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ENVIRONMENTAL DISPUTES IN WTO IN THE LIGHT OF ARTICLE XX OF THE GATT

Measures aimed at protecting the environment come in various shapes and forms. Under WTO rules, members can adopt trade-related measures aimed at protecting the environment. However, due to their very nature certain measures taken to ensure environmental protection goals may restrict trade and thereby impact the WTO rights of other members. There may be a violation of basic trade rules, for instance, the non-discrimination obligation and the prohibition of quantitative restrictions. To cope with such disruption there are exceptions to rules are envisaged in Art. XX of General Agreement on Tariffs and Trade (hereinafter – GATT). These exceptions may ensure a balance between on the one hand - the right of members to take regulatory measures, which are trade restrictions, to achieve such objectives as the protection of human, animal or plant life and health, and natural resources and on the other hand - the rights of other WTO members under basic trade rules. There were several disputes concerning such measures settled. Four particularly relevant disputes I would like to elaborate on. Namely, the US – Gasoline case (clean air), the US – Shrimp case (turtles), the EC – Asbestos case (human life and health). The protected objects are bracketed.

Thus, to reduce air pollution in the United States and to ensure that pollution from the combustion of gasoline did not exceed 1990 levels (1990 amendment to Clean Air Act), there were permitted only gasoline of a specified ("reformulated gasoline") to be sold to consumers in the most polluted areas of the country. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 ("conventional gasoline") could be sold. The Gasoline Rule applied to all US refiners, blenders and importers of gasoline. Under its regulation, there were two different types of baseline emissions standard: individual baseline, which was established by domestic refiners which were on operation at least six months in 1990, and statutory baseline was assigned to those refiners who were not in operation for at least six months in 1990, and to importers and blenders of gasoline. The statutory baseline imposed a stricter burden on foreign gasoline producers. The claimants, Venezuela and Brazil, argued that such rules favored domestic producers and were prejudicial to their exports. The panel agreed with the USA that a policy to reduce air pollution resulting from the consumption of gasoline was a policy concerning the protection of human, animal and plant life or health mentioned in Article XX(b) of GATT. However, the panel found that the baseline establishment methods were not "necessary" under Article XX(b) since there were other consistent or less inconsistent measures reasonably available to the USA for the same policy objective. The Appellate Body held that the baseline establishment rules contained in the Gasoline

Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX. It noted that the chapeau addressed not so much the questioned measure or its specific contents as such, but rather how that measure is applied. There should be explored adequately means, including in particular cooperation with Venezuela and Brazil, of mitigating the administrative problems that led the USA to reject individual baselines for foreign refiners.

Again the USA was pursuant to protect natural resources namely the five endangered or threatened species of sea turtles and thus prohibited their take within the USA, its territorial sea and the high seas. Hence, shrimp trawlers must use "turtle excluder devices" (TED) in areas of habitat of turtles. The national legislation banned shrimp imports from countries that were not certified as having comparable conservation policies for endangered sea turtles or as coming from shrimp boats equipped with TEDs. The USA claimed that the measures at issue were justified under Article XX(b) and (g) given that these provisions did not contain jurisdictional limitations, nor limitations on the location of the animals or natural resources to be protected and conserved. The complainants argued to the contrary that Article XX(b) and (g) could not be invoked to justify a measure applying to animals outside the jurisdiction of the Member enacting the measure. The Appellate Body further ruled that the measure at stake qualified for provisional justification under Article XX(g), but failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX. Because there was constituted "unjustifiable" discrimination between countries where the same conditions prevail and thus was not within the scope of measures permitted under Article XX.

Following to ensure the protection of human health, France, known as a big importer of chrysotile asbestos, adopted a Decree which provided for a ban on asbestos fibres and products containing asbestos fibres, which are highly toxic material. France considered that it could reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma. Canada, a big producer and exporter of chrysotile, argued that the Decree altered the conditions of competition between substitute fibres of French origin and chrysotile fibre from Canada. Concerning the chapeau of Article XX, the panel found that the application of the Decree did not constitute arbitrary or unjustifiable discrimination. Canada disputed whether the measure at issue was "necessary" to protect human life or health. Hence, the Appellate Body examined, whether there was an alternative measure consistent with the GATT 1994, or less inconsistent with it, which a Member could reasonably be expected to employ to achieve its objectives. In this case, the objective pursued (health) was characterized as "vital and important in the highest degree". Besides, the Appellate Body noted that the more vital or important the policy pursued, the easier it would be to prove that a measure was necessary to meet the objectives of the policy.

I would like to emphasize that the WTO rules provide freedom for solving environmental problems. Even if the measure is found to be incompatible with the basic rules of the WTO, it can be justified by one of the exceptions, for example, if it pursues the goal of protecting the environment or human health and if its application does not reveal protectionist intentions.