accorded to like gasoline of national origin. The Panel observed that domestic gasoline benefitted in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product, as illustrated by the case of a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule. The Panel also noted that this less favourable treatment of imported gasoline induced the gasoline importer, in the case of a batch of imported gasoline not meeting the statutory baseline, to import that batch at a lower price. This reflected the fact that the importer would have to make cost and price allowances because of its need to import other gasoline with which the batch could be averaged so as to meet the statutory baseline. Moreover, the Panel recalled an earlier panel report which stated that "the words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products."<sup>28</sup> The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.

6.11 The Panel then examined the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from *similarly situated* domestic parties — domestic refiners with limited 1990 operations and blenders. According to the United States, the difference in treatment between imported and domestic gasoline was justified because importers, like domestic refiners with limited 1990 operations and blenders, could not reliably establish their 1990 gasoline quality, lacked consistent sources and quality of gasoline, or had the flexibility to meet a statutory baseline since they were not constrained by refinery equipment and crude supplies. The Panel observed that the distinction in the Gasoline Rule between refiners on the one hand, and importers and blenders on the other, which affected the treatment of imported gasoline with respect to domestic gasoline, was related to certain differences in the characteristics of refiners, blenders and importers, and the nature of the data held by them. However, Article III:4 of the General Agreement deals with the treatment to be accorded to like products; its wording does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it. The Panel noted that in the *Malt Beverages* case, a tax regulation according less favourable treatment to beer on the basis of the size of the producer was rejected.<sup>29</sup> Although this finding was made under Article III:2 concerning fiscal measures, the Panel considered that the same principle applied to regulations under Article III:4. Accordingly, the Panel rejected the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from

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<sup>28</sup>"United States - Section 337 of the Tariff Act of 1930", BISD 36S/386, para 5.11 (adopted on 7 November 1989).

<sup>29</sup>"United States - Measures Affecting Alcoholic and Malt Beverages", BISD 39S/206, para. 5.19 (adopted on 19 June 1992).

similarly situated domestic parties.

6.12 Apart from being contrary to the ordinary meaning of the terms of Article III:4, any interpretation of Article III:4 in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors. This would thereby create great instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.

6.13 The Panel considered that the foregoing was sufficient to dispose of the US argument. It noted, however, that even if the US approach were to be followed, under any approach based on "similarly situated parties" the comparison could just as readily focus on whether imported gasoline from an identifiable *foreign* refiner was treated more or less favourably than gasoline from an identifiable US refiner. There were, in the Panel's view, many key respects in which these refineries could be deemed to be the relevant similarly situated parties, and the Panel could find no inherently objective criteria by means of which to distinguish which of the many factors were relevant in making a determination that any particular parties were "similarly situated." Thus, although these refineries were similarly situated, the Gasoline Rule treated the products of these refineries differently by allowing only gasoline produced by the domestic entity to benefit from the advantages of an individual baseline. This consequential uncertainty and indeterminacy of the basis of treatment underlined, in the view of the Panel, the rationale of remaining within the terms of the clear language, object and purpose of Article III:4 as outlined above in paragraph 6.12.

6.14 The Panel then noted the argument of the United States that the treatment accorded to gasoline imported under a statutory baseline was *on the whole* no less favourable than that accorded to domestic gasoline under individual refiner baselines. The United States claimed that the Gasoline Rule did not discriminate against imported gasoline, since the statutory baseline (by the nature of its calculation) and the average of the sum of the individual baselines both corresponded to average gasoline quality in 1990, and that domestic and imported gasoline was treated equally overall. The Panel noted that, in these circumstances, the argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others. A previous panel had found that

the "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.<sup>30</sup>

The Panel concurred with this reasoning that under Article III:4 less favourable treatment of particular imported products in some instances could not be balanced by more favourable treatment of other

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<sup>30</sup>United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.14 (adopted on 7 November 1989).

imported products in other instances. The Panel therefore rejected the US argument.

6.15 The Panel observed that, considered even from the point of view of imported gasoline as a whole, treatment was generally less favourable. Importers of gasoline had to adapt to an assigned average standard not linked to the particular gasoline imported, while refiners of domestic gasoline had only to meet a standard linked to their own product in 1990. Statistics on baselines bore out this difference in treatment. According to the United States, as of August 1995, approximately 100 US refiners, representing 98.5 percent of gasoline produced in 1990, had received EPA approval of their individual baselines. Only three of the refiners met the statutory baseline for all parameters. Thus, while 97 percent of US refiners did not and were not required to meet the statutory baseline, the statutory baseline was required of importers of gasoline, except in the rare case (according to the parties) that they could establish a baseline using Method 1.

6.16 The Panel found that imported and domestic gasoline were like products, and that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.

## 2. *Article III:1*

6.17 The Panel then noted the arguments advanced by Venezuela and Brazil that the Gasoline Rule was applied “so as to afford protection to domestic production” contrary to Article III:1. The United States disagreed and argued in the alternative that Article III:1 was only hortatory and could not form the basis of a violation. The Panel examined first whether, after making a finding of inconsistency with Article III:4, it should make a finding under Article III:1. The Panel noted that the panel in the *Malt Beverages* case had examined a claim made under paragraphs 1, 2 and 4 of Article III. That panel had concluded that “because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider [the complainant’s] Article III:1 allegations to the extent that the Panel were to find [the respondent’s] measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.”<sup>31</sup> The present Panel agreed with this reasoning, and therefore did not find it necessary to examine the consistency of the Gasoline Rule with Article III:1.

## C. *Article I:1*

6.18 The Panel proceeded to examine the claim of Venezuela and Brazil that the Gasoline Rule violated the most-favoured-nation provision of Article I:1 by permitting an importer to use secondary evidence to establish an individual baseline, provided that in 1990 it imported at least 75 percent of the production from an affiliated foreign refinery. Venezuela and Brazil claimed that the rule targeted a small number of countries, and that the different treatment was based on criteria (ownership and proportion of product purchased) that had no link to the product, as required under Article I:1. The United States claimed the rule was based on objective criteria and, in any case, it was not applicable because no importer had qualified for the benefit before the deadline.

6.19 The Panel observed that it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel’s terms of reference were fixed, were not and would not become effective. In the 1978 *Animal Feed Protein* case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the panel’s terms of reference.<sup>32</sup>

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<sup>31</sup>“United States - Measures Affecting Alcoholic and Malt Beverages”, BISD 39S/206, 270, para. 5.2 (adopted on 19 June 1992).

<sup>32</sup>“EEC - Measures on Animal Feed Proteins”, L/4599, BISD 25S/49 (adopted on 14 March 1978). See also the Report of the Panel on “United States - Prohibitions of Imports of Tuna and Tuna Products from Canada”, BISD 29S/91, 106, para. 4.3 (adopted on 22 February 1982).

In the 1980 *Chile Apples* case, the panel ruled on a measure terminated before agreement on the panel's terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction.<sup>33</sup> In the present case, the Panel's terms of reference were established after the 75 percent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 percent rule was a measure that, although currently not in force, was likely to be renewed. Finally, the Panel considered that its findings on treatment under the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1. The Panel did not therefore proceed to examine this aspect of the Gasoline Rule under Article I:1 of the General Agreement.

#### **D. Article XX(b)**

6.20 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (b) of Article XX. The relevant parts of Article XX were as follows:

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

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

The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

- (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
- (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied.

##### **1. Policy goal of protecting human, animal or plant life or health**

6.21 The Panel noted the United States argument that air pollution, in particular ground-level ozone and toxic substances, presented health risks to humans, animals and plants. The United States argued that, since about one-half of such pollution was caused by vehicle emissions, and the Gasoline Rule reduced these, the Gasoline Rule was within the range of policy goals described in Article XX(b). Venezuela and Brazil did not disagree with this view. The Panel agreed with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in

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<sup>33</sup>"EEC - Restrictions on Imports of Apples from Chile", BISD 27S/98, (adopted on 10 November 1980).

Article XX(b).

## 2. *Necessity of the inconsistent measures*

6.22 The Panel recalled its finding in paragraph 6.16 that imported gasoline was treated less favourably than domestic gasoline, since, under the baseline establishment methods, imported gasoline was prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product. The Panel then proceeded to examine whether the aspect of the Gasoline Rule found inconsistent with the General Agreement was necessary to achieve the stated policy objectives under Article XX(b). The Panel noted that it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefitting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product. It was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX(b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement.

6.23 The Panel then turned to the arguments of the parties relating to that aspect of the Gasoline Rule found inconsistent with the General Agreement. The United States argued that not all entities dealing in gasoline could be assigned an individual baseline and, of those who could be assigned such a baseline, not all could use the same types of secondary or tertiary evidence (Methods 2 and 3) to establish it. Certain entities including importers, blenders and refiners which did not have continuous 1990 operations, were simply not in a position to furnish this secondary or tertiary evidence. Venezuela and Brazil argued on the other hand that foreign refiners should be accorded their own individual baselines under the Gasoline Rule using the same types of evidence, as easily available to them as to domestic refiners. Alternatively, they argued that importers should be able to use individual 1990 baselines established for the foreign refiners with whom they dealt. They noted that an EPA regulatory proposal had even been made along those lines in May 1994. The United States countered that such a proposal would not be feasible because of: (1) the impossibility of determining the refinery of origin for each imported shipment; (2) the incentive to "game" the system thereby handed to exporters and importers; and (3) the difficulty for the United States to exercise an enforcement jurisdiction with respect to a foreign refinery, since the Gasoline Rule required criminal and civil sanctions in order to be effective. The United States argued further against the use of foreign refiner baselines by citing "equity concerns" of importers that their use would favour those firms that dealt with Venezuelan product, and the existence of particular competitive conditions in the international market, including the flexibility maintained by foreign refiners.

6.24 The Panel proceeded to examine whether the United States had in fact demonstrated that the inconsistent measures found to violate Article III:4 were necessary to achieve the stated policy objectives of the United States. The Panel noted that the term "necessary" had been interpreted in the context of Article XX(d) by the panel in the *Section 337* case which had stated 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.<sup>34</sup>

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<sup>34</sup>"United States - Section 337 of the Tariff Act of 1930", BISD 36S/345, para. 5.26 (adopted on 7 November 1989).

The same reasoning had been adopted by the 1990 *Thai Cigarette* panel in examining a measure under Article XX(b). That panel saw no reason not to adopt the same interpretation of “necessity” under Article XX(b) as under Article XX(d), stating 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 measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.<sup>35</sup>

The Panel also noted that while several past panels examining issues under Article XX had identified alternative measures that were reasonably available and fully consistent with the General Agreement, they had also in other instances identified alternative measures that would be “less inconsistent” with the General Agreement. For example, the panel in the 337 case found that, while a general exclusion order applying to imported products was not “necessary”, a limited *in rem* order could be justified even though it too was inconsistent with Article III:4.<sup>36</sup> Recalling its remarks in paragraph 6.22 above, the Panel considered that its task was thus to determine whether the United States had demonstrated whether it was necessary to maintain precisely those inconsistent measures whereby imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded to domestic gasoline by an individual baseline tied to the producer of a product. If there were consistent or less inconsistent measures reasonably available to the United States, the requirement to demonstrate necessity would not have been met.

6.25 The Panel then examined whether there were measures consistent or less inconsistent with the General Agreement that were reasonably available to the United States to further its policy objectives of protecting human, animal and plant life or health. The Panel did not consider that the manner in which imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded to domestic gasoline by an individual baseline tied to the producer of a product was necessary to achieve the stated goals of the Gasoline Rule. In the view of the Panel, baseline establishment methods could be applied to entities dealing in imported gasoline in a way that granted treatment to imported gasoline that was consistent or less inconsistent with the General Agreement. If a single statutory baseline applying to all entities — refiners, blenders and importers — was not the chosen regulatory method, then importers could for example be permitted to use a gasoline baseline applicable to imports derived, when possible, from evidence of the individual 1990 baselines of foreign refiners with whom the importer currently dealt. Although such a scheme could result in formally different regulation for imported and domestic products, the Panel noted that previous panels had accepted that this could be consistent with Article III:4.<sup>37</sup> The requirement under Article III:4 to treat an imported product no less favourably than the like domestic product is met by granting formally different treatment to the imported product, if that treatment results in maintaining conditions of competition for the imported product no less favourable than those of the like domestic product. Further, these conditions of competition referred to those conditions that were established by government measures and would not therefore include factors such as the “flexibility of individual producers” in this case. The Panel noted finally that a regulatory scheme using foreign refiner baselines, to the extent that it did not distinguish between imported gasoline on the basis of its country of origin, would not necessarily contravene Article I or other provisions of the General Agreement, and that the United States, notwithstanding suggestions that certain importers might have equitable concerns, had not established the contrary.

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<sup>35</sup>“Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes”, BISD 37S/200, para. 75 (adopted on 7 November 1990).

<sup>36</sup>“United States - Section 337 of the Tariff Act of 1930”, BISD 36S/345, para. 5.32 (adopted on 7 November 1989).

<sup>37</sup>“United States - Section 337 of the Tariff Act of 1930”, BISD 36S/345, para. 5.11 (adopted on 7 November 1989).

6.26 The Panel noted the claims of the United States that allowing importers or foreign refiners to use individual baselines in such a way was not feasible for the reasons listed in paragraph 6.23. The Panel was not convinced that the United States had satisfied its burden of proving that those reasons precluded the effective use of individual baselines in a manner which would allow imported products to obtain treatment that was consistent, or less inconsistent, with obligations under Article III:4. First, while the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less inconsistent with the General Agreement. Indeed, the Panel noted that a determination of origin would often be feasible. The Panel examined, for instance, the case of a direct shipment to the United States. It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.

6.27 Second, the Panel did not agree that the United States had met its burden of showing that the “gaming” concern was an adequate justification for maintaining the inconsistency with Article III:4 resulting from the baseline establishment methods. It was uncertain if, or to what extent, gaming would actually occur, especially given the small market share of imported gasoline (approximately 3 percent). Moreover, the Panel noted that the Gasoline Rule did not guarantee in its regulation of US entities that gasoline characteristics subject to non-degradation requirements (i.e. those regulated by baselines), would remain at the 1990 average levels. For example, there was no volume cap on the production of reformulated gasoline by individual refineries, which meant that if producers of relatively dirtier gasoline expanded their relative share of production of reformulated gasoline, the national average level of pollutants subject to the non-degradation requirements would be greater than in 1990. Similarly, within the 1990 volume limitations, if the output of producers of relatively cleaner gasoline fell below 1990 levels, while output of others did not, national average levels of pollutants would be worse. Moreover, specific provisions of the Gasoline Rule permitted some refiners to produce dirtier gasoline than they produced in 1990 (e.g., certain producers of JP-4 jet fuel) and permitted others to request specific derogation from the Rule. The Panel stressed that it was not finding that such events would occur, only that they could under the Rule. Given that the Gasoline Rule did not therefore guarantee that gasoline characteristics subject to non-degradation requirements would remain at 1990 levels, the Panel considered that it was not consistent for the United States to insist that there could be no possible deviation from achieving those levels in respect of imports, when it had not deemed it necessary to be as exacting on its own domestic production. Moreover, slightly stricter overall requirements applied to both domestic and imported gasoline could offset any possibility of an adverse environmental effect from these causes, and allow the United States to achieve its desired level of clean air without discriminating against imported gasoline. Such requirements could be implemented by the United States at any time. The Panel concluded that the United States had not met its burden of showing that concern over gaming was an adequate justification for maintaining the inconsistency with Article III:4 resulting from the baseline establishment methods.

6.28 Third, the Panel did not accept that the United States had demonstrated that there was no other measure consistent, or less inconsistent, with Article III:4 reasonably available to enforce compliance with foreign refiner baselines, or importer baselines based thereon. The imposition of penalties on importers was in the Panel’s view an effective enforcement mechanism used by the United States in other settings. In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve US purposes. This, however, was the practical effect of

the application of the Gasoline Rule. In the Panel's view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data. In the Panel's view, because allowing for such a possibility was reasonably available to the United States and would entail a lesser degree of inconsistency with the General Agreement, the United States had failed to demonstrate the necessity of the Gasoline Rule's inconsistency with Article III:4 on this matter.

6.29 In view of the Panel's finding that the aspect of the baseline establishment methods found inconsistent with Article III:4 was not "necessary" under Article XX(b), the Panel did not proceed to examine whether it met also the conditions in the introductory clause to Article XX.

**E. Article XX(d)**

6.30 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (d) of Article XX. The relevant parts of Article XX were as follows:

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

- (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;

6.31 The Panel recalled that the party invoking an exception under Article XX bore the burden of proving that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to demonstrate the following elements:

- (1) that the measures for which the exception were being invoked - that is, the particular trade measures inconsistent with the General Agreement - *secure compliance* with laws or regulations themselves not inconsistent with the General Agreement;
- (2) that the inconsistent measures for which the exception was being invoked were *necessary* to secure compliance with those laws or regulations; and
- (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(d), all the above elements had to be satisfied.

**1. *Securing compliance with consistent laws or regulations***

6.32 The Panel proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with the General Agreement secured compliance with a law or regulation not inconsistent with the General Agreement. The United States argued that the non-degradation requirements were laws and regulations not inconsistent with the General Agreement, and that the baseline establishment methods secured compliance with these. Venezuela argued that the United States had not clearly established which laws or regulations were not inconsistent with the General Agreement, and with which compliance was secured. Brazil considered that the US measures at most enforced a policy objective, not an actual obligation as required under Article XX(d).

6.33 The Panel observed that, assuming that a system of baselines by itself were consistent with Article III:4, the US scheme might constitute, for the purposes of Article XX(d), a law or regulation “not inconsistent” with the General Agreement. However, the Panel found that maintenance of discrimination between imported and domestic gasoline contrary to Article III:4 under the baseline establishment methods did not “secure compliance” with the baseline system. These methods were not an enforcement mechanism. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned.<sup>38</sup>

**2. *Other conditions***

6.34 The Panel observed that, in view of its finding that the less favourable treatment of imported gasoline under the baseline establishment methods accorded to importers did not “secure compliance” with the underlying baseline establishment rules, it did not need to consider also whether these methods were “necessary” to secure compliance and met the conditions in the introductory clause to Article XX.

**F. *Article XX(g)***

6.35 The Panel proceeded to examine whether the part of the Gasoline Rule found inconsistent with Article III:4 could, as argued by the United States, be justified under paragraph (g) of Article XX. The relevant parts of Article XX were as follows:

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

- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to demonstrate the following elements:

- (1) that the *policy* in respect of the measures for which the provision was invoked fell

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<sup>38</sup>“European Economic Community - Regulation on Imports of Parts and Components”, BISD 37S/132, paras. 5.12 - 5.18 (adopted on 16 May 1990).

within the range of polices related to the conservation of exhaustible natural resources;

- (2) that the measures for which the exception was being invoked - that is the particular trade measures inconsistent with the General Agreement - were *related to* the conservation of exhaustible natural resources;
- (3) that the measures for which the exception was being invoked were made effective *in conjunction* with restrictions on domestic production or consumption; and
- (4) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

In order to justify the application of Article XX(g), all the above elements had to be satisfied.

***1. Policy goal of conserving an exhaustible natural resource***

6.36 The Panel noted the US argument that clean air was an exhaustible resource within the meaning of Article XX(g), since it could be exhausted by pollutants such as those emitted through the consumption of gasoline. Lakes, streams, parks, crops and forests were also natural resources that could be exhausted by air pollution. Measures to control air pollution were therefore measures to conserve exhaustible natural resources. Venezuela disagreed, considering that air was not an exhaustible natural resource within the meaning of Article XX(g); rather, its "condition" changed depending on its cleanliness. Article XX(g) was originally intended to cover exports of exhaustible goods such as petroleum and coal; to expand it to cover "conditions" of renewable resources was not justified.

6.37 The Panel then examined whether clean air could be considered an exhaustible natural resource. In the view of the Panel, clean air was a resource (it had value) and it was natural. It could be depleted. The fact that the depleted resource was defined with respect to its qualities was not, for the Panel, decisive. Likewise, the fact that a resource was renewable could not be an objection. A past panel had accepted that renewable stocks of salmon could constitute an exhaustible natural resource.<sup>39</sup> Accordingly, the Panel found that a policy to reduce the depletion of clean air was a policy to conserve a natural resource within the meaning of Article XX(g).

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<sup>39</sup>"Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", BISD 35S/98, para 4.4 (adopted on 22 March 1988). See also the same conclusion with respect to dolphins in the Report of the Panel on "United States - Restrictions on Imports of Tuna", circulated on 16 June 1994, DS29/R, para 5.13, not adopted.

2. ***Measures “related to” the conservation of an exhaustible natural resource; and made effective “in conjunction” with restrictions on domestic production or consumption***

6.38 The Panel proceeded to examine whether the baseline establishment methods found inconsistent with Article III:4 were “related to” the conservation of clean air. Venezuela argued that past panels had interpreted “related to” to mean “primarily aimed at” the conservation of the resource. According to Venezuela, loopholes in the establishment of the baseline undermined its own conservation objectives, and the measure could not therefore be seen as “primarily aimed” at conservation.

6.39 The Panel noted that the words “related to” did not in isolation provide precise guidance as to the required link between the measures and the conservation objective. However, the Panel agreed with the interpretation of this term in the report of the 1987 *Herring and Salmon* case, where the panel stated that

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).<sup>40</sup> (emphasis added)

For the same reasons, the *Herring and Salmon* panel decided 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.<sup>41</sup> (emphasis added)

6.40 The Panel then proceeded to examine whether the baseline establishment methods could be said to be “primarily aimed at” achieving the conservation objectives of the Gasoline Rule. The Panel recalled the purpose of Article XX:(g), which had been expressed by the panel in the 1987 *Herring and Salmon* case as follows:

[T]he purpose of including Article XX:(g) in the General Agreement was not to widen the scope of 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 then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III -- the less favourable baseline establishments 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

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<sup>40</sup>“Canada - Measures Affecting Exports of Unprocessed Herring and Salmon”, BISD 35S/98, para 4.6 (adopted on 22 March 1988).

<sup>41</sup>*Ibidem*.

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 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 establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

6.41 With respect to whether the baseline establishment methods could be said to be primarily aimed at "rendering effective restrictions on domestic production or consumption", the Panel noted that it had not determined that the measures at issue were "restrictions", and whether they were "on" domestic production or consumption. However, in light of its finding in paragraph 6.40, the Panel did not proceed to determine this issue or whether the measure met the conditions in the introductory clause of Article XX.

**G. Article XXIII:1(b)**

6.42 The Panel then noted the claim by Venezuela under Article XXIII:1(b) that benefits accruing to it under the General Agreement had been nullified and impaired by the application of the Gasoline Rule, whether or not it conflicted with provisions of the General Agreement. In view of the finding by the Panel that the Gasoline Rule violated Article III:4 of the General Agreement, and could not be justified under Article XX (b), (d) and (g), the Panel concluded that it was not necessary to examine this additional claim.

**H. Applicability of the Agreement on Technical Barriers to Trade**

6.43 In view of its findings under the General Agreement, the Panel concluded that it was not necessary to decide on issues raised under the TBT Agreement.

**VII. CONCLUDING REMARKS**

7.1 In concluding, the Panel wished to underline that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule. Its examination was confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement. Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.

## VIII. CONCLUSIONS

8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

8.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.