UNITED STATES - STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE

Report of the Appellate Body

WT/DS2/AB/R

Adopted by the Dispute Settlement Body on 20 May 1996

United States, Appellant	Present:
Brazil, Venezuela, Appellees	Feliciano, Presiding Member
European Communities, Norway, Third Participants	Beeby, Member
	Matsushita, Member

I. INTRODUCTORY

The United States appeals from certain conclusions on issues of law and certain legal interpretations contained in the Panel Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996 (the "Panel Report"). That Panel had been established to consider a dispute between the United States, on the one hand, and Venezuela, later joined by Brazil, on the other. The dispute related to the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 (the "CAA") and, more specifically, to the regulation enacted by the United States' Environmental Protection Agency (the "EPA") pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. This regulation is formally entitled "Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline", Part 80 of Title 40 of the Code of Federal Regulations,[1] and is commonly referred to as the Gasoline Rule.

A. Procedural Matters

On 21 February 1996, the United States notified the Dispute Settlement Body of its decision to appeal certain conclusions on issues of law and legal interpretations in the Panel Report pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU")[2] and simultaneously filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the Working Procedures for Appellate Review (the "Working Proce-

[1] 40 CFR 80, 59 Fed. Reg. 7716 (16 February 1994).
[2] WT/DS2/6.

dures").[3] Thereafter, on 4 March 1996, the United States filed its Submission as Appellant.[4] Venezuela in turn filed, on 18 March 1996, its Appellee's Submission; Brazil filed on the same day its Appellee's Submission.[5] The third participants followed, the European Communities and Norway filing Submissions, on 18 March 1996.[6]

The complete record of the Panel proceedings was duly transmitted to the Appellate Body.[7]

The oral hearing contemplated by Rule 27 of the Working Procedures was held on 27 and 28 March 1996.[8] At the hearing, oral arguments were made respectively by the participants and the third participants. Questions were put to them by the Members of the Appellate Body hearing the appeal. Most of these questions were answered orally, and some were responded to in writing with the responses being furnished both to the Appellate Body and the other participants and third participants.[9] In addition, the participants and third participants were invited to provide, and did provide, the Appellate Body and each other with final written statements of their respective positions.[10] All the participants and third participants responded positively and punctually, which was a source of satisfaction for the Appellate Body.

B. The Clean Air Act and its Implementation

The CAA and its implementation by the Gasoline Rule, are described fully at paragraphs 2.1- 2.13 of the Panel Report. However, it may be convenient to recall a number of the Panel's factual findings at this stage.

The CAA established two gasoline programs[11] to ensure that pollution from gasoline combustion does not exceed 1990 levels and that pollutants in major population centres are reduced. The first program concerns ozone "nonattainment areas", consisting of (i) nine large metropolitan areas that have experienced the worst summertime ozone pollution and (ii) various additional areas included at the request of the state governors concerned. All gasoline sold to consumers in these nonattainment areas must be "reformulated." The sale of conventional gasoline in nonattainment areas is prohibited. The second program concerns "conventional" gasoline, which may be sold to consumers in the rest of the United States. The implementation of both programs, which apply to gasoline sold by domestic refiners, blenders and importers, was entrusted to the EPA. As a result, the EPA adopted the Gasoline Rule, which relies heavily on the use of

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3 WT/AB/WP/1, 15 February 1996.
4 Pursuant to Rule 21(1) of the *Working Procedures*.
5 Pursuant to Rule 22(1) of the *Working Procedures*.
6 Pursuant to Rule 24 of the *Working Procedures*.
7 Pursuant to Rule 25 of the *Working Procedures*.
8 The oral hearing was originally scheduled for 25 March 1996 but had, for exceptional and unavoidable reasons, to be deferred to 27 and 28 March 1996.
9 Rule 28 of the *Working Procedures*.
10 Rule 28(1) of the *Working Procedures*.
11 Section 211(k).

1990 baselines as a means of determining compliance with the CAA requirements.

1. The Reformulated Gasoline Program

The CAA established certain compositional and performance specifications for reformulated gasoline.[12] Thus, the oxygen content must not be less than 2.0 per cent by weight, the benzene content must not exceed 1.0 per cent by volume and the gasoline must be free of heavy metals, including lead or manganese. The performance specifications of the CAA require a 15 per cent reduction in the emissions of both volatile organic compounds ("VOCs") and toxic air pollutants ("toxics"), and no increase in emissions of nitrogen oxides ("NOx"). Section 80.41 of the Gasoline Rule sets out two methods by which entities can certify their gasoline as meeting these requirements. From 1 January 1995 to 1 January 1998, domestic refiners, blenders and importers may use an interim method of certification called the "Simple Model", which requires compliance with fixed specifications concerning Reid Vapour Pressure, oxygen, benzene and toxics performance. In addition, compliance is required with certain "non-degradation requirements" by maintaining sulphur, olefins and T-90 qualities at or below 1990 baseline levels, on an average annual basis. As of 1 January 1998, these entities must comply with the "Complex Model", which more accurately predicts emissions performance. The Complex Model is not in issue in the present dispute.

2. The Conventional Gasoline Program

In order to prevent the "dumping" of pollutants extracted from reformulated gasoline into conventional gasoline, the CAA requires that conventional gasoline sold by domestic refiners, blenders and importers in the United States remains as clean as 1990 baseline levels.[13] Unlike the Simple Model for reformulated gasoline, the "non-degradation" from 1990 baseline requirements for conventional gasoline applies in respect of all conventional gasoline qualities, and not only sulphur, olefins and T-90. Compliance is measured by comparing emissions from the conventional gasoline sold by domestic refiners, blenders and importers against emissions from a 1990 baseline and is assessed on an annual average basis.[14]

3. Baseline Establishment Rules

In respect of both reformulated gasoline (for sulphur, olefins and T-90 requirements under the Simple Model) and conventional gasoline (for all requirements), 1990 baselines are an integral element of the Gasoline Rule enforcement process. Accordingly, the Gasoline Rule contains detailed baseline

[12] Section 211(k)(2)-(3).
[13] Section 211(k)(8) of the CAA.
[14] Section 80.90 of the Gasoline Rule.

establishment rules.[15] Baselines can be either individual (established by the entity itself) or statutory (established by the EPA and intended to reflect average 1990 United States gasoline quality), depending on the nature of the entity concerned.

(i) domestic refiners

Any domestic refiner which was in operation for at least six months in 1990 must establish an individual baseline representing the quality of gasoline produced by that refiner in 1990. The Gasoline Rule provides three methods of establishment to be used for this purpose. Under Method 1, the domestic refiner must use the quality data and volume records of its 1990 gasoline. If Method 1 data is not available, the domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that Method 2 data is not available, the domestic refiner must establish an individual 1990 baseline on the basis of its post-1990 gasoline blendstock and/or gasoline quality data modeled in the light of refinery changes to show 1990 gasoline composition (Method 3).

Domestic refiners that were in operation for at least six months in 1990 are not permitted to forego their individual baseline and use the statutory baseline established by the EPA. However, domestic refiners that commenced operations after 1990, or operated for less than six months during 1990, are required to use the statutory baseline established by the EPA.

(ii) blenders

Blenders are required to establish an individual baseline representing the quality of their 1990 gasoline using Method 1 above. Failing this, they must use the statutory baseline established by the EPA. Blenders may not apply an individual baseline using Methods 2 or 3.

(iii) importers

Importers of foreign gasoline are required to establish an individual baseline in respect of gasoline imported by them during 1990, using Method 1. Like blenders, importers become subject to the statutory baseline if, as anticipated by the EPA, the data necessary for Method 1 is unavailable.

The Gasoline Rule does not provide for foreign refiner individual baselines, although the possible use of individual baselines for foreign refiners was examined by the EPA while drafting the Gasoline Rule. Indeed, the EPA continued to examine the possible use of individual baselines for foreign refineries after the adoption of the Gasoline Rule, and prepared its May 1994 proposal[16] as a result. The May 1994 proposal provided for limited use by importers of individual baselines established for foreign refineries in order to demonstrate that gaso-

[15] Section 80.91.
[16] 40 CFR 80, 59 Fed. Reg. at 22 800 (3 May 1994).

line produced at that foreign refinery complied with the reformulated (but not conventional) gasoline standards. The individual baselines would be determined using Methods 1, 2 or 3, as for domestic refineries under the Gasoline Rule. However, the use of individual baselines in such cases would be conditioned and limited in a number of ways. The EPA's May 1994 proposal never entered into force, as the United States Congress enacted legislation in September 1994 denying the funding necessary for its implementation.

C. The Panel Report: Its Findings and Conclusions

The Panel's overall conclusions and its recommendation are set out in the following terms:

> 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.
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> 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.[17]

On route to its overall conclusions, the Panel made the following principal findings:

> (i) that the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been mentioned in the terms of reference, and that, in any case, it was unnecessary, in view of findings (ii), (iv), (v) and (vii) below, to determine whether the measure at issue was inconsistent with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "*General Agreement*");[18]
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> (ii) that imported and domestic gasoline were "like products" and that since, under the baseline establishment rules of the Gasoline Rule, 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. The baseline establishment rules of the Gasoline Rule were accordingly inconsistent with Article III:4 of the *General Agreement*;[19]

[17] Panel Report at paras. 8.1-8.2.
[18] Panel Report, para. 6.19.
[19] Panel Report, para. 6.16.

(iii) that, in view of finding (ii), it was not necessary to examine the consistency of the Gasoline Rule with Article III:1;[20]

(iv) that the "aspect of the baseline establishment methods" found inconsistent with Article III:4 was not justified under Article XX(b) of the *General Agreement* as "necessary to protect human, animal or plant life or health";[21]

(v) that the "maintenance of discrimination between imported and domestic gasoline" contrary to Article III:4 was not justified under Article XX(d) as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the General] Agreement";[22]

(vi) that clean air was an exhaustible natural resource within the meaning of Article XX(g) of the *General Agreement*;[23]

(vii) that the baseline establishment rules found to be inconsistent with Article III:4 could not be justified under Article XX(g) as a measure "relating to" the conservation of exhaustible natural resources;[24]

(viii) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption";[25]

(ix) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue met the conditions in the introductory clause of Article XX (sometimes referred to as the chapeau of Article XX);

(x) that it was unnecessary, in view of findings (ii), (iv), (v) and (vii), to determine whether the measure at issue was inconsistent with Article XXIII:1(b) as having nullified and impaired benefits accruing under the *General Agreement*;[26] and

(xi) that it was unnecessary, in the light of findings (ii), (iv), (v) and (vii), to determine whether the measure at issue was inconsistent with Articles 2.1 and 2.2 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*").[27]

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[20] Panel Report, para. 6.17.
[21] Panel Report, para. 6.29.
[22] Panel Report, para. 6.33.
[23] Panel Report, para. 6.37.
[24] Panel Report, para. 6.40.
[25] Panel Report, para. 6.41.
[26] Panel Report, para. 6.42.
[27] Panel Report, para. 6.43.

II. ISSUES RAISED IN THIS APPEAL

A. The Claims of Error by the United States

It is important to focus upon the subject matter of this appeal. We seek to do this first by identifying the issues which have been raised by the Appellant, the United States. In what follows we highlight those same issues by listing certain other issues dealt with in the Panel proceedings but which have *not* been brought before the Appellate Body in this appeal, and which we accordingly exclude from consideration in this Appellate Report.

In its Notice of Appeal, dated 21 February 1996, and its Appellant's Submission, dated 4 March 1996, the United States claims that the Panel erred in law, firstly, in holding that the baseline establishment rules of the Gasoline Rule are not justified under Article XX(g) of the *General Agreement* and, secondly, in its interpretation of Article XX as a whole.

More specifically, the United States assigns as error the ruling of the Panel that the baseline establishment rules do not constitute a "measure" "relating to" the conservation of clean air within the meaning of Article XX(g) of the *General Agreement*. Consequently, it is also the view of the United States that the Panel erred in failing to proceed further in its interpretation and application of Article XX(g), and in not finding that the baseline establishment rules satisfy the other requirements of Article XX(g) and the introductory provisions of Article XX.

The sharply limited scope of this appeal is underscored by noting the number of findings which the Panel had made but which have not been appealed from by the United States. Very briefly, the United States does not appeal from the findings or rulings made by the Panel on, or in respect of, the consistency of the baseline establishment rules with Article I:1, Article III:1, Article III:4, and Article XXIII:1(b) of the *General Agreement* and the applicability of Article XX(b) and Article XX(d) of the *General Agreement* and of the *TBT Agreement*. Understandably, the United States has also not appealed from the Panel's ruling that clean air is an exhaustible natural resource within the meaning of Article XX(g) of the *General Agreement*.

B. The Claims of the Appellees and the Arguments of the Third Participants

The Appellees, Venezuela and Brazil, submit that the Appellate Body should dismiss the United States' appeal and uphold the Panel's findings and conclusions concerning Article XX(g). In particular, Venezuela and Brazil support the Panel's finding that the measure at issue before the Panel was not one "relating to" the conservation of exhaustible natural resources. Venezuela also states that a measure can only be "relating to" or "primarily aimed at" conservation if the measure was both: (i) primarily intended to achieve a conservation goal; and (ii) had a positive conservation effect.

Venezuela argues that, as the United States has not met its burden with respect to the "relating to" requirement of Article XX(g) in this appeal, the Ap-

pellate Body may uphold the Panel Report on this issue alone, and it is not necessary to address the additional requirements of Article XX(g), nor the requirements in the Article XX chapeau.

If the Appellate Body overturns the Panel's findings on the "relating to" component of Article XX(g) and does proceed to examine the other requirements of Article XX(g), Venezuela and Brazil submit that the United States has also failed to demonstrate that those requirements have been satisfied. They argue that the measure in issue is not "made effective in conjunction with restrictions on domestic production or consumption" as the restrictions are not imposed as direct limits on the production or consumption of clean air, but rather upon the consumption of certain kinds of gasoline. They further submit that clean air does not qualify as an "exhaustible natural resource" within the meaning of Article XX(g).

With regard to the requirements in the chapeau to Article XX, Venezuela and Brazil submit that the measure is applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Venezuela argues that the measure constitutes a "disguised restriction on international trade" as well.

The Appellees also raise the conditional argument that, if the Appellate Body were to overturn the Panel's findings on Article XX(g), and not find in favour of Venezuela and Brazil as to the other requirements of Article XX, it would then need to examine their claims under the *TBT Agreement*.

The third participants, the European Communities and Norway, endorse the Panel's interpretation of "relating to" and the Panel's findings under Article XX(g). They find it difficult to accept the United States' arguments that the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption," as the measure in issue did not impose restrictions on clean air. With regard to the Article XX chapeau criteria, the European Communities and Norway both submit that the measure is applied in a manner constituting "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on international trade."

C. The Preliminary Question

A preliminary question was raised by the United States at the oral hearing concerning arguments made by Venezuela and Brazil in their respective Appellees' Submissions on the issues of whether clean air is an exhaustible natural resource within the meaning of Article XX(g) and whether the baseline establishment rules are consistent with the *TBT Agreement*. The gist of the preliminary question is that the above issues and the related arguments made by Venezuela and Brazil were not properly brought before the Appellate Body in this appeal in accordance with the *Working Procedures*. It was underscored by the United States that Venezuela and Brazil had not appealed from the ruling of the Panel on the clean air issue or from the non-ruling of the Panel on the applicability of the *TBT Agreement*. Venezuela and Brazil had not filed Appellants' Submissions under Rule 23(1) of the *Working Procedures*. Neither had Venezuela nor Brazil filed separate appeals under Rule 23(4) of the *Working Procedures*.

Their arguments on these two matters had been made in their Appellees' Submissions pursuant to Rule 22 and, as Appellees, Venezuela and Brazil could not challenge the Panel's finding on the clean air issue and its non-finding on the *TBT Agreement*'s applicability.

At the oral hearing, in response to questions posed by the Appellate Body, Venezuela and Brazil confirmed that they, indeed, were not appealing the mentioned two matters. They went on, however, to state that they believed it would be within the scope of authority of the Appellate Body, if it found it necessary to do so, to address the results of the Panel's examination of those two issues.

In its Post-Hearing Memorandum, the United States asserted, among other things, that were the Appellate Body to take up the above two matters in the present appeal, unfairness would be generated *vis-à-vis* the United States and it would encourage a disregard of the *Working Procedures*. Such disregard by the Appellate Body would, it was further stated, create difficulties for third parties who would have to make up their minds to become third participants or not on the basis of the issues raised on appeal as set out in the Notice of Appeal and the Appellant's Submission. The United States itself had not raised the clean air issue and the applicability of the *TBT Agreement* in its appeal, and the United States was the only Appellant in AB-1996-1.

We find the United States' submissions on this preliminary question persuasive. The arguments raised by Venezuela and Brazil on the clean air and TBT issues may be seen to be, in effect, conditional appeals, that is, conditional on the Appellate Body's overturning the Panel's overall findings on Article XX(g) and not finding in favour of Venezuela and Brazil as to the other requirements of Article XX. This condition is not fulfilled. Even if this condition had been fulfilled, the Appellate Body would have been most reluctant to pass upon these two issues. We observe, in the first place, that the issues in fact raised by the Appellant, the United States, are not of the kind which cannot be decided without at the same time necessarily resolving the clean air issue or the applicability of the *TBT Agreement*. In the second place, to deal with those two issues, under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own *Working Procedures* and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or *force majeure*. Venezuela and Brazil could have appealed the Panel's finding and non-finding on the two matters by taking advantage of Rules 23(1) or 23(4) of the *Working Procedures* and thereby placing the Appellate Body in a position to dispose of those issues directly in one and the same appellate proceeding.

The acceptance by Venezuela and Brazil of the *Working Procedures*, and their commitment to them, is not in question. We have no option, however, but to find that the route they chose for addressing the two issues in question is not contemplated by the *Working Procedures*, and therefore, these issues are not properly the subject of this appeal.

III. THE ISSUE OF JUSTIFICATION UNDER ARTICLE XX(G) OF THE GENERAL AGREEMENT

Article XX(g) needs to be set out in full:

> Article XX
>
> *General Exceptions*
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> 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:
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> . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
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> . . .

A. *"Measures"*

The initial issue we are asked to look at relates to the proper meaning of the term "measures" as used both in the chapeau of Article XX and in Article XX(g). The question is whether "measures" refers to the entire Gasoline Rule or, alternatively, only to the particular provisions of the Gasoline Rule which deal with the establishment of baselines for domestic refiners, blenders and importers.

Cast in the foregoing terms, the issue does not appear to be a live one. True enough the Panel Report used differing terms, or terms of shifting reference, in designating the "measures" in different parts of the Report. The Panel Report, however, held only the baseline establishment rules of the Gasoline Rule to be inconsistent with Article III:4, to the extent that such rules provided "less favourable treatment" for imported than for domestic gasoline. These are the same provisions which the Panel evaluated, and found wanting, under the justifying provisions of Article XX(g). The Panel Report did not purport to find the Gasoline Rule itself as a whole, or any part thereof other than the baseline establishment rules, to be inconsistent with Article III:4; accordingly, there was no need at all to examine whether the whole of the Gasoline Rule or any of its other rules, was saved or justified by Article XX(g). The Panel here was following the practice of earlier panels in applying Article XX to provisions found to be inconsistent with Article III:4: the "measures" to be analyzed under Article XX are the same provisions infringing Article III:4.[28] These earlier panels had not interpreted "meas-

[28] *Canada - Administration of the Foreign Investment Review Act*, BISD 30S/140, adopted 7 February 1984; *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989; *United States - Taxes on Automobiles*, DS31/R (1994), unadopted.