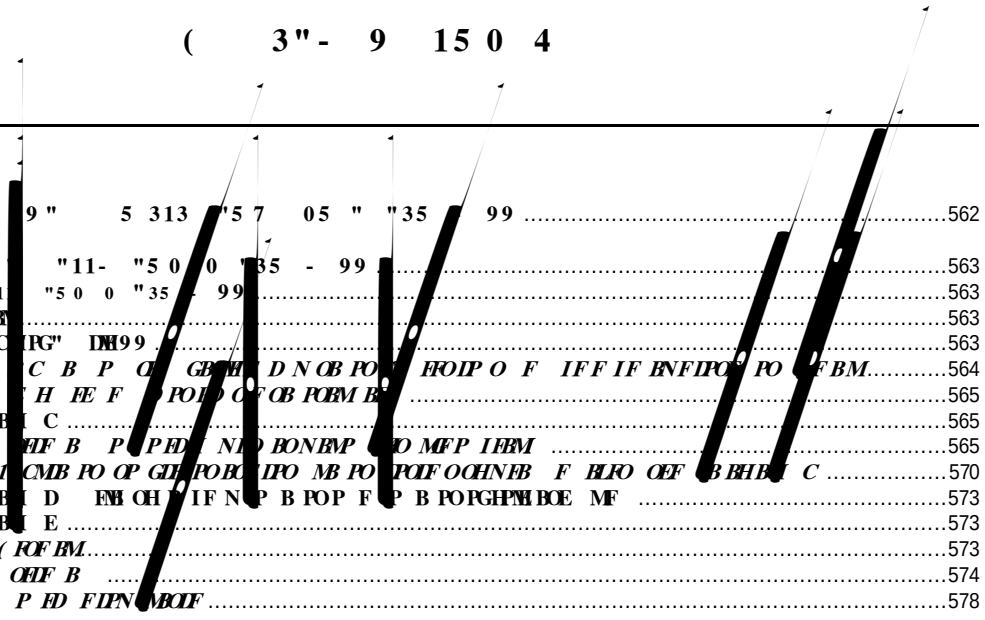

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to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

(*a*) necessary to protect public morals;

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

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions

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

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

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

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

> "The Panel noted that the United States had argued that its direct embargo under the MMPA could be justified under Article XX(b) or Article XX(g), and that Mexico had argued that a contracting party could not simultaneously argue that a measure is compatible with the general rules of the General Agreement and invoke Article XX for that measure. The Panel recalled that previous panels had established that Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself.[3] Therefore, 0113(e)10(d)6( )-nelsiKL3êjWD/rá ep1re.

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

"In order to prevent abuse of the exceptions of Article 32 ... the following sentence should be inserted as an introduction: 'The undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any Member of the following

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

In the 1987 Panel Report on "Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", in discussing the claim of Japan that discriminatory or protective taxes on various alcoholic beverages could be justified as designed to meet the objective of taxation according to ability to pay, the Panel noted the scope provided to domestic tax systems under Article III; it also noted that "...

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

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

"The Panel then examined whether the Thai concerns about the *quality* of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-

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

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

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

"It accordingly urged all member states

> 'to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco'.[26]

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

"The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel ob.11(a)10(lx)6(

In the November 1990 Council discussion preceding the adoption of this Panel Report, the representative of Thailand stated that "it was clear from the present Panel report that Thailand's cigarette régime was based on public health policy considerations. His Government intended to take all measures necessary to prevent an increase in tobacco consumption, and to reduce it if possible. Thailand took heart from the report that a set of GATT-consistent measures could be taken to control both the supply of and demand for cigarettes, as long as they were applied to both domestic and imported cigarettes on a national-treatment basis. He concluded by saying that as a contracting party, Thailand intended to abide by its GATT obligations. It had lifted its import

During discussions in the Third Committee at the Havana Conference,

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

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

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

"1. A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal or plant life or health involved, as provided in Article XX(b).

"2. The importing contracting party should notify the Director-General as quickly as possible. A notification by telephone should be followed immediately by a written communication from the importing contracting party, which would be circulated to contracting parties.

"3. The importing contracting party would be expected to agree to expeditious informal consultations with the principally concerned contracting party as soon as a trade-damaging act has occurred, with a view to reaching a common view about the dimension of the problem and the best way to deal with it effectively".[41]

In December 1989, at the Forty-fifth Session, Austria informed the CONTRACTING PARTIES that with effect from 1 December 1989, Austria had limited traffic of certain heavy trucks during night hours on certain Austrian transit roads; the representative of Austria stated that "This measure has become unavoidable due to the intolerable increase in heavy traffic on certain transit routes causing extreme noise and pollution seriously endangering the health of the adjacent Austrian population. This measure has been taken in accordance with Article XX(b) of the General Agreement ¬ t ¬ Ƒ T Mtoto v

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

The 1984 Panel Report on "Canada - Administration of the Foreign Investment Review Act" examined

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

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

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

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

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

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

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

This provision was intended to prevent circumvention of anti-dumping duties

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

"For the reasons indicated in the preceding paragraphs, the Panel found that Article XX(d) covers only measures related to the enforcement of obligations under laws or regulations consistent with the General Agreement. The Panel noted that the general anti-dumping Regulation of the EEC does not

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

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

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Drafts for an "Agreement on Measures to Discourage the Importation of Counterfeit Goods" were circulated in 1979 and 1982.[74] The preamble of the revised draft noted, *inter alia*, "that the contracting parties are exercising their rights under Article XX of the General Agreement, *inter alia*, to adopt or enforce laws and regulations relating to the protection of trademarks". Following the Decision on Trade in Counterfeit Goods

"The Panel noted that some of the subparagraphs of Article XX state that the measure must be 'necessary' or 'essential' to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), d) and (j)) while subparagraph

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

"The Panel further noted that Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they not 'constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade' refer to the trade measure requiring justification under Article XX(g), not however to the conservation policies adopted by the contracting party. The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their Tm[(6a)-64(t104.9 617.74 Tm[(to)-4( )-377(th)-4(e)-5(m)-4[0055>

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"The Panel ...

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

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

"The Economic and Social Council,

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

> [XVII] which is headed 'Non-discriminatory administration of state-trading enterprises'. Clearly, if the State were a party to a commodity arrangement and it were also a trader in that commodity, it would be bound to give precedence in its state-trading operations to the provisions of the commodity arrangement into which it had entered, and not so much to the considerations to which its attention is directed by Paragraph 1 of Article 31."[109]

Thus, in the General Agreement as concluded 30 October 1947, paragraph (h) (Article XX:I(h)) provided an exception for measures "undertaken in pursuance of obligations under intergovernmental commodity agreements, conforming to the principles approved by the Economic and Social Council of the United Nations in its Resolution of March 28, 1947, establishing an Interim Co-ordinating Committee for International Commodity Arrangements". The "principles" referred to in the ECOSOC Resolution are, as noted above, those of the Charter chapter on commodity agreements, which became in due course Chapter VI of the Havana Charter. Chapter VI of the Charter provided for intergovernmental commodity agreements with respect to "primary commodities", defined as "any product of farm, forest or fishery or any mineral, in its natural form

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

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

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

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

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

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

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

"(d) The determination of what is 'equitable' to all the contracting parties in any given set of circumstances will depend upon the facts in those circumstances."[142]

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

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The 1983 Panel Report on "United States - Imports of Certain Automotive Spring Assemblies" examined the consistency of Section 337 of the Tariff Act of 1930 and its application to the imports of certain spring

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